

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENCH-III
NEW DELHI

IB-1598/(ND)/2018

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:

Aamir Jamal,
A-407, Priyadarshini Apartment,
IP Extn. Patparganj,
New Delhi-110092.

.....Financial Creditor

VERSUS

Futec Shelters Private Ltd.,
R-19, 3rd Floor, Neaqr Shakarpur,
Laxmi Nagar,
Vikas Marg,
Delhi-110092.

.....Corporate Debtor

Coram:

R.VARADHARAJAN,
Hon'ble Member (Judicial)

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

Counsel for the Petitioners: Mr. Vikas Tiwari, Mr. Neeraj Kumar
Gupta, Advocates

Counsel for the Respondent : Mr. Himanshu Tyagi, Advocate

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11/10/18

Delivered on: 09.10.2019

ORDER

The Applicant being the home buyer in the capacity of a Financial Creditor (FC) has filed this Petition against the Respondent/ Corporate Debtor (CD).

2. The particulars and facts in brief as evidenced from the prescribed Application are as follows:

3. The Applicant is an individual, as reflected in Part-I of the Application. Part-II of the Application discloses the details of the CD from which it is seen that the CD was incorporated on 4.7.2006 and the nominal share capital and the paid up share capital is stated to be Rs.1,20,00,000/- and Rs.3,75,000/- respectively. The registered office of the CD is stated to be situated at R-19,3rd Floor, Near Shakarpur, Laxmi Nagar, Vikas Marg, Delhi-110092 which address is also reflected in the Master Data as filed by the Applicant annexed at Annexure-P1. The Applicant in Part-III of the Application proposes the name of the Interim Resolution Professional (IRP) being one Mr.Sunil Prakash Sharma having the registration No. IBBI/IPA-002/IP-N00551/2017-2018/11726. Part-IV of the Application discloses the amount of debt granted by the Applicant to the Respondent which is stated to be in a sum of Rs.44,10,784/- and the details of the financial debt have also been given by way of a tabulation from which it is seen that the payment commenced from 9.7.2011 and ending on 5.8.2016. Along with the said amount of Rs.44,10,784/- claimed to be in default it is stated that a sum of Rs.1,00,85,842/- which includes interest payable computed till 10.8.2018. The date of default initially stated to have occurred on 31.12.2014 and in view of the claim being

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recognized of the Applicant by the Respondent by demanding payments from the Applicant under protest on 5.8.2016, the same is reckoned as the date of default by the Applicant. Part-V of the prescribed Application, lists out the documents in support of the claim as made by the Applicant against the CD. In view of the claim being a financial debt and the amount is in default, this Application by the Applicant.

4. The claim it is averred arises out of Flat Buyer Agreement as executed between the Applicant and the CD on 3.8.2012 for purchase of flat being No.A2-601, Tower A having an area of 1750 sq.ft. in the project named as Gardenia Gateway being developed by CD at Plot No.10, Eco City, Sector-75, Noida, UP. As per the Agreement the agreed project price of the above said unit/flat is Rs.54,16,250/-, individual break-up of which has been given by way of a tabulation and out of total consideration payable ^{amount Paid} has also been given in a sum of Rs. ~~100,85,842/-~~ ^{44,10,784/-} had been paid. In terms of clause 27 of the above said Agreement dated 3.8.2012, the CD was required to deliver the possession of the flat after obtaining completion certificate from the Competent Authority in December, 2014. However, even after a delay of more than three and half years, no possession has been given by the CD to the Applicant and instead the CD invoking clause 19 of the Agreement had thereby insisting upon the Applicant to pay an interest @18% per annum for one month and at 24% per annum for next months in case of any default or delay in timely remittance of instalments.

5. Even though substantial amounts have been paid, possession has not been given by the CD to the Applicant by way of discharge of its obligations which compelled the Applicant to approach on 20.2.2018 the RERA UP seeking for the possession of the residential unit and interest for delay in possession. However, the



said complaint is yet to be heard by RERA. Apart from the above complaint, the Applicant has not approached any other forum it is averred in relation to the present cause or claim.

6. Upon notice issued to the CD, the CD had entered its appearance and have also filed ~~the~~^{its} reply. Perusal of the reply shows that a technical objection has been taken by the CD that the amount which had been paid by the Applicant to the CD is in a sum of Rs.46,56,752/- instead of Rs.44,10,784 as stated in the Application and the payment in a sum of Rs.2,45,968 made by the Applicant on 16.1.2016 had not been mentioned and in the circumstances since the actual figures paid had not been mentioned the Petition is defective and deserves to be dismissed on this sole ground. It is also contended by the Respondent that it is a solvent company and having several projects and every endeavour is being made to deliver the possession of the flat by June, 2019 to the Applicant and that the finishing work is also in the advance stage.

7. Placing reliance upon the decision of Hon'ble NCLAT in Nikhil Mehta vs. AMR Infrastructure as well as in Kamal Dutta vs. Anubhuti Aggarwal & Anr. judgements rendered by Hon'ble NCLAT, the Respondent contends that the amounts which had been paid by the Applicant cannot be considered as consideration paid against the time value for money and also based on the said judgements contends that there is no financial debt and that the Applicant cannot be considered as a FC.

8. It is also contended that there is existence of dispute in as much as there had been delay on the part of the Applicant in remitting the instalment amounts as it was required to pay on due dates as per the Payment Schedule given in the Agreement and the actual date of payment evidences a default on the part of the Applicant, which has



been given by way of a tabulation. It is also brought to the notice of this Tribunal that delay in the development had occurred due to the proceedings initiated by Hon'ble National Green Tribunal and in the circumstances 'force majeure' situation arise due to paralysis in policy which has also delayed the completion of the project and in handing over the flat's possession. The reply also mentions about the dispute in relation to the title to the land which is also stated as a cause for delay. It is also brought to the notice of this Tribunal by way of the reply that the Applicant herein has approached the Consumer Redressal Forum, ITO, New Delhi and that a final order on the complaint case Nio.769 of 2014 had been passed vide order dated 2.4.2018. In relation to the proceedings for the RERA, it is contended by the Respondent that the Applicant had failed to appear before the Authority. Taking into consideration, all the above grounds, inter alia, CD seeks for the dismissal of the Petition with costs the Application being devoid of any merits.

9. A rejoinder has also been filed by the Applicant to the above said reply of the CD wherein the averments made in the Petition are reiterated. In relation to the payment of Rs.2,45,968/- which is sought to be included by the CD in relation to the sale consideration, it is stated that the said sum was paid under protest before the Ld. District Forum, during the proceedings on 13.01.2016 and that the contention of the CD in relation to the same no way covers up the wrong doings of the Respondent/CD.

10. The oral submissions of the parties were heard in detail and after consideration of the pleadings and documents annexed therewith as well as oral submissions of respective Ld. Counsels for the parties, the following position emerges:

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11. In relation to the objection of the amount, it is seen that it is only a technical objection which had been taken by the CD which in no way detracts the case of the Applicant as it is required to be noted that the Applicant had erred if at all on the lower side of the claim amount and in the circumstances the said technical objection is over ruled. In relation to the contention of the CD that it is a solvent company, even though it may not be a material criteria as this Tribunal under the Provisions of IBC,2016 is to see the existence of a default in relation to the financial debt. However, even perusal of the Master Data as filed by the Applicant as Annexure P-1 discloses that the last date of AGM held by the CD is 30.9.2016 and that the date of balance sheet filed with the RoC is on 31.3.2016. No document has been produced to establish the solvency in any case to support the contention of the CD in this regard.

12. In relation to the delivery as stated by the CD in the reply itself that the possession will be given at the end of June,2019. However, nothing has come forward on the part of CD. On the contrary, it is seen that in relation to the proceedings initiated by the Applicant before UP RERA, order had been given that the CD is required to hand over the possession after obtaining completion certificate by September, 2019 and that it had also ordered to pay a compensation on account of delay from 31.12.2014 to 30.04.2016 along with interest as specified in the order dated 12.04.2019 which clearly evidences that there has been delay on the part of the CD to deliver the possession of the flat booked by the Applicant. In relation to the judgement relied on as rendered by Hon'ble NCLAT and as listed in the reply namely, Nikhil Mehta vs. AMR Infrastructure as well as in Kamal Dutta vs. Anubhuti Aggarwal & Anr., by virtue of the recent judgement as delivered by the Hon'ble Supreme Court in Writ Petition (Civil) No.43 of 2019 in the matter of Pioneer Urban Land and Infrastructure

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Limited & Anr. dated 9.8.2019, all the contentions as sought to be raised on legal issues by the CD had been laid to rest vide the said judgement dated 9.8.2019 categorically holding that the home buyers whether before or after the amendment including explanation to Section 5(8)(f) dated 9.8.2019 are required to be considered as FC, irrespective of other assured return clause in existence or not in the Agreement entered into between the home buyer and the developer. It is also brought into focus in the judgement of the Apex Court that the money which is paid by the home buyer to the CD is in fact a commercial borrowing in relation to a particular project and that the same is an amount made against the consideration of the time value for money, in as much as a return for the consideration paid, the developer is required to deliver the flat as per the Agreement by handing over possession along with completion certificate within the time period specified failing which to refund the money received along with compensation/interest. Thus, the reliance placed by the CD herein ^{on} the Judgements of Hon'ble NCLAT delivered prior to the judgement of Hon'ble Supreme Court as rendered in Writ Petition (Civil) No.43 of 2019 Pioneer Urban Land and Infrastructure Limited & Anr. dated 9.8.2019 may not be of any avail. In light of the same, legal objections are also over ruled. Further, in relation to the proceedings before the Consumer Forum and that the same was dismissed in Case No.CC-769/2014, it is seen from the order that the said complaint was dismissed in view of lack of pecuniary jurisdiction and not based on the merits. In any case, as observed by Hon'ble Supreme Court in Writ Petition (Civil) No.43 of 2019 in Pioneer Urban Land and Infrastructure Limited & Anr. dated 9.8.2019, provisions of the Consumer Protection Act or for that matter RERA may not be deterrent for the home buyers to approach this Tribunal under IBC,2016 as the remedies given to the allottees of flats/ apartments and

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that such allottees of flats/apartments can avail remedies under the Consumer Protection Act, 1986, RERA as well as triggering of the Code i.e. IBC,2016.

13. Taking into consideration all the above facts as well as the position of law, we find that there is existence of financial debt as made available by FC namely, the home buyer/ Applicant herein and in view of non delivery of the possession of the flat within the time prescribed under the Agreement as entered into between the Applicant and the Respondent as non- refund of the amount paid, there is an existence of default as defined under Section 3(12) of IBC,2016, and in the circumstances the Application is admitted and the Corporate Insolvency Resolution Process (CIRP) stands initiated in relation to the CD. Since the Applicant has proposed the name of Mr.Sunil Prakash Sharma having the registration No. IBBI/IPA-002/IP-N00551/2017-2018/11726 as the IRP, he is appointed as the IRP.

14. Mr.Sunil Prakash Sharma having the registration No. IBBI/IPA-002/IP-N00551/2017-2018/11726 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;

a. 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.

b. 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 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.

c. 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:-

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(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.

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

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(K.K.VOHRA)
MEMBER(Technical)

U.D.Mehta/09.10.2019

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- Sd-

(R.VARADHARAJAN)
MEMBER(Judicial)

11/10/19 Deputy Registrar
National Company Law Tribunal
CGO Complex, New Delhi-110003

Pronounced today in open court in pursuance of Power under Rules 151 of NCLT Rules, 2016 as Hon'ble Member (Judicial) Mr R. Varadharajan is not holding court today.

MADHUNARULA, Court Officer