

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

IA-287/2021

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-287/2021:**

**Mr. Rupesh Das & 37 Ors.**

**..... 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)**

**IA-287/2021 In IB-1348(ND)/2019**

**Date of Order: 18.12.2023**

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1. The present Application has been filed by Mr. Rupesh Das & 37 Ors., the Applicants (Homebuyers of Sanskriti residential project of the Corporate Debtor) on 17.01.2021 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016 before this Adjudicating Authority, for seeking the following reliefs:

*“a) Allow the present Application and direct the RP to withdraw the illegal and unlawful demands of electricity and maintenance charges made vide its notices of demand dated 26.12.2020, and further withdraw the demand for interim finance made on 31.12.2020; and*

*b) Allow the present Application and direct the RP to expeditiously close the books of accounts of the Corporate Debtor, appoint Forensic Auditors, and exhaustively collate the claims of homebuyers; and*

*c) Declare all the resolutions passed at the 3<sup>rd</sup> meeting of the CoC as illegal, null and void, and unenforceable, in view of the opaqueness with which they were passed and by excluding the eligible Financial Creditors from the process; and*

*d) Direct the RP to properly manage the affairs of the Corporate Debtor, in accordance with law, by raising the necessary finance for Banks or Financial Institutions, if need be; and*

*e) Direct the RP to withdraw the banner/notice installed at the site on or around 10.01.2021, and make all such efforts as are necessary to continue to provide essential services to the occupants of the project; and*

*f) In the Interim, till such time that the Application remains pending for Adjudication, stay the operation of demands arising out of the impugned notices of demand dated 26.12.2020 demand for interim finance dated 31.12.2020 and also the operations of the resolutions passed in the 3<sup>rd</sup> meeting of the CoC; and*

*g) Pass any other/further orders, as this Hon'ble Tribunal may deem fit."*

**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 26<sup>th</sup> 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. It is the case of the Applicant that during the CIRP of the Corporate Debtor, the RP took decisions which are detrimental to the interest of hundreds of homebuyers, including the Applicants, in flagrant violation of duties and responsibilities cast upon him under the provisions of the IBC read with CIRP Regulations. The impugned decisions do not have any basis in the provisions of the Apartment Buyers Agreement ("ABA"), the

Allotment Letter, leading to an irresistible inference about the possible collusion of the RP with the erstwhile management of the Corporate Debtor, in mismanaging the affairs of the Corporate Debtor.

- ii. The instances of acts and omissions by the RP are as follows:
  - A.** Opaqueness in the conduct of 3<sup>rd</sup> COC meeting of 19.12.2020 whereby materially adverse decisions taken, in a stark departure from the conduct of the 2<sup>nd</sup> COC meeting.
  - B.** Raising of illegal demands from the homebuyers, beyond the contractual dues, in the form of higher charges for electricity, as well as, claiming of unlawful maintenance charges.
  - C.** Illegal demands made from the Homebuyers for depositing interim finance @ Rs. 20,000/- per claim of real estate units.
  - D.** Gross and deliberate deficiency in collation of claims.
  - E.** Adoption of unlawful and coercive techniques by the RP.
  - F.** Ostensibly deliberate delay in closing the books of accounts and conducting statutory audit.
  - G.** Gross delay in appointing a Forensic Auditor to identify the modus operandi of siphoning off of the assets of the Corporate Debtor.
- iii. In light of the above, the Applicants/homebuyers are praying for directions to the RP to expedite finalization and closure of books of accounts, appointment of Forensic Auditors, and collation of claims of homebuyers and also the RP may be directed to desist from making illegal and unlawful demands of electricity and maintenance charges.

4. **Submission of the Respondent**

- i. The Resolution Professional has filed reply affidavit denying the contentions and allegations made in this application filed by the Applicants/ homebuyers. The Respondent/ Resolution Professional has submitted that with regard to the increase in rate of maintenance charges, it is submitted that the same has not been done as the CoC in its 4<sup>th</sup> meeting vide agenda no 9

- has rejected its earlier decision of increase in rate of maintenance charges. The main grievance of the Applicants in the present application is increase of electricity rate from Rs. 7.00/- unit to Rs. 8.91/- unit w.e.f. 01.01.2021 and raising of interim finance @ Rs. 20,000/- per allottees (from 900 allottees).
- ii. It is submitted that before the insolvency commencement date the Corporate Debtor has given the possession of units/flats to various allottees despite the fact that the construction of the real estate project was not complete.
  - iii. It is further submitted that since the NPCL has provided the temporary electricity connection to CD for construction purposes therefore the NPCL is rightly charging the per unit rate of commercial slab (i.e. Rs. 8.91 /unit).
  - iv. During the month of July, 2020, the NPCL issued disconnection notice because of there accumulated dues when the answering Respondent was appointed as RP from the past history of electricity consumption by the Corporate Debtor.
  - v. Currently, the Corporate Debtor who is providing the electricity to the allottees is charging Rs. 7/- per unit from the residents residing at the Sanskriti and Casa Royal project (from the allottees) whereas the Noida Power Corporation Limited (NCPL) charged Rs. 8.91/- per unit (per unit rate of commercial slab) from the Corporate Debtor.
  - vi. It is submitted that the disconnection of electricity will not adversely affect the Corporate Debtor as no construction activity from February' 2020 was done but the disconnection would adversely affect the lives of the residents residing there.
  - vii. The average consumption of the residents is ranging between 180-200 units per month which shall not cost to the applicants more than Rs. 350-400 per month which may be less than the cost of this application.
  - viii. it is submitted that raising of interim finance is permissible under Section 25(2)(c) read with Section 28(1)(a) of the

Insolvency & Bankruptcy Code, 2016. It is further submitted that as per Section 5(13)(a) of the code, the insolvency resolution process cost includes the interim finance raised by the IRP/ RP. Further, as per Section 30(2)(a) of the code, the insolvency resolution process cost has its own priority. It is also pertinent to mention here that the RP proposed to raise Rs. 180.56 lakhs from the allottees subject to contribution of Rs. 20,000/- per allottee which means as per the agenda number 19, the RP is empowered to raise interim finance from 900 allottees only. It is also pertinent to highlight here that the aforesaid agenda was approved by 980 allottees (i.e. 86 % of the 1140 allottees participated as class).

5. **Analysis and Findings**

- i. We have heard the submissions of Ld. Counsel appearing for the Applicants/ homebuyers as well as Ld. Counsel appearing for the Resolution Professional/Respondent.
- ii. On 21.11.2023, this Adjudicating Authority passed the the following order:

**“IA-82/2022**

*Mr. Rishabh Jain, Ld. Counsel appearing for the Resolution Professional has submitted that the CoC has approved the Resolution Plan on 19.08.2023 and an application seeking approval of the plan has been filed before this Adjudicating Authority which is coming up for hearing on 29.11.2023. He further submitted that the Resolution Plan provided that 100% outstanding dues towards electricity will be paid as CIRP cost.*

*Ld. Counsel appearing for the Applicant seeks time to take instructions”*

- iii. The Hon’ble Supreme Court in the matter of **K. Sashidhar Versus Indian Overseas Bank & Ors.** in Civil Appeal No. 10673 of 2018 has held that the commercial decision of CoC is non-justiciable.

- iv. In light of the above-quoted judgement, it is clear that the “Commercial wisdom of CoC” is given paramount status. This Adjudicating Authority is not endowed with the powers of jurisdiction or authority to analyse or evaluate the commercial decision of the CoC. The CoC in its Commercial wisdom has approved and not approved the agendas of the 3<sup>rd</sup> and 4<sup>th</sup> CoC meetings, this Adjudicating Authority cannot interfere in the same.
  - v. On a conspectus of the case, it is a settled law that once the Resolution Plan has been approved by the CoC, the Adjudicating Authority can't go back to look into the nitty-gritty's involved in the CIRP of the Corporate Debtor. Therefore, this Adjudicating Authority cannot entertain the present Application which is devoid of merits and not sustainable. The Applicant is attempting to derail or delay the present CIRP proceedings of the Corporate Debtor.
  - vi. We are of the considered view that if such application are allowed, then this Adjudicating Authority will continue to receive further such applications and the case will never reach resolution. Further, it will also cause a hurdle to the Successful Resolution Applicant in executing the Resolution Plan.
6. In view of the above facts and circumstances and the foregoing discussion. It is accordingly ordered as follows:
- i. The Application bearing **IA-287/2021** filed by the Applicants/ homebuyers 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)**