

IN THE NATIONAL COMPANY LAW TRIBUNAL

NEW DELHI, COURT-III

C.P.(IB)-69(ND)/2021

(Order under Section 7 of the IBC, 2016 Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016)

IN THE MATTER OF:

Mr. Narendra Singh Rawat & Ors.

..... Financial Creditors/Applicants

VERSUS

M/S. Elegant Infracon Private Limited

Having Its Registered Office at:

H. No. 225 F/F, Durga Mandir Gali,

Village Kondli, East Delhi-110096

..... Corporate Debtor

Order Pronounced On: 30.04.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)

APPEARANCES:

For the Financial Creditors : Mr. M.P. Sahay, Ms. Awanitika, Mr. Sachin Kharb, Mr. Tushar Sharma Advs.

For the Corporate Debtor : Mr. P Nagesh, Sr. Adv., Mr. Arpit Singh Arora, Adv.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This Application has been filed jointly by 105 Financial Creditors who are also 'Homebuyers' (for brevity 'Applicants') before this Adjudicating Authority under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC" or

(IB) - 69(ND)/2021

Date of Order: 30.04.2024



“Code”) r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking an Order to initiate Corporate Insolvency Resolution Process (“CIRP”), declaring moratorium and for appointment of Interim Resolution Professional (“IRP”), against M/s. Elegant Infracon Private Limited, the Respondent/Corporate Debtor. The Corporate Debtor is registered with Registrar of Companies, Delhi & Haryana and is therefore within the jurisdiction of this Adjudicating Authority.

2. Submissions of the Applicant/Financial Creditor:

- i. The Financial Creditor(s] entered into allotment agreements with the Corporate Debtor wherein they were allotted flats / units in the project "Elegant Ville" situated at Tech zone IV, Noida Extension, Greater Noida, (U.P). The possession of the flats in question was to be offered w.e.f. 90 days post completion/construction of the respective flat/units.
- ii. It is submitted that despite making payments on time as per the schedule of payment, the possession has not been offered so far by the Corporate Debtor and the timeline for the same has long elapsed.
- iii. The Corporate Debtor is ready to give un-authorized possession to the needy buyers without CC/OC and demand letters has been sent which are not as per Builder-Buyer agreements. The Corporate debtor does not intend to complete the project. Its only aim was to collect money from Buyers as during the period from 2017 to 2021 there has not been any construction work in the project on account of non-payment of dues Contractors/Labourers/Govt. Authorities etc.
- iv. The families residing there are going through mental harassment and acute stress because of the following reasons –
 - a. *No firefighting system is available in society – Already there was fire in the society on two occasions;*
 - b. *In Towers ‘B’, ‘C’, ‘D’ & ‘E’, only one lift has been installed against two Lifts. Further, the installed lift breaks down most of the times, causing inconvenience to the Residents;*
 - c. *Club, park is still under construction and is not usable;*



- d. *Five times theft had taken place and there was a loss of about 20-25 lakhs, gold, cash and valuable items were stolen in day times in Tower B & Tower-D;*
- e. *No proper power connection has been taken from concerned department; DG kept in open place;*
- f. *All sides of project are open. There are no proper security arrangements and the Main Gate and Road are also not constructed;*

3. Submissions of the Respondent/Corporate Debtor:

- i. The Ld. Counsel for the Respondent argued that the present Company Petition is barred by limitation. In the present case, as per the Builder Buyer Agreement (“**BBA**”), the last date of handing over the possession of the unit/flats was 09.10.2015 and the limitation period of 3 years expired on 09.10.2018. However, the present application has been filed on 28.01.2021 which is beyond the limitation and ought to be rejected.
- ii. It is submitted that the Applicant No.1, namely, Mr. Narendra Singh Rawat has given affidavit at Page no. 61 of the Progress Report dated 18.05.2022 filed by the Respondent Company, wherein he has categorically stated that he has been misled to file the present case and has been falsely implicated as party to the present case and that he has no grievance/complaint qua Respondent Company and hence withdraws himself as a party to the present case. In the light of the said affidavit the present application cannot be entertained.
- iii. It is submitted that according to the Progress Report dated 18.05.2022, 13 Applicants have given their consent to withdraw their names from the matter.
- iv. It is submitted that the Ld. Local Commissioner in his report failed to mention that the possession of 273 flats have already been given by the Corporate Debtor Company in a habitable condition to the 273 Homebuyers. Further, out of the said number of 273, 40 units are of those Applicants who are present before this Hon’ble Tribunal. The Local Commissioner omitted to record the same in his report.
- v. It is also submitted that the Ld. Local Commissioner on Page No.5 of his report, in the Column titled as “Assessment of Commissioner” very rightly and



clearly records that “the flats offered for possession are fully constructed. During the inspection none of the residents made any grievance qua their flats. The residents and homebuyers who have taken the possession of their units is fully constructed and completed and are fit for occupancy with all the necessary amenities such as water, electricity, gen set back up etc.

4. Analysis and Findings

- i.** We have heard the Ld. Counsels appearing for both parties. Records as well as pleadings and written submissions have been perused.
- ii.** The present petition is filed by a total number of 105 Financial Creditors/ Home Buyers. The claim of the Applicants is based on the fact that after receiving the payments for the flats the Corporate Debtor has failed to deliver the possession of the flats even after 5 years from the date of handing over the possession as per the BBA. The total amount paid by each financial creditor to the Corporate Debtor is mentioned in Form 1 which meets out the pecuniary threshold limit of Rs. 1 crore and the instant petition is filed jointly by more than one hundred allottees of the same real estate project. Since, the present Application has been filed by 105 Financial Creditors/Home buyers, it meets the threshold requirement as provided under the Proviso 2 of Section 7 of the Code which is to be seen at the time of filing of the Application as held by the Hon’ble Supreme Court in the case of **Manish Kumar vs. Union of India & Anr.**, reported in 2021 SCC OnLine SC 30. Therefore, the present application is maintainable as per the threshold limit as set out in Section 7 of the Code.
- iii.** Ld. Counsel for the Applicants submitted that out of the 105 Financial Creditor(s), who have filed the instant IB petition before this Hon’ble Tribunal only 23 have already taken the alleged possession of their respective flats under duress/ pressure and diktat of the builder. The Corporate Debtor before giving the so-called alleged possession on ‘as is where is’ basis has been pressurising the buyers to sign an affidavit on a Rs. 10/- stamp paper mentioning that the Buyer would withdraw the case already filed in NCLT/ NCDRC and any appropriate forum. The Corporate Debtor also obtains an undertaking from the buyers stating that they would not claim any



penalty/compensation/ delay charges etc. This act of the Corporate Debtor is not as per the Builder Buyer's agreement. The contention of the Corporate Debtor that the Applicant No.1 and other allottees/applicants have given an affidavit to the Corporate Debtor stating that they shall withdraw from the present case cannot be accepted because no such application has been filed before this Adjudicating Authority seeking deletion of the name of applicants or to withdraw the present petition.

- iv.** The Builder Buyer Agreement between the Applicant No.1 namely Mr. Narendra Singh Rawat and the Developer/Corporate Debtor dated 12.01.2012 in Clause 18 states the following: -

“The Developer shall complete the Development/construction of the flats within 30 months from the date of the approval of from NCR Planning Board. The completion date is subject to force majeure condition and/or subject to any other reason beyond the control of the Developer in which a maximum of 6-month period may be added for the completion of the project.”

The Respondent Company was supposed to handover the possession of the unit/flats within a period of maximum 36 months (i.e., 30 plus 6 months grace period) from the date of approval from NCR Planning Board i.e. 09.10.2012. The possession was supposed to be given on or before 09.10.2015 (i.e. 36 months from 09.10.2012) as per the BBA. The cause of action or the right to apply accrued on 09.10.2015 to the Applicant No.1. However, the present application has been filed on 28.01.2021.

The Ld. Counsel for the Respondent contended that the present application is barred by limitation because as per the BBA, the limitation to file the present Application got expired on 09.10.2018 as a Section 7 Application under IBC, 2016 has to be filed within the period of three years from the date when the right to apply accrues but the present petition was filed in the year 2021 i.e. after more than 5 years from the date on which the right to apply accrued. Reliance has been placed on the judgment of the Hon'ble NCLAT in the case of **Abhijit Jasrasaria v. JOP International**, reported in (2022) SCC Online NCLAT 2070 wherein it was held that that a continuing cause of action may be a ground for filing a complaint under Real Estate Regulatory Authority Act



but for filing a Section 7 Application under IBC, an Application has to be filed within a period of three years from the date when the right to apply accrues and Section 7 Application has to be rejected if its filed beyond three years from the date when the right to apply accrues.

- v. The Ld. Counsel for the Applicants distinguished the facts of the present case with the facts and ratio of the case relied upon by the Respondent that in the said case, the Applicant had himself stated the date of default in Form 1 which was held to be barred by limitation by Hon'ble NCLAT. However, in the present case, the date of default as set out in Part IV of Form 1 is a recurring cause of action till the possession with OC/CC is not given and Registry of the units is not done and no date is mentioned. He placed reliance on the case of **M/s. Mist Avenue Private Limited v. Nitin Batra**, Company Appeal (AT) (Insolvency) No. 127 of 2023, wherein the Hon'ble NCLAT held that in the case of real estate allottees, the limitation is running, recurring and subsisting.
- vi. After perusal of the judgments relied by the parties, we are of the considered view that in the present case, since the Corporate Debtor failed to deliver the possession of the said unit as per the Builder Buyer Agreement the debt was continuing since the possession had not been offered till the date of filing of Section 7 Application. The cause of action in the present case is recurring one till the possession with OC/CC is not given to the Applicants. Therefore, the present application is not barred by limitation.
- vii. The contention of the Respondent that the Applicant have not filed BBA of all the allottees and merely filed BBA of Applicant No.1 cannot be entertained at the stage of Final Arguments because no averments in that regard have been made in the Reply Affidavit submitted by the Respondent.
- viii. It may not be out of the place to mention that this Adjudicating Authority vide Order dated 24.08.2023 in IA 984/2023 appointed Mr. Rishabh Jain, Advocate as Local Commissioner to visit the real estate project of the Corporate Debtor in person and inspect the project in question and submit a report on the following aspect within four weeks from the date of the order:

"1. Status of Construction of the flats.



2. Status of Electricity connection, lifts, fire safety measures, water connection and STP with relevant certificates from the Concerned Authorities.

3. Number of flats which are already constructed and which are under construction.

4. Number of flats already has taken possession by the Home Buyers/Allottees.

5. Security aspects. All statutory clearances and permissions like OC, CC, Fire, NOC etc.”

The Ld. Local Commissioner visited the real estate project of the Corporate Debtor on 23.09.2023 and vide its Report dated 14.10.2023 recorded the following observations:

a. Tower A & F are fully under construction;

b. Tower B & E are partially under construction;

c. Tower C & D structure is complete but lack basic amenities essential of cohabitation purpose.

d. The flooring and marking in stilt parking of the real estate project is not complete;

e. The basement parking of real estate project is under construction;

f. Ramp N0-1 which connects the basement with ground floor is partially construction;

g. Ramp No-2 which connects the basement with ground floor is under construction;

h. Sewerage Treatment Plant (STP) is under construction, currently Corporate Debtor is using temporary service to dump the sewerage.

i. The commercial project of the Corporate Debtor is not complete.

j. Towers B, C, D & E do have provision for two lifts but only one lift is installed. It relevant to highlight here that the provision for second lift contains shaft which if remained open then anyone can fall into it. Only in some places the said shaft was noted to be covered with temporary items such as cardboard etc.

k. Effectively 4 out of 12 lifts are operational. Currently residents are getting electricity through single point electricity connection



whereas per D.P. Electricity Code, 2005 (amended from time to time) the Corporate Debtor should develop necessary infra for multi-point electricity to enable to residents to apply for their individual connections.

- ix.** After taking the consent of almost all the petitioners/allottees along with other allottees in the project have moved an application for renewal of the lapsed registration and other sin qua non conditions in tandem with the renewal of the registration u/s 8 of the RERA Act, 2016 and the time was extended to complete the project.

The relevant paragraph of the Order dated 15.09.2023 of RERA is reproduced below for reference: -

“(e) The Authority shall review the compliance of proposed capital infusion by the Promoter, i.e., deposit of Rs. 4.5 Crore within 3 months from the date of the order as directed under paragraph 15(d) above and in case of failure of the Promoter to comply with the same, the Authority may decide to withdraw this order of authorization under Section 8 and initiate further necessary proceedings for completion of these Projects as provided under the relevant provisions of the Act.

(i) The Authority will review the progress of the Projects every three months and if the progress of the Projects is found unsatisfactory at the time of such review, the Authority may permit the Promoter(s) to continue with the development of the work under the Projects with the condition that it will make for the shortfall within the next three months. Further, if the progress of the Projects remains unsatisfactory at the end of next three months, the Authority may decide to withdraw this order of authorization under Section 8 and initiate further necessary action under the relevant provisions of the Act. The conditions under paragraph 15(e) are in addition to the condition incorporated herein.”

- x.** In the Order dated 15.09.2023 of RERA, it is observed that in towers B, C, D and E about 85% of construction and development work has been completed, while in towers A and F about 80% of the work has been completed. Further, an extension of 14 months was given to the promoters to complete the construction work from the date of Order that is 15.09.2023 but, till date the



project is not delivered, construction is not complete and possession has not been handed over to the allottees.

- xi.** The contention of the Corporate Debtor is that UPRERA has granted time to complete the said project. We find that the argument is completely fallacious, in as much as the same would not absolve the Corporate Debtor of its liability to honour the commitment made to the Applicants as per the BBA. Moreover, the observations of the Ld. Local Commissioner and Section 8 order of RERA itself proves that “construction is still going on and project is not completed till now”. It is also a settled principle of law that time is the essence of a contract in such type of construction contracts where the builder is required to adhere to the date of delivery as mentioned in the Builder-Buyer Agreement and therefore, the Corporate Debtor is bound by the contract to complete the project and deliver the possession of the flats to the Applicants.

5. From the conspectus of the above mentioned facts and circumstances, the only thing that emerges is that the Corporate Debtor has failed to give delivery of possession of the flats to the Applicants herein and thereby has committed default. Thus, the Applicants/Financial Creditors have established that the debt is due and there is default committed by the Corporate Debtor.

Therefore, in our considered view, the CIRP is ought to be initiated against the Corporate Debtor, i.e., M/s. Elegant Infracon Private Limited for their project ‘Elegant Ville’ situated at Plot No. GH – 06B, Sector Tech Zone IV, Noida Extension, Greater Noida, U.P.

- 5.** In light of the above facts and circumstances, it is ordered as follows: -
- i. The Application bearing **IB-69(ND)/2021** filed by the Applicants under Section 7 of the Code read with Rule 4 of the Adjudicating Authority Rules for initiating CIRP against the Respondent is **admitted**.
 - ii. We also declare a moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flow from the provisions of Section 14(1)(a), (b), (c) and (d) of the Code. Thus, the following prohibitions are imposed:



*“(a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
(b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
(c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;
(d) The recovery of any property by an owner or lessor, where such property is occupied by or in the possession of the Corporate Debtor.*

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]”

- iii. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the Corporate Debtor in terms of Section 14(3)(b) of the Code.
- iv. The Applicants have proposed the name of Mr. Naresh Kumar Aggarwal as the Interim Resolution Professional (“IRP”) having address: M – 806, Emaar Palm Drive, Sector 66 Gurgaon. 122018. His Email id is nareshaggarwal375



@gmail.com. His registration number is IBBI/IPA-001/IP-P02116/2020-21/13274. The Applicants filed a copy of the Consent Issued by Mr. Naresh Kumar Aggarwal in Form 2, Written Communication by proposed IRP, as per the requirement of Rule 9(l) of the Adjudicating Authority Rules along with the Certificate of Registration and Authorization for Assignment in Form B. Accordingly, Mr. Naresh Kumar Aggarwal is appointed as IRP.

- v. In pursuance of Section 13(2) of the Code, we direct the IRP, as the case may be to make a public announcement immediately with regard to the admission of this application under Section 7 of the Code. The expression immediately means within three days as clarified by Explanation to Regulation 6(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
- vi. During the CIRP period, the management of the Corporate Debtor shall vest in the IRP/RP, in terms of Section 17 of the IBC. The officers and managers of the Corporate Debtor shall provide all documents in their possession and furnish every information in their knowledge to the IRP within one week from the date of receipt of this order, in default of which coercive steps will follow. There shall be no future opportunity given in this regard.
- vii. The IRP is expected to take full charge of the Corporate Debtor's assets, and documents without any delay whatsoever. He is also free to take police assistance and this Court hereby directs the Police Authorities to render all assistance as may be required by the IRP in this regard.
- viii. The IRP or the RP, as the case may be shall submit to this Adjudicating Authority periodical report with regard to the progress of the CIRP in respect of the Corporate Debtor.
- ix. The Financial Creditors shall deposit a sum of Rs 2,00,000/- (Rupees Two Lakh Only) with the IRP to meet the expense to perform the functions assigned to him in accordance with Regulation 6 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within one week from the date of receipt of this order by the Financial Creditors. The amount however be subject to adjustment by the Committee of Creditors, as accounted for by IRP and shall be paid back to the Financial Creditors.



In terms of Section 7(7) of the Code, the Registry is hereby directed to communicate a copy of the order to the Financial Creditors, the Corporate Debtor, the IRP and the Registrar of Companies, NCT of Delhi and Haryana, by Speed Post and by email, at the earliest but not later than seven days from today.

- xi. The Registrar of Companies shall update his website by updating the status of the Corporate Debtor and specific mention regarding admission of this petition must be notified.
- xii. The Registry is further directed to send a copy of this order to the Insolvency and Bankruptcy Board of India (“IBBI”) for their record.
- xiii. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

-Sd-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

-Sd-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**