

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

IA-796/2021

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-796/2021:

Mr. Dinesh Mohan Sharma & 44 Ors.

..... Applicants

VERSUS

Mr. Deepak Gupta & Ors.

1. Mr. Deepak Gupta

Authorised Representative of the Financial Creditors in Class (Home Buyers)

2. M/s. Noida Power Company Limited

..... Respondents

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-796/2021 In IB-1348(ND)/2019

Date of Order: 18.12.2023

1. The present Application has been filed by Mr. Dinesh Mohan Sharma & 44 Ors., the Applicants (Homebuyers of Group Housing Project Casa Royale, Plot No. GH-10, Sector- 1, Greater Noida, Gautam Budh Nagar, Uttar Pradesh) on 03.02.2021 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 quash the Resolution No. 14 and 19 passed in the 3rd meeting of the Committee of Creditors of the Corporate Debtor and declare the same to be null and void.*
- b) Allow the present Application and quash Resolution No. 11-A passed in the 4th meeting of the Committee of Creditors of the Corporate Debtor and declare the same to be null and void.*
- c) Allow the present Application and direct the Resolution Professional to withdraw the illegal and unlawful demands of electricity 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*
- d) Allow the present Application and direct the Resolution Professional to expeditiously close the books of accounts of the Corporate Debtor, appoint Forensic Auditors, and exhaustively collate the claims of homebuyers; and*
- e) Declare all the resolutions passed at the 3rd 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*
- f) 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*
- g) 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 3rd meeting of the COC; and

h) In the interim, till such time that the Application remains pending for adjudication, stay the operation of demands arising out Resolution 11-A of the 4th meeting of the Committee of Creditors of the Corporate Debtor.

i) 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 Aroraas 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.

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 3rd meeting of the CoC was conducted and various resolutions were listed for consideration and voting. In gross violation of Regulation 25(4) of the CIRP Regulations, the Resolution Professional did not announce the names of the members of the committee who voted for or against the decision or abstained from voting. In fact, the said information is also conspicuously missing from the Minutes of the Meeting as circulated by the Resolution Professional.
- iii.** The non-disclosure of the names is also a stark deviation from the precedent established in the 2nd meeting of the CoC, wherein the names of the members and their respective votes were not only disclosed after the vote but also mentioned in the minutes of the meeting.
- iv.** The Resolution 14 of the 3rd CoC meeting provided that the electricity rate has been increased from the existing Rs. 7/- per unit to Rs. 8.91/- per unit w.e.f. 01.01.2021 and will be charged from the Applicants and other allottees of Casa Royale project of the Corporate Debtor. Consequently, the Resolution Professional issued notices of demand dated 26.12.2020, to the Applicants/ Allottees. The said demand is not only arbitrary, unjustified but also illegal.

- v. The Applicants ought to be charged at rates applicable to domestic consumption instead of, the rates applicable for commercial/ temporary use for construction work. The cost of construction including electricity consumed for such purpose is to be solely borne by the Corporate Debtor with no obligation on the allottees to contribute to the same.
- vi. In addition to the above financial liability, the Resolution Professional vide Resolution 19, has also demanded from the homebuyers including the Applicants, a loan in the form of interim finance of Rs. 20,000.00. The said demand is arbitrary and is without any legal basis.
- vii. It is submitted that the despite a long lapse of 10 years and despite parting with their life savings, the Resolution Professional is bent upon mismanaging the affairs of the Corporate Debtor and has practically abdicated his duties of managing the Corporate Debtor by even attempting to raise finance from elsewhere.

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 4th 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 Corporate Debtor 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 their 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 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 3rd and 4th 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-796/2021** 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)**