

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT- III**

**IA-2230/2021
In
IB-1348/ND/2019**

IN THE MATTER OF

M/s. Nisus Finance & Investment Managers LLP & Anr.

...Financial Creditor/Applicant

Versus

M/s. Earthcon Universal Infratech Pvt. Ltd.

...Corporate Debtor

And

IN THE MATTER OF

Savita Rani Bakshi & Anr.

....Applicants

Versus

Earthcon Universal Infratech (P.) Ltd.

.... Respondent

Coram:

Shri Bachu Venkat Balaram Das
Hon'ble Member (Judicial)

Shri Narender Kumar Bhola
Hon'ble Member (Technical)

Delivered on: 07.12.2021

Appearances:

Applicant : Mr. Pradeep Teotia (Advocate)
Corporate Debtor : Mr. Rishabh Jain (Advocate)

ORDER

Per: Bachu Venkat Balaram Das, Member (Judicial)

1. The present application has been filed by one Ms. Savita Rani Bakshi (Applicant No. 1) and her daughter-in-law Ms. Sikha Bakshi (Applicant No. 2) claiming to be joint allottees of Flat No. B-203, Tower B in Project Sanskriti, admeasuring Super Area of 1062 Sq. Ft/98.66 Sq. Mtr., which is being constructed by the Corporate Debtor M/s. Earthcon Universal Infratech Pvt. Ltd. (Respondent No. 1). That on 08.01.2020, the CIRP was initiated against the Corporate Debtor/Respondent vide order dated 08.01.2020 passed by this Hon'ble Tribunal in IB-1348/ND/2019.
2. It is contended by the Applicants that prior to the initiation of CIRP against the Corporate Debtor, the Applicants preferred a complaint before the Hon'ble Delhi State Consumer Dispute Redressal Commission {DSCDRC} seeking a direction to the Corporate Debtor to pay interest at the rate of 18% per annum compounded quarterly on the total amount of Rs. 29,87,174 for the delayed period i.e., from 01.10.2016 to till the date of filing of the complaint and interest at the Rate of 18% per annum for the period 01.10.2016 to 30.06.2018 amounting to Rs. 10,77,957/- or in the alternative to direct the Corporate Debtor to refund the amount paid by the complainant till date

along with interest at the rate of 18% per annum from the date of payment till the date of refund.

3. The State Consumer Commission referred the matter to mediation and subsequently a Mediation Agreement was executed on 05.07.2019. It was agreed between the parties that the Corporate Debtor shall pay a total sum of Rs. 30,40,000/- to the Applicants. It is contended by the Applicants that the Corporate Debtor failed to abide by the terms of the mediation agreement.
4. Consequent, upon the commencement of CIRP on 08.01.2020 and pursuant to the public announcement made by the IRP, the Applicants raised a claim of Rs. 27,84,140/- on 05.02.2020 before the Interim Resolution Professional. The said claim was admitted by the Resolution Professional as Financial Debt as per entry No. 1156 ("list of Unsecured Financial Creditor real estate allottees") dated 31.12.2020 with the remarks - "Flat Cancelled/Surrendered, claim collated on provisional basis." The Applicants made a representation before the Resolution Professional vide e-mail dated 09.01.2021 with a request to remove the remarks flat cancelled/surrendered since the flat was never cancelled or surrendered by the Applicants.
5. That pursuant to representations made by the Applicants before the Resolution Professional, the remarks were modified as "Flat cancelled/surrendered, claim collated on provisional basis-Under litigation." The Applicants again filed objections vide email dated 29.03.2021 through their Authorized

Representatives to the proposed Resolution Plan received from the Prospective Resolution Applicants against the treatment of their case as “Homebuyers/Allottees who have cancelled their units prior to the commencement of CIRP” since the Applicants never cancelled their unit/‘subject property’

6. The Applicants have filed the present application since they did not get any response from the Resolution Professional and are seeking to be considered as Financial Creditor in the category of Home Buyers. The Applicants have sought following prayers in the present application:

“(i) Pass directions to the Resolution Professional and (Proposed) Resolution Applicant to treat the claim of the Applicants under the category "Home buyers/Allottees: other approved units sold and possession not yet given" instead of "homebuyers/allottees: who have cancelled their units prior to the commencement of CIRP" for the purpose of Corporate Insolvency Resolution Process and Proposed (or approved) Resolution Plan.

“(ii) Pass such other or further directions as may be deemed appropriate by this Hon'ble Tribunal in the facts and circumstances of the case.”

7. The Applicants submitted that in the mediation agreement a clause was inserted vide clause-V wherein both the parties agreed that the Applicants shall have the right to pursue the case. The Corporate Debtor will be liable to pay interest of Rs. 12% on the delayed period in case the case continues. It was also agreed that in case of default in payment of amount of Rs.

29.40 Lakh the Applicants shall have the right to pursue the case. The Applicants further contended that they have never agreed for the cancellation of the flat in question in the said mediation agreement and the Corporate Debtor has deliberately, on 09.01.2020 i.e., one day after the commencement of CIRP unilaterally sent an e-mail cancelling the allotment which was never accepted by the Applicants.

8. The Applicants further contend that in terms of clause 5 in the Mediation Agreement both the parties had clearly agreed that the complainants (Applicants herein) shall have right to pursue the case, and that they shall be entitled to get interest of 12% on the delayed period in case the case continues. It is also contended by the Applicants that clause 8 in the Mediation Agreement was inserted to protect their existing right, title etc. in the Flat B-203 of which they are original allottees and have paid more than 95% of the Base Sale Price since September 2012 till date. They further contend they have retained all the original documents (Allotment letter, BBA, payment receipts etc.), being the original allottees of the flat. Retention of such documents with Applicants is another reason to assess the intention of the parties that the rights, title, interest etc. of the Applicants were agreed to continue to exist over the Flat B-203, till such time the CD complete his obligations under the Mediation Agreement.
9. The Resolution Professional has filed a reply affidavit to the said IA and has denied the averments made by the Applicants

in the IA. The RP contended that the allotment to the Applicants was cancelled on the basis of execution of settlement deed dated 05.07.2019. The Corporate Debtor further contended that in view of the settlement arrived at by the parties before the mediation it was agreed that a sum of Rs. 30,40,000/- will be refunded by the Corporate Debtor to the Applicants as against the payment of Rs. 29,87,174/-. Out of Rs. 30.40 Lakhs, Rs. 1 Lakhs was paid by the Corporate Debtor to Applicant on 05.07.2019 vide DD No-857561 and the remaining amount of Rs. 29.40 Lakhs were required to be paid by the Corporate Debtor to the Applicants on or before 20.11.2019. The Corporate Debtor, on 22.11.2019 paid Rs. 2 Lakhs to the Applicant and the State Commission extended the time by 45 days for payment of balance amount of Rs. 27.40 Lakhs. Thereafter, the CIRP commenced from 08.01.2020 and therefore the balance amount of Rs. 27,40,000/- could not be paid to the Applicants. The respondent submitted that the settlement agreement dated 05.07.2019 overrides the earlier agreement entered into between the builder and buyer.

10. We have heard the Ld. Counsel for both the sides and perused the petition, reply along with documents as well as written submissions filed by them. On an analysis of the averments and pleadings it is seen that the Corporate Debtor/Respondent has admitted the claim of the Applicants and in the settlement before the mediation, it has also agreed

to refund an amount of Rs. 30.40 Lakhs. In the said settlement deed, it is not mentioned that the settlement deed will override the earlier agreement entered between the parties. Therefore, the contention raised by the Respondent that the earlier agreement stands cancelled /revoked automatically is not correct.

11. From perusal of the submissions made by Applicants, it is seen that Corporate Debtor has been in default with regard to honoring the Mediation Agreement arrived at between the parties. It is clearly brought on record that the Applicants have reserved their right towards the flat in question till such time the terms of agreement are complied with. The Applicants in this case have already paid more than 95% of the Base Sale Consideration for the Flat B-203 and so far, no third-party interest is stated to have been created with respect to the said flat. Therefore, we feel no prejudice is likely to be caused to anyone if prayers of the Applicants are allowed.
12. Further the Counsel for the Applicants have already stated on bar that Applicants shall pay all such legitimate payments qua the said flat as may be demanded from the class/category of Homebuyers to whom any flat has been allotted but the possession has not been delivered as part of the resolution plan as may be approved by this Authority. We are also convinced that in the given facts and circumstances of the case the Corporate Debtor cannot be permitted to undue benefit of its own wrongs.

13. In view of the above, we hereby allow the present petition in its totality and direct the Resolution Professional to consider the claim of Applicants at par with *"Home buyers/Allottees: other approved units sold and possession not yet given"* and consequently extend same/identical benefits to the Applicants as are available to all other allottees/homebuyers. It is made clear that the Applicants shall remain liable to pay all balance dues in terms of Builder Buyer Agreement and the Resolution Plan as may be approved by this Authority.

Accordingly, IA is **disposed of**.

-S-d-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)

-S-d-

(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)