

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT-III**

IA-2791/2021
In
IB-1348(ND)/2019

IN THE MATTER OF IB-1348(ND)/2019:

M/s. NISUS FINANCE & INVESTMENT LLP & Anr.

..... Financial Creditors

VERSUS

M/s. EARTHCON UNIVERSAL INFRATECH PRIVATE LIMITED

.....Corporate Debtor

IN THE MATTER OF IA-2791/2021:

Mrs. Shikha Lal & Ors.

1. Mrs. Shikha Lal
2. Mr. Pravin Bihari Lal

..... Applicants

VERSUS

Mr. Gaurav Katiyar

Resolution Professional of the Corporate Debtor

..... Respondent

Order Delivered On: 18.12.2023

CORAM:

**SHRI BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (JUDICIAL)
SHRI ATUL CHATURVEDI, HON'BLE MEMBER (TECHNICAL)**

APPEARANCES:

- For the Applicants : Mr. Chandrashekhar Yadav, Mr. Gauransh Singh Chauhan, Advs. in IA-2791/2021,
Mr. Shikhil Suri, Ms. Wamika Chadha, Ms. Nidhi Kapoor, Advs. in IA-4645/2022,
Mr. Siddharth Bhatli, Ms. Khyati Jain, Advs. in IA-5441/2021,
- For the RP : Mr. Rishabh Jain, Advocate for RP

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. The present Application has been filed by Mrs. Shikha Lal & Ors., the Applicants (claimants) on 05.07.2021 under Rule 11 of the NCLT

IA-2791/2021 In IB-1348(ND)/2019

Date of Order: 18.12.2023

Rules, 2016 before this Adjudicating Authority, for seeking the following reliefs:

- “i) Direct the Resolution Professional to include the name of the applicants/claimants in the category of “flat buyers”; and/or*
- ii) Pass any other order(s) as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of justice;*

2. Brief Background of the Case

- i. An application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC") was filed by the Financial Creditor i.e. M/s. Nisus Finance & Investment LLP, against the Corporate Debtor i.e. M/s. Earthcon Universal Infratech Private Limited and the said application was admitted by this Adjudicating Authority vide order dated 08.11.2020 and a moratorium was declared including appointment of Mr. Jitendra Arora as an Interim Resolution Professional. Subsequently, the present Respondent namely Mr. Gaurav Katiyar was confirmed as Resolution Professional.
- ii. The Resolution Plan was submitted by the Successful Resolution Applicant namely Consortium of M/s. D S Infraheights Private Limited and M/s. Anand Buildtech Private Limited which was approved by the CoC in its 26th meeting dated 19.08.2023 by 70.18% voting share in respect of the CIRP of the Corporate Debtor after considering its feasibility and viability. Thereafter, Mr. Gaurav Katiyar, the Resolution Professional of M/s. Earthcon Universal Infratech Private Limited submitted an IA-4466/2023 for seeking approval of Resolution Plan under Section 30(6) read with Section 31 of IBC, 2016 on 22.08.2023, which is pending adjudication before this Adjudicating Authority.

3. Submission of the Applicants

- i. The Corporate Debtor approached the Applicants and represented that Corporate Debtor are in the business of development of Real Estate including residential, commercial, hospitality and large integrated townships and the Corporate Debtor are in the process of developing a Housing Project in the name and style of "Casa Royale" at Plot No. GH-10, Sector 1, Greater Noida West, Greater Noida, Uttar Pradesh-201306.
- ii. The Applicants induced by various advertisements issued by the Corporate Debtor for their housing project to be developed/constructed under lawful arrangements by M/s Earthcon Universal Infratech Pvt. Ltd. applied for an Apartment vide Booking Form dated 21.01.2019 admeasuring super area of 2225 sq. fts. at the rate of Rs. 100/- per sq. ft. whereby the Applicants were allotted Apartment on 16th floor, D-1602, 4BHK, Size 2225 sq.ft. for a total sales consideration of Rs. 52,59,900/-. The Applicants paid a sum of Rs. 5,00,000/- vide Cheque No. 136362 dated 22.01.2019 drawn on Axis Bank, New Delhi as booking amount.
- iii. Thereafter, a Builder Buyer's Agreement purportedly dated 09.01.2019, was executed between the Corporate Debtor and the Applicants. In Article 4 of the Agreement, it is stated that the Corporate Debtor would complete the construction work of the said apartment on or before 12 months with the grace period of 3 months i.e. 09.04.2020, from the date of the agreement. The Applicants paid further an amount of Rs. 21,22,955/-.
- iv. The Applicants have been continuously following up with the Corporate Debtor about the status of the project/complex but a vague and evasive reply was given by the Corporate Debtor. Thereafter, the Applicants on 03.08.2019 submitted a cancellation affidavit along with the original documents to the Authorised Representative of the Corporate Debtor.

- v. On 05.09.2019, the Applicants registered a Case in Uttar Pradesh Real Estate Regulatory Authority (UPRERA) bearing No. NCR144/09/0463/2019. On 20.03.2020, the UPRERA directed the Corporate Debtor to refund an amount of Rs. 26,22,955/- alongwith interest within two months.
- vi. In the due Course, the Applicants came to know that CIRP has been initiated against the Corporate Debtor. Thereafter, the Applicants submitted their claim on 25.02.2020 in Form-CA being a Financial Creditor. The claim of the Applicants was accepted by the IRP i.e. Mr. Jitender Arora vide email dated 03.03.2020.
- vii. The Applicant No. 1 vide letter dated 19.11.2020 and email dated 20.12.2020 addressed to resolution professional withdrew the cancellation and opted for the flat as the applicant continued to retain lien over her flat as no refund was made to her.
- viii. Vide email dated 05.01.2021, the resolution professional circulated the list of homebuyers as on 24.03.2021 wherein name of Applicant No. 1 with remarks "Flat cancelled/ surrendered, claim collated on provisional basis" has been shown. However, it is to reiterate that vide email dated 20.12.2020, the Applicant No. 1 had already opted for flat by withdrawing the cancellation and therefore, the list sent is not proper and the applicants ought to have been placed under category of "Flat Buyer".
- ix. The Applicant has written various letters and e-mails to the Resolution Professional and the Resolution Professional has not replied to letters and e-mails.

4. Submission of the Respondent

- i. It is submitted that the main grievance of the Applicant is that the Applicant wants the possession of their unit despite the fact the Applicant has wilfully surrendered their units by way of affidavit of cancellation and the Uttar Pradesh Real Estate Regulatory Authority (UP RERA) has passed an order of refund in favour of Applicant. It is submitted that after cancellation of unit and

becoming a decree holder under the provisions of UP RERA Act, 2016, the cause of action on the basis of Allotment letter and Builder Buyer Agreement (BBA) stands obliterated. Therefore, the Applicant is not entitled for possession of real estate unit as sought for in the present Application.

- ii. The BBA was executed on 09.01.2019 and as per signed BBA the Corporate Debtor was required to offer the possession of the flat to the applicant by April'2020. But the applicants without even waiting for April 2020, in August 2019 submitted an affidavit of cancellation. Once the BBA was breached before the due date of performance has arrived (i.e. April 2020), as per the laws of contract, the Corporate Debtor has two alternatives:
 - a. either Corporate Debtor may rescind the contract immediately; or
 - b. Corporate Debtor may not put an end to the contract but treat it as still subsisting and alive and wait for performance of the contract on the appointed date.
- iii. It is submitted by the Respondent that as per para 4 and 8 of the affidavit of cancellation submitted by the Applicant clearly shows that in the present case out of aforesaid two options the Corporate Debtor before the insolvency commencement date repudiated the contract and decided to refund the money of the Applicant.
- iv. The Applicant repudiated the contract before the agreed date of performance of the contract and the Corporate Debtor also choose to terminate the BBA and acceded the request of surrender of flat by the Applicant and necessary corresponding entry was also made in CRM software maintained by the Corporate Debtor wherein the unit earlier allotted was after cancellation was transferred to the inventory.

5. **Analysis and Findings**

- i. We have heard the submissions of Ld. Counsel appearing for the Applicants/claimants as well as Ld. Counsel appearing for the Resolution Professional/Respondent.
- ii. We find that the Applicants have wilfully and voluntarily surrendered their unit which do not change the nature of the transactions from which the Applicants sought the possession of their unit.
- iii. We are of the considered view that the RP collated the claim of the Applicants under the refund category is covered well within the ambit of the Law of contract. The BBA came to an end and the Applicants were entitled to a refund of money as the only remedy left.
- iv. Hence, we are of the view that the Resolution Professional has not committed any illegality w.r.t. the Applicant's classification under the refund category.

6. In view of the above facts and circumstances and the foregoing discussion. It is accordingly ordered as follows:

- i. The Application bearing **IA-2791/2021** filed by the Applicants is **dismissed**.
- ii. The Registry is directed to send a copy of this order to the Insolvency and Bankruptcy Board of India for their record.

No order as to costs.

Sd/-

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

Sd/-

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