THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT III

(IB) 201/ND/2021

U/S. 7 of the IBC, 2016 Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rule, 2016.

IN THE MATTER OF:

MASOOD HASAN & ORS.
F-42, 2nd Floor, Sector – 20,
Noida, G.B Nagar,
U.P – 210303

……FINANCIAL CREDITORS

VERSUS

M/s. ELEGANT INFRACON PRIVATE LIMITED
1114, 11th Floor,
Hemkunt Chamber,89
Nehru Place, New Delhi – 110019

……..CORPORATE DEBTOR

Order Pronounced on: - 23.01.2024

CORAM:

SHRI BACHU VENKAT BALARAM DAS

HON'BLE MEMBER (JUDICIAL)

SHRI ATUL CHATURVEDI

HON'BLE MEMBER (TECHNICAL)

Parties / Counsels present

For Applicant : Mr. M.P. Sahay, Adv.

For the Respondent : Mr. Prashant Kumar, Adv.

O R D E R

Per: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The present Application is filed under Section – 7 of the Insolvency & Bankruptcy Code, 2016 jointly by the Financial Creditors who are also 'Home Buyers' (for brevity 'Applicants'). The Financial Creditors, Masood Hasan & Ors., are seeking an Order to initiate Corporate Insolvency Resolution Process (hereinafter referred as 'CIRP') against the Corporate Debtor viz., M/s. Elegant Infracon Private Limited, to declare moratorium and to appoint (Interim Resolution Professional (hereinafter referred as 'IRP'). The Corporate debtor is registered with Roc, Delhi & Haryana and is therefore within the jurisdiction of this Adjudicating Authority.

2. The Financial Creditor/Applicant has averred as follows: -

a) The Financial Creditors entered into Allotment Agreements with the Corporate Debtor. The Agreement executed between the parties was for allotment of flats/units in the project 'Elegant Splendour' situated at Plot No. GH – 05C, Tech Zone IV, Noida Extension, Greater Noida, U.P. The Financial Creditors made timely payments to the Corporate Debtor towards the said flats/units.

b) It is submitted that despite making payments on time as per the schedule of payments, the Corporate Debtor has failed to offer the possession of the flats to the Financial Creditors and the timeline for the same has elapsed. The Financial Creditors further submitted that more than 3 years have elapsed and the possession of the flats has not been given to the Applicants till date.

3. In response to the contention raised by the Financial Creditors the Corporate Debtor has raised various counter contentions: -

a) It is submitted by the Ld. Counsel appearing for the Corporate Debtor that the construction of the aforementioned project is in full swing and the respondent is tapping/utilizing all resources and manpower to complete the entire project. Further, each and every step is taken by the respondent to fulfil the mandatory conditions of RERA Act, 2016. It is further submitted that the instant petition filed by the Financial Creditors is barred by limitation as it does not disclose the actual date of default which is a statutory requirement to be fulfilled by the Applicants.

b) It is further averred by the Ld. Counsel appearing for the Corporate Debtor that the instant petition falls under the ambit of Section - 10A of Insolvency and Bankruptcy Code, 2016. Further, the project was delayed due to multifarious reasons. One of the primary reason was global spread of Covid – 19 pandemic and the said project was in possession of the Bank. The project was under the siege on the order of National Green Tribunal for a considerable period of time and as soon it was de-sealed the work is being done in full swing.

c) It is further submitted that, the respondents are making all efforts and utilizing all possible resources to complete the real estate project. The respondents have approached the Real Estate Regulatory Authority u/s 8 of the RERA Act, 2016, wherein the respondent has filed an Application for renewal of the lapsed registration and other sin qua non conditions in tandem with the renewal of the registration and the builder/respondent has made all possible efforts in the interest of allottees.

4. We have heard the arguments advanced by the Ld. Counsel appearing for the Financial Creditor as well as for the Corporate Debtor and also perused the records.

5. The present petition is filed by a total number of 127 Financial Creditors/ Home Buyers. The Applicant claim 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. More than 3 years have elapsed and the possession of the flats has not been given to the Applicants till date. The 127 Financial Creditors have been named and detailed in the Form 1 and all 127 have filed their respective Affidavits as well in support of the petition. The amount paid by each financial creditor to the Corporate Debtor has also been mentioned which meets out the pecuniary threshold limit of Rs. 1 crore and this instant petition is filed jointly by more than one hundred allottees of the same real estate project.

6. The first issue raised by the Corporate Debtor is that, the instant petition is barred by limitation as it does not disclose the actual date of default. It is submitted by the Applicant that, as per the clause 19 (a) of the Builder Buyer Agreement dated 10.04.2016 the Developer was supposed to complete the construction of the flats by 36 months within an extended period of 6 months. Therefore, according to our considered view the Date of Default will be 10.10.2019 taking into account the terms of Agreement which enables the Corporate Debtor to complete the construction within 36 months with extended period of 6 months from the date of the Agreement. The present petition was filed on 28.03.2021 therefore, this Application is filed within limitation. For reference clause 19 (a) and clause 19 (b) of the Builder Buyer Agreement is reproduced below for reference: -

> *19 (a) That the Developer shall complete the development/construction of the flat by 36 months and within an extended period of 6 months thereof from the date of agreement. The completion date is subject to force majeure conditions and/or subject to any other reasons beyond the control of the Developer……*

19 (b) That the Developer shall after completion of the flat shall intimate the Allottee to take over the possession of the flat within thirty days thereof. The Allottee shall within the stipulated time, take the possession of said Flat from the Developer by executing lease deed and necessary indemnities, undertakings and such other documentation as the Developer may prescribe.

7. As regards to the second issue the Ld. counsel appearing for the Corporate Debtor submitted that, 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 22.12.2022 of RERA is reproduced below for reference: -

e. The Promoter commenced construction work only in towers E, F, G and H. About 70 percent of construction work has been completed in towers E and F, 80 percent in tower G and 55 percent in tower H. No construction work commenced in towers A, B, C and D, all towers of Phase III of the project.

b. The Promoter(s) shall have to adhere to the construction milestones submitted by it and complete the balance development work in towers E, F, G and H within 12 months and in towers A, B, C and D within 36 months from the date of this order. The Promoter(s) shall submit an affidavit undertaking to contribute to the shortfalls in cash flows, if any, during the course of development and construction of the project (comprising Phase I and Phase III) within the timelines as contemplated herein.

8. In the Order dated 22.12.2022 of RERA, it is observed that about 70 % of construction work is completed by the promoters and no construction work has commenced in towers A, B, C and D. Further, an extension of 12 months and 36 months were given to the promoters to complete the construction work from the date of Order that is 22.12.2022 but, till date the project is not delivered, construction is not complete and possession has not been handed over to the allottees. The contention of the Corporate Debtor is that time has been granted to compete 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 honor the commitment made to the Applicants as per the builder buyer agreement. Moreover, 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. Since, the Corporate Debtor has failed to do so, the present Application filed under Section – 7 is liable to be admitted. In view of the same observations, we allow this Application and initiate CIR process against M/s. Elegant Infracon Private Limited for their project 'Elegant Splendour' situated at Plot No. GH – 05C, Tech Zone IV, Noida Extension, Greater Noida, U.P.

9. The Financial Creditor has proposed the name of the IRP, therefore this Adjudicating Authority hereby appoints Mr. Rajeev Ranjan Singh having Regn. No. IBBI/IPA-002/IP-N00707/2018-19/12418 as IRP. Consent and valid AoA of the IRP must be filed within three days of passing this order. The said IRP is directed to take charge of the Respondent Corporate Debtor's management immediately. He is also directed to cause public announcement under section 15 of the IBC, 2016, within three days from date of receiving the copy of this order and call for submissions of claim in the manner as prescribed.

10. The moratorium is declared which shall have effect from the date of this order till the completion of CIRP, for the purposes referred to in section 14 of the IBC, 2016. It is ordered to prohibit all of the following, namely:

a. The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor for said project 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's 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 for said project in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

d. The recovery of any property against the said project by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

e. The explanation below section - 14 (1) also stipulates "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".

11. The supply of essential goods or services of the said project of Corporate Debtor shall not be terminated, suspended or interrupted during moratorium period. However, The provisions of sub-section (1) of section 14 of IBC, 2016 shall not apply to such transactions, as notified by the Central Government.

12. The IRP shall comply with the provisions of Sections 13(2), 15, 17 and 18 of the code. The Directors of the Corporate Debtor, its promoters or any person associated with the management of the Corporate Debtor shall extend all assistance and cooperation to the IRP as stipulated under section 19 for discharging his function under section 20 of the IBC, 2016.

13. The Financial Creditor is directed to send the copy of this order to the IRP with immediate effect, so that he could take charge of the Corporate Debtor's assets etc., with respect to said project and make compliance with this order as per the provisions of IBC, 2016.

14. The Financial Creditors are directed to communicate this Order to the IRP and the Corporate Debtor with immediate effect. Further Financial creditor shall provide initial finance to the tune of Rs. 2,00,000/- to the aforesaid Interim Resolution Professional within a weeks' time from the date of this order as advance towards initial cost and expenses of CIRP process. The said advance of Rs. 2,00,000/- shall be adjustable as CIRP cost by the Committee of Creditors immediately after its constitution by the IRP.

15. The Registry is directed to send a copy of this order to the Registrar of Companies concerned for updating the status of Corporate Debtor on the MCA-21 site of Ministry of Corporate Affairs for information of all concerned.

16. Accordingly, the present Application IB – 201 (ND) 2021 filed under Section – 7 of the Code, stands ***allowed***. No orders to costs.

SD/-

(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

SD/-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)