

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

IA-3379/2020

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-3379/2020:

Mr. Jitender Arora

..... Applicant

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 Applicant : Ms. Shweta Saini, Advocate along with Mr.
Jitender Arora, Erstwhile IRP

For the RP : Mr. Rishabh Jain, Advocate for RP

ORDER

PER: ATUL CHATURVEDI, MEMBER (TECHNICAL)

1. The present Application has been filed by Mr. Jitender Arora the Applicant (Erstwhile IRP of the Corporate Debtor) on 30.07.2020 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 before this Adjudicating Authority, for seeking the following reliefs:

“1. To direct the stakeholder(s) including the Committee of Creditors to make the payment of fees & other expenses incurred by the IRP till 12th June 2020 during the CIRP proceedings.

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Date of Order: 18.12.2023

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2. To order fixation of remuneration of the IRP/RP during stay period towards administering the affairs of the Corporate Debtor.
3. To direct IRP/RP to make & implement some policy/ roadmap subject to the approval of Hon'ble Adjudicating Authority for the collection of expenses towards essential services from the allottee(s)/ other stakeholder(s) so that continuous supply of essential services can be maintained to the allottees.
4. To direct the Suspended Board of Directors to disclose the Bank accounts of the Corporate Debtor other than the Punjab and National Bank and Punjab and Sindh Bank and such other directions in pursuant to Section 70.
5. To direct the Noida Power Company Limited not to disconnect the electricity connection and to provide the options for making payment on installment basis with time extension.
6. To direct the Noida Power Company Limited to provide a proper & permanent domestic electricity connection in the society.
7. To direct the Johnson Lift Company to provide their maintenance services and / or also provide the option for making the payment of Annual Maintenance Contract etc. on installment basis.
8. To direct the Suspended Directors of the Corporate Debtor to deposit such additional amount for providing illegal connection of electricity to outsiders.
9. To direct the Suspended Director / Board and personnel of the Corporate Debtor not to act on behalf of the Corporate Debtor or make any representation and such other directions in pursuant to Section 73.
10. To direct the Punjab & Sindh Bank (Banker of the Corporate Debtor) to honour the instructions of the IRP during the stay of the Corporate Insolvency Resolution Proceedings.
11. Any other directions as may be in facts & circumstances.”

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 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, which is pending adjudication before this Adjudicating Authority.
3. We have heard the submissions of Ld. Counsel appearing for the Applicant as well as Ld. Counsel appearing for the Respondent.
 4. We find that, since the Resolution Plan has already been approved by the CoC in its 26th meeting dated 19.08.2023 by 70.18% voting share. The Prayer Nos. 3 to 11 become infructuous and the proceedings could not continue pertaining to the appointment of Mr. Gaurav Katiyar, new Resolution Professional of the Corporate Debtor vide order dated 09.11.2020.
 5. With Respect to the Prayer No. 1 and 2, the CoC in its 2nd meeting dated 15.10.2020 approved the remuneration of Mr. Jitender Arora

(erstwhile IRP) as Rs. 4,00,000/- + Gst per month for 8 months. Subsequent to the 2nd meeting, the erstwhile IRP has received 14,16,000/- out of Rs. 41,37,867/-. Further, it is submitted by Mr. Gaurav Katiyar, new RP that the balance amount of Rs. 27,21,867/- will be paid by the Resolution Applicant as the CIRP cost.

6. This Adjudicating Authority vide order dated 21.12.2020 directed the Resolution Professional to place the unapproved expenses of erstwhile IRP before the CoC. In compliance of the order dated 21.12.2020, the Resolution Professional convened the 4th CoC meeting on 21.01.2021 wherein, inter-alia, the agenda for approval of expenses of the IRP was placed before the CoC meeting. The CoC by 68.8% majority rejected the expenses of IRP.
7. This Adjudicating Authority vide order dated 20.10.2021 again directed the Resolution Professional to place the unapproved expenses of erstwhile IRP before the CoC. In compliance of the order dated 20.10.2021, the Resolution Professional convened the 9th CoC meeting on 09.11.2021 and convened the 10th CoC meeting on 14.12.2021, inter-alia, the agenda for approval of expenses of the IRP was placed before the CoC meeting. The 9th CoC meeting was concluded without any decision. The CoC again by 79.32% majority rejected the expenses of IRP in the 10th CoC meeting.
8. 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.
9. 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 not approved the agendas of the 4th, 9th and 10th CoC meetings, this Adjudicating Authority cannot interfere in the same.
10. In view of the above facts and circumstances and the foregoing discussion. It is accordingly ordered as follows:

- i.** The Application bearing **IA-3379/2020** filed by the Applicant 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)**

**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 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

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 3rd 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 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, 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 3rd COC meeting of 19.12.2020 whereby materially adverse decisions taken, in a stark departure from the conduct of the 2nd 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 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 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 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-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)

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

IA-2791/2021
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-2791/2021:

Mrs. Shikha Lal & Ors.

1. Mrs. Shikha Lal
2. Mr. Pravin Bihari Lal

..... 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)

1. The present Application has been filed by Mrs. Shikha Lal & Ors., the Applicants (claimants) on 05.07.2021 under Rule 11 of the NCLT

IA-2791/2021 In IB-1348(ND)/2019

Date of Order: 18.12.2023

Rules, 2016 before this Adjudicating Authority, for seeking the following reliefs:

- “i) Direct the Resolution Professional to include the name of the applicants/claimants in the category of “flat buyers”; and/or*
- ii) Pass any other order(s) as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the case and in the interest of justice;*

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 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, which is pending adjudication before this Adjudicating Authority.

3. Submission of the Applicants

- i. The Corporate Debtor approached the Applicants and represented that Corporate Debtor are in the business of development of Real Estate including residential, commercial, hospitality and large integrated townships and the Corporate Debtor are in the process of developing a Housing Project in the name and style of "Casa Royale" at Plot No. GH-10, Sector 1, Greater Noida West, Greater Noida, Uttar Pradesh-201306.
- ii. The Applicants induced by various advertisements issued by the Corporate Debtor for their housing project to be developed/constructed under lawful arrangements by M/s Earthcon Universal Infratech Pvt. Ltd. applied for an Apartment vide Booking Form dated 21.01.2019 admeasuring super area of 2225 sq. fts. at the rate of Rs. 100/- per sq. ft. whereby the Applicants were allotted Apartment on 16th floor, D-1602, 4BHK, Size 2225 sq.ft. for a total sales consideration of Rs. 52,59,900/-. The Applicants paid a sum of Rs. 5,00,000/- vide Cheque No. 136362 dated 22.01.2019 drawn on Axis Bank, New Delhi as booking amount.
- iii. Thereafter, a Builder Buyer's Agreement purportedly dated 09.01.2019, was executed between the Corporate Debtor and the Applicants. In Article 4 of the Agreement, it is stated that the Corporate Debtor would complete the construction work of the said apartment on or before 12 months with the grace period of 3 months i.e. 09.04.2020, from the date of the agreement. The Applicants paid further an amount of Rs. 21,22,955/-.
- iv. The Applicants have been continuously following up with the Corporate Debtor about the status of the project/complex but a vague and evasive reply was given by the Corporate Debtor. Thereafter, the Applicants on 03.08.2019 submitted a cancellation affidavit along with the original documents to the Authorised Representative of the Corporate Debtor.

- v. On 05.09.2019, the Applicants registered a Case in Uttar Pradesh Real Estate Regulatory Authority (UPRERA) bearing No. NCR144/09/0463/2019. On 20.03.2020, the UPRERA directed the Corporate Debtor to refund an amount of Rs. 26,22,955/- alongwith interest within two months.
- vi. In the due Course, the Applicants came to know that CIRP has been initiated against the Corporate Debtor. Thereafter, the Applicants submitted their claim on 25.02.2020 in Form-CA being a Financial Creditor. The claim of the Applicants was accepted by the IRP i.e. Mr. Jitender Arora vide email dated 03.03.2020.
- vii. The Applicant No. 1 vide letter dated 19.11.2020 and email dated 20.12.2020 addressed to resolution professional withdrew the cancellation and opted for the flat as the applicant continued to retain lien over her flat as no refund was made to her.
- viii. Vide email dated 05.01.2021, the resolution professional circulated the list of homebuyers as on 24.03.2021 wherein name of Applicant No. 1 with remarks "Flat cancelled/ surrendered, claim collated on provisional basis" has been shown. However, it is to reiterate that vide email dated 20.12.2020, the Applicant No. 1 had already opted for flat by withdrawing the cancellation and therefore, the list sent is not proper and the applicants ought to have been placed under category of "Flat Buyer".
- ix. The Applicant has written various letters and e-mails to the Resolution Professional and the Resolution Professional has not replied to letters and e-mails.

4. Submission of the Respondent

- i. It is submitted that the main grievance of the Applicant is that the Applicant wants the possession of their unit despite the fact the Applicant has wilfully surrendered their units by way of affidavit of cancellation and the Uttar Pradesh Real Estate Regulatory Authority (UP RERA) has passed an order of refund in favour of Applicant. It is submitted that after cancellation of unit and

becoming a decree holder under the provisions of UP RERA Act, 2016, the cause of action on the basis of Allotment letter and Builder Buyer Agreement (BBA) stands obliterated. Therefore, the Applicant is not entitled for possession of real estate unit as sought for in the present Application.

- ii. The BBA was executed on 09.01.2019 and as per signed BBA the Corporate Debtor was required to offer the possession of the flat to the applicant by April'2020. But the applicants without even waiting for April 2020, in August 2019 submitted an affidavit of cancellation. Once the BBA was breached before the due date of performance has arrived (i.e. April 2020), as per the laws of contract, the Corporate Debtor has two alternatives:
 - a. either Corporate Debtor may rescind the contract immediately; or
 - b. Corporate Debtor may not put an end to the contract but treat it as still subsisting and alive and wait for performance of the contract on the appointed date.
- iii. It is submitted by the Respondent that as per para 4 and 8 of the affidavit of cancellation submitted by the Applicant clearly shows that in the present case out of aforesaid two options the Corporate Debtor before the insolvency commencement date repudiated the contract and decided to refund the money of the Applicant.
- iv. The Applicant repudiated the contract before the agreed date of performance of the contract and the Corporate Debtor also choose to terminate the BBA and acceded the request of surrender of flat by the Applicant and necessary corresponding entry was also made in CRM software maintained by the Corporate Debtor wherein the unit earlier allotted was after cancellation was transferred to the inventory.

5. **Analysis and Findings**

- i. We have heard the submissions of Ld. Counsel appearing for the Applicants/claimants as well as Ld. Counsel appearing for the Resolution Professional/Respondent.
- ii. We find that the Applicants have wilfully and voluntarily surrendered their unit which do not change the nature of the transactions from which the Applicants sought the possession of their unit.
- iii. We are of the considered view that the RP collated the claim of the Applicants under the refund category is covered well within the ambit of the Law of contract. The BBA came to an end and the Applicants were entitled to a refund of money as the only remedy left.
- iv. Hence, we are of the view that the Resolution Professional has not committed any illegality w.r.t. the Applicant's classification under the refund category.

6. In view of the above facts and circumstances and the foregoing discussion. It is accordingly ordered as follows:

- i. The Application bearing **IA-2791/2021** 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)**

**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)