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IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-III
NEW DELHI

IB-453/(ND)/2019

Section: Under Section 7 of the Insolvency and Bankruptcy Code, 2016 and Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority), Rules, 2016.

In the matter of:

Satyabir Kumar Mahato,
S/Shri Chhathu Lal Mahato,
Flat No.351, DDA Flat, Pocket C,
Vikashpuri, Hastal, Delhi-110059.

.....Applicant/ Financial Creditor

VERSUS

M/s Newtech La-Palacia Pvt. Ltd.,
Unit 219, S/F,
Vasundhara Enclave Plot No.1,
Vardhman Sunrise Plaza LSC,
Delhi East, Delhi-110096.

.....Respondent/Corporate Debtor

Coram:

R.VARADHARAJAN,
Hon'ble Member (Judicial)

K.K.VOHRA
Hon'ble Member(Technical)

Counsel for the Petitioners: Mr. Yashish Chandra, Mr. Ramakant Rai, Advocates

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9/10/19

Counsel for the Respondent : Mr.C.S.Gupta, Advocate

Delivered on: 30.09.2019

ORDER

The Petition preferred by home buyer in the capacity as the Financial Creditor (FC) under Section 7 of Insolvency and Bankruptcy Code, 2016 (IBC,2016) seeking for the initiation of Corporate Insolvency Resolution Process (CIRP) in relation to a default of the financial debt owed to the FC.

2. The prescribed format under which this Application has been filed from Part-I of which it is seen that the Applicant/FC is an individual. Part-II details the particulars of the CD from which it is seen that the date of incorporation of the CD is stated to be 17.12.2013. The authorized share capital and the paid up share capital is disclosed as Rs.10,00,00,000/- and Rs.10,00,000/- respectively. The registered office of the CD is stated to be situated at Unit 219, S/F, Vasundhara Enclave Plot No.1, Vardhman Sunrise Plaza LSC, Delhi East, Delhi-110096. FC has also proposed the name of the Interim Resolution Professional in Part-III being the one Mr.Shashi Bhushan Prasad. The total amount of financial debt as disclosed in Part-IV is stated to be Rs.32,66,937/- and the details of disbursement of the financial debt has also been given from which it is evident that on and

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from 24.5.2015 to 30.5.2017, the above amounts in tranches have been disbursed to the CD. The date of default is also mentioned as 7.6.2018 under Part-IV. In support of the claim, in Part-V of the prescribed Application, details have been furnished of Builder Buyer Agreement executed between home buyer/FC and CD.

Also, MOU has been entered into between FC and CD in relation to the obligation of CD to pay back bank loan installments till the date of handing over of flats and an e-mail dated 31.1.2018 is also relied on by FC where in it is stated that the CD has admitted the delay in possession due to poor economic conditions and the legal notice served upon the CD by FC. Pursuant to notice to the CD in relation to proceedings pending before this Tribunal, CD has filed reply in relation to the Petition from which the following contentions primarily are raised:

- i. FC has defaulted in payment of instalment and despite several reminders failed to make payment. Similarly, the flat buyers/allottees in relation to the project, subject matter of this Petition, in which FC has booked unit and also committed a default and in the circumstances the CD was not in a position to complete and hand over possession which was subject to compliance of the Agreement by the respective buyers.

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- ii. It is also stated that the total sale consideration of the flat is Rs.39,90,375/- and that out of the said amount which has been paid by FC to CD save Rs.31,48,894/-, by virtue of the Tripartite Agreement between the developer/CD/FC and Dewan Housing Finance Corporate Limited (DHFL) dated 24.06.2015 had been paid only by the said DHFL. In connection with the default in making payment of several instalments, it is contended by the CD in the reply that interest of Rs.43,664/- was also levied on the unpaid amount by FC and the statement of account would show that the FC falls under the defaulted category.
- iii. It is also stated that the project in which FC has booked the flat is registered under UPRERA and that the time line for completion is available to the CD till June, 2019 and in the circumstances, construction in the project is going at a fast pace. It is also contended by the CD that MOU dated 2.8.2015 will come into effect only after 90% of the total sale price is deposited by the FC to the CD and in the absence of depositing of 90% of the total consideration, the claim of the FC without payment of EMIs before possession is also not correct. A tabulation in this respect is also given in the reply as against the total consideration of Rs.39,90,375/-, the amount advanced by DHFL of Rs.31,48,894/-

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being 79% of the total consideration and the balance consideration remaining is in a sum of Rs.8,41,481/- which along with interest on the defaulted amount comes to Rs.43,664/- aggregating to Rs.8,85,145/- to be paid by the FC to CD which clearly indicates that it is below 90% and in the circumstances MOU cannot be relied on by the FC. Further, CD has also contended that in view of prevalence of force majeure conditions which are beyond the control of the CD as restrictions were imposed by the National Green Tribunal in the construction activities and due to non-availability of construction material as well as taking into consideration the legal proceedings initiated by the villagers seeking for fair compensation, there has been delay in the execution of the project and the said delay in any case is taken care of in the Allotment-cum-Flat-Buyer-Agreement itself by virtue of clause 19(c) by providing for a compensation of Rs.5/- per sq.ft. of super area per month to be paid by the CD to the OC provided all due instalments have been received from the FC in time.

In any case, as per the terms of the Allotment-cum-Flat-Buyer-Agreement dated 7.6.2015 provides for arbitration in case of any dispute between the parties and also in addition provides that only Courts in Noida shall have the exclusive jurisdiction to try and entertain any disputes

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which may arise out of or in connection with the terms of the MOU and the Courts at Gautam Budh Nagar and then High Court of Judicature at Allahabad shall have the exclusive jurisdiction. The reply also deals with and contends that there is no financial debt owed to the FC by the CD much less a debt and there is no default on the part of the CD to FC taking into consideration the definitions of debt/financial debt/default. Taking into consideration the ~~conditions~~ ^{contentions} as made by the CD in the reply, CD seeks for the rejection of the Application as filed the FC under Section 7 of IBC,2016 with exemplary costs. ②

The submissions of the respective Ld. Counsels were heard in detail. The Allotment-cum-Flat-Buyer-Agreement dated 7.6.2015 has been annexed and is available at Pages 42-58 of the typed set of documents. From the said Agreement, it is seen that the flat which has been booked by the FC with CD Unit No. B 307, Floor 3 having super area of 1165 sq. ft. with a basic sale consideration of Rs.39,36,250/-. In addition, other charges have also been detailed aggregating in all in a sum of Rs.54,125/- thereby making the total cost of the flat or unit to Rs.39,90,375/-. From the Agreement it is also evidenced that the booking amount in a sum of Rs.10,000/- which had been paid and as acknowledged in the Agreement and the balance amount of Rs.39,80,375/- is payable by FC to the CD. The project namely, the complex was to be known as 'Newtech La-Palacia Pvt.

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Ltd.' The Agreement also provides for payment schedule as seen from page number 53 of the typed set filed along with the Application and as per the payment schedule, a sum of Rs.39,90,375 was payable on achieving the stages of construction, as disclosed in the payment schedule. As per clause 19(a) of the Agreement dated 7.6.2015, CD being developer was required to complete development/construction of the flats within 30 months from the start of excavation/signing of the Agreement with variation of plus or minus 6 months and the force majeure clause has also been provided for in relation to the completion date. Onus on completion of the flat and to intimate to FC was placed on the CD and within 30 days from the date of intimation, the flat was required to be taken possession by the FC. Under clause 11 of the Agreement, it is also provided that the timely payment of the instalments indicated in the payment schedule is the essence of the said Agreement and if not paid the CD was to charge interest at the rate of 18% per annum for one month delay and 24% per annum upto the next 2 months and in case the allottee being the FC, defaults in the payment of more than 3 consecutive instalments, the allotment shall automatically stand cancelled. From the above Agreement, the salient features of which deal with show that onerous responsibility has been placed on the FC being the allottee. It is also evident from the Agreement that the possession of the flat being the

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subject matter of the said Agreement, was required to be given within the period of 30 months with a further extension of 6 months. Based on the commitment as is required to be fulfilled by the FC to the CD, a Tripartite Agreement dated 24.6.2019 has been entered into in relation to the fact being Builder Subvention wherein FC/CD and DHFL are party. From the said Tripartite Agreement, it is evident that the loan amount availed is in a sum of Rs.31,69,000/- and the FC has been defined as the 'Borrower' and the loan availed is required to be repaid by the Borrower by way of EMIs comprising of principal and interest. Developer namely, the CD as requested by the FC, DHFL has undertaken to service pre-EMI interest in relation to loan disbursed for a fixed period of 24 months.

As per clause 4 of the above Tripartite Agreement irrespective of the stage of the construction of the project and handing over, CD was required to pay the pre-EMI interest for the fixed period of 24 months and thereafter the FC was made liable. The borrower shall pay to DHFL regularly each month pre-EMIs as laid down in the Agreement.

Clause 9 of the said Agreement also places the responsibility for the payment of EMI as agreed to in the loan agreement until the builder refunds the amount to the DHFL and DHFL shall have the right to initiate legal action against the FC in case of non-payment.

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From the payment schedule as given in the Petition, it is seen that a sum of Rs.39,90,375/- had been remitted by the FC either from his personal funds or through the borrowing from DHFL on the premise that the project will be completed within the agreed period of 30 plus 6 months. It is no doubt that the Agreement dated 7.6.2015 between FC and CD as narrated above and the Tripartite Agreement dated 24.06.2015 has also been entered into between FC/CD and DHFL. Despite being fully aware of the commitments in relation to the project and possession of the flat as agreed to be given to the FC should be delivered within the time period, it is evident from the e-mail correspondence dated 31.01.2018, which reads as follows:

Rediffmail
Subject: Regarding Your Pre EMI from Newtech La Palacia, Greater Noida West

From info@newtechgroup.co on Wed, 31 Jan 2018 15:01:50
To:<recipients undisclosed>
Dear Sir/Madam,

Newtech La Palacia Management are informing you that we are not able to pay "Pre EMI" to all of you from February, 2018, due to funds problem in our Project "Newtech La Palacia". Also market is not supportive.

So, we are offering you, a rental flat 2 BHK for 2 BHK Clients (Area-995 Sq.Ft. & 1165 Sq. Ft.) and 3 BHK for 3 BHK Clients (Area-1425 Sq. Ft.) respectively against of your booking in "Newtech La Palacia" to another project up to till offer of possession as per your conditions (if your booking is in "No Pre EMI Till Offer of Possession Plan") due to delay in possession of our project "Newtech La Palacia".

Or

If you are not interested to go on rental flat then we will pay you as a rental against of your booking in "No Pre EMI Till Offer of Possession" (according to our commitment). We will pay Rs.6000/- (six thousand only) for 2 BHK (Area - 995 Sq. Ft. & 1165 Sq. Ft.) and Rs.7000/- (Seven thousand only) for 3 BHK (Area 1425 Sq. Ft.).

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We will also give the possession " Newtech La Palacia" tentatively June, 2019.

Your co-operation in this regard and a favourable reply from your side shall be highly obliged. Please send your details with the Name, Unit No. and Area.

Thanks & Regards

Management
Newtech La Palacia
Newtech

Newtech La-Palacia
Plot No.GH-09A, Tech Zone-4,
Near- Sarvottam Institute of Technology and Management, Greater Noida
(West),
Gautam Budh Nagar, Uttar Pradesh-201306(India)
Website:www.newtechgroup.co

Subject: Regarding Your Pre EMI from Newtech La Palacia, Greater
Noida West

From info@newtechgroup.co
Date: Mon, January 29, 2018 12:41 pm

Newtech La-Palacia
Plot No.GH-09A, Tech Zone-4,
Near- Sarvottam Institute of Technology and Management, Greater Noida
(West),
Gautam Budh Nagar, Uttar Pradesh-201306(India)
Website:www.newtechgroup.co

From the above e-mail communication, it is fairly evident that the CD had pleaded its inability to pay 3 pre-EMI as agreed by virtue of the Tripartite Agreement with DHFL and FC nor has it been able to give possession of the flat within the agreed time and in relation to the possession, it has tentatively stated in the above said e-mail that the possession will be given in the month of June, 2019. Upon a query posed during oral submissions to Ld. Counsel for the parties as to whether as of today whether the flat was ready to be handed over for possession to the FC by CD, the CD was not in a position to give any categorical reply which

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obviously denotes that there has been default on the part of CD to hand over the flat to the CD, as agreed to by it. However, in relation to the same, specious argument has been placed that RERA has extended the timeline till June, 2019. Hon'ble Supreme Court in the matter of Pioneer Urban Land and Infrastructure Limited & Anr. dated 9.8.2019 has specifically stated that the registration with RERA of the developer of the project will not be material criteria to ascertain the development as the home buyer is not a party to the said registration as the flat has been booked and in the instant case, more particularly, the flat has been booked in the year 2013. It is also seen that the onus for repayment of money in case of default on the part of CD to the lender namely, DHFL has been placed on the FC being the borrower and after 24 months, interest is also required to be paid along with EMIs from the date of the Loan Agreement. It is the admission of the CD that a major portion of the advance in relation to the flat has come from DHFL and in the circumstances since CD has committed the default in completing the project and the e-mail also clearly discloses that it is not in a position to finance the pre-EMI payments as required to be paid by it, it is seen that a default had arisen on the part of CD. Section 5(8) of IBC,2016 and the explanation provided there under and taking into consideration the above said decision of the Hon'ble Supreme Court in the matter of Pioneer Urban Land and Infrastructure Limited & Anr. wherein

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the Hon'ble Supreme Court has held that the home buyers can be considered as financiers to a particular project and the same is a commercial borrower of FC to the CD in the capacity as the developer of the project and the delivery of possession of the flat contracted to be delivered within the specified time frame is the consideration as against the time value for money. In the circumstances, we find that there is a default on the part of CD which is evident from the admission of the CD itself in view of the e-mail extracted above and thus taking into consideration the provisions of IBC,2016 as well as the decision of the Hon'ble Supreme Court rendered in WP(C) 43 of 2019 dated 9.8.2019 in the matter of Pioneer Urban Land and Infrastructure Limited & Anr. the Petition stands admitted and as a consequence the CIRP is initiated in relation to the CD.

- a. Mr.Shashi Bhushan Prasad, having registration No. IBBI/IPA-002/IP-N00676/2018-19/12114 E-mail : shashipbd@gmail.com proposed by the Financial Creditor is appointed as the interim resolution professional and he shall strictly act in accordance with the provisions of the Code and the attendant Rules enjoined upon him;

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b. In terms of Section 14, as reproduced hereunder, the Corporate Debtor shall be under moratorium on the following terms:

(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.

c. However during the pendency of the moratorium period in terms of Section 14(2) and 14(3) as extracted hereunder:

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or

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suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

- d. The duration of the period of moratorium shall be as provided in Section 14(4) of IBC, 2016 and for ready reference reproduced as follows:-

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

- e. The Board of Directors of the Corporate Debtor shall stand suspended on and from this day as envisaged under Section 17 of the Code.

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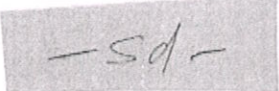
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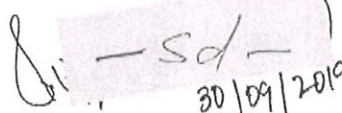
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f. In terms of Section 7(7)(a) of the Code the registry of this Tribunal is directed to communicate the order to both the Financial Creditors and the Corporate Debtor at the earliest. In addition a copy of the order shall also be forwarded to IBBI for its records. Further the IRP above named be also furnished with copy of this order forthwith by the Registry.

With the above directions, the application stands disposed of.


(K.K.VOHRA)
MEMBER(Technical)

U.D.Mehta
30.09.2019


(R.VARADHARAJAN)
MEMBER(Judicial)




Deputy Registrar
National Company Law Tribunal
CGO Complex, New Delhi-110003

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