IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-II

IA No. 2803 of 2023

IN

C.P. (IB) No. 411/MB/2019

Under Section 60(5) U/s 7 of the Insolvency and Bankruptcy Code, 2016

Vikas Prakash Gupta.

… Applicant /Liquidator

V/s

State Bank of India Employees Sea View Cooperative Housing Society Limited

… Respondent

In the matter of

Reliance Home Finance Limited

… Financial Creditor

Versus

Zaveri Constructions Private limited

… Corporate Debtor

Order Delivered on :09.10.2023

***Coram*:**

Hon'ble Member (Technical)
Mr. Anil Raj Chellan

Hon'ble Member (Judicial)
Mr. Kuldip Kumar Kareer

Appearances:

For the Liquidator : Adv. Manoj Kumar Mishra

For Respondent : Adv. Gauraj Shah a/w Adv. Devang Raut

ORDER

Per: Anil Raj Chellan, Member Technical

1. The instant application is filed by Applicant Liquidator to pass an order declaring the forfeiture of Security Deposit of Rs.50 lakh by the Respondent to be non-est and in violation of the moratorium period and direct the Respondent to restore the Security Deposit to the Corporate Debtor.

The Brief facts leading to the present petition are as under:

2. Zaveri Constructions Pvt Ltd, the Corporate Debtor herein was admitted to Corporate Insolvency Resolution Process (CIRP) by an order of this Tribunal dated 26.09.2019 and Mr. Pankaj Sham Joshi was appointed as the Interim Resolution Professional. Moratorium in terms of Section 14 of the Insolvency and Bankruptcy Code, 1986 (the Code) was also ordered by the said order.

3. Prior to the commencement of CIRP, the Corporate Debtor had entered into a registered Development Agreement dated 02.09.2016 (Development Agreement) with State Bank of India Employees Sea View Co-operative Housing Society Ltd, the Respondent herein,

wherein the Respondent had entrusted redevelopment of the building to the Corporate Debtor. In consideration of the development rights granted by the Respondent in favour of the Corporate Debtor, the Corporate Debtor paid an instalment of Rs.50 lakh which is to be refunded to the Corporate Debtor in stages, depending upon the progress of redevelopment of the building. A registered irrevocable Power of Attorney was also executed in favour of the then director of the Corporate Debtor.

4. After admission of the Corporate Debtor to CIRP and declaration of moratorium, the Respondent, on account of no progress in the redevelopment work, terminated the Development Agreement under a Termination Notice dated 12.02.2021 and forfeited the Security Deposit of Rs.50 lakh.

5. The RP vide his letter dated 01.05.2021 forwarded a copy of the order admitting the Corporate Debtor to CIRP and advised against forfeiture of Security Deposit on account of the subsistence of moratorium passed by this Tribunal. Subsequently, this Tribunal vide its order dated 26.08.2022 placed the Corporate Debtor into liquidation, by virtue of which Mr. Vikas Prakash Gupta was appointed as Liquidator of the Corporate Debtor.

6. During the process of liquidating the assets of the Corporate Debtor, the Liquidator filed this application for the reversal of the forfeited amount of Rs.50 lakh from the Respondent in favour of the Corporate Debtor.

Submissions of the Applicant:

7. In view of the admission of Corporate Debtor to CIRP on 26.09.2019, and declaration of moratorium period with effect from 26.09.2019, transfer of the assets/beneficial rights of the Corporate Debtor, more particularly the forfeiture of Security Deposit, is in violation of the moratorium declared under Section 14 of the Code and also in contravention of the waterfall mechanism regarding distribution of sale proceeds specified under Section 53 of the Code.

8. The Applicant stated that termination notice dated 12.02.2021 and the subsequent notice dated 12.03.2021 are illegal and unsustainable in the eyes of law for the reason that a registered Development Agreement cannot be terminated by an unregistered notice. Further, as per Section 49 of the Registration Act, 1908, the instrument unless registered, will not affect the right, title or interest in an immovable property.

9. The Applicant further stated that the Security Deposit forms part of the assets of the Corporate Debtor and the same is to be distributed to creditors as per Section 53 of the Code.

Submissions of the Respondent

10. The Corporate Debtor countered the arguments of the Applicant and stated that the Corporate Debtor failed to perform the terms and conditions contained in the Development Agreement and hence the

Respondent rightly terminated the same. The IRP/the Liquidator had not challenged the aforesaid termination, consequently the termination has become absolute and binding upon the Corporate Debtor, for all intents and purposes in law. Section 17 r/w Section 49 of the Registration Act is not applicable as the Development Agreement is a contract which is terminable in nature and as per Section 39 of the Indian Contract Act, 1872, a party who is disabled to perform its promise under the contract, as in the present case where Corporate Debtor has disabled itself by becoming an insolvent, can be terminated by the other party.

11. The moratorium which kicked in w.e.f. 26.09.2019 is not applicable as forfeiture of security deposit is not an action to foreclose, recover or enforce any security interest created by the Corporate Debtor as provided under Section 14(c) of the Code.

12. Section 53 of the Code which deals with the manner of distribution of assets of the Corporate Debtor is not applicable as deposit once made belongs to the Respondent and the Respondent is entitled to apply the security deposit in accordance with the Development Agreement for breach of the same.

FINDINGS

13. We have heard the contentions of the parties and also perused the documents on record.

14. It is admitted by the parties that a Development Agreement dated 02.09.2016 was executed between the Corporate Debtor and the Respondent for redevelopment of a housing building, the Corporate Debtor had paid to the Respondent a security deposit of Rs. 50 Lakh which was to be refunded by the Respondent to the Corporate Debtor in stages on achievement of certain milestones under the Development Agreement, and the Corporate Debtor was in default/ breach of the terms and conditions regarding redevelopment of the property. Therefore, the first point for consideration is whether the security deposit made by the Corporate Debtor can be forfeited for the breaches under the Development Agreement. It is pertinent to mention here that the redevelopment of the property which is the subject matter of the Development Agreement belongs to the Respondent and only development rights were transferred to the Corporate Debtor for the purpose of redevelopment. Hence, we do not consider it necessary for the purpose of disposal of the present petition to deal with the legality and validity of termination of Development Agreement made by the Respondent.

15. While perusing the Development Agreement it is noted that an irrevocable and unconditional bank guarantee from a nationalized bank for the sum of Rs. 13 Crore was specified in the Development Agreement for securing the due completion of the flats and the same shall remain in force until the Corporate Debtor completes the intended building. Though the Development Agreement provides for invocation of guarantee in case of breach of the terms, there is no term in the Development Agreement for forfeiture of the security deposit

under any circumstances and is to be returned to the Corporate Debtor.

16. It is a matter of record and within the knowledge of the Respondent that the Corporate Debtor was admitted to CIRP and moratorium as specified under Section 14 of the Code, has been ordered in respect of the Corporate Debtor. The object of declaring moratorium is to keep the Corporate Debtor's assets together during CIRP and facilitate orderely completion of processes as per the Code. The security deposit made by the Corporate Debtor is in the nature of a deposit and liable to be refunded by the Respondent on completion of certain work as specified in the Development Agreement. Hence, we have no hesitation to consider the security deposit as a property of the Corporate Debtor.

17. The Learned Counsel appearing for the Respondent vehemently argued that the Respondent had not taken any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property as contemplated in Section 14(1) (c) of the Code, and, therefore, none of the prohibitions contained in Section 14 of the Code, had been violated by the Respondent. In this context, we observe that Section 14(1) (b) of the Code, prohibits, inter alia, transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein. We cannot adopt an interpretation that the prohibition of transferring, encumbering, etc. of assets as contained in Section 14(1) (c) is applicable only to Corporate Debtor and not to

any other person. It is clear that the prohibition on transfer, alienation etc of assets of Corporate Debtor is applicable not only on Corporate Debtor but on every person in possession of Corporate Debtor's assets.

18. The Corporate Debtor is presently undergoing the process of liquidation and the Liquidator shall have the powers and duties to take into his custody or control all the assets, property, effects and actionable claim of the Corporate Debtor for the purpose of sale and the proceeds from the sale of the liquidation assets are to be distributed as per the waterfall mechanism provided under Section 53 of the Code. We have already mentioned that the security deposit of the Corporate Debtor with the Respondent is an asset of the Corporate Debtor in the possession of the Respondent. The assets of the Corporate Debtor cannot be distributed or forfeited or adjusted by any person after declaration of moratorium under the Code.

19. In view of the above, **IA.No.2803/2023 is allowed** and the Respondent is directed to restore the security deposit of Rs. 50 Lakh to the Corporate Debtor.

20. Ordered accordingly.

Sd/-	**Sd/-**
ANIL RAJ CHELLAN	**KULDIP KUMAR KAREER**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**