

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.P. NO. IB-1747(PB)/2018

IN THE MATTER OF:

Vijay Kumar Suri & Ors.Financial Creditors/Petitioners

v.

M/s. Earth Buildprop Pvt. Ltd

.....Corporate Debtor/Respondent

SECTION: Under Section 7 of The Insolvency and Bankruptcy Code, 2016

Judgment delivered on 13.05.2019

CORAM:

CHIEF JUSTICE (RTD.) M.M. KUMAR
HON'BLE PRESIDENT

SHRI S.K. MOHAPATRA
HON'BLE MEMBER (T)

PRESENTS:

For the Petitioner(s):

Mr. Vinod Chaurasia, Advocate

For the Respondent:

Mr. Prashant Jain, Mr. Varun Garg &

Ms. Sakshi Kapoor, Advocates

M.M. KUMAR, PRESIDENT

JUDGMENT

Mr. Vijay Kumar Suri including four others claiming themselves to be a 'financial creditors' have filed this application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for brevity 'the Code') read with rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for brevity 'the Rules') with a prayer for initiation of Corporate Insolvency Resolution Process in



respect of respondent company, M/s. Earth Buildprop Private Limited, who is stated to be the corporate debtor.

2. The Respondent company-the Corporate Debtor, M/s. Earth Buildprop Private Limited (CIN U70102DL2013PTC247953) was incorporated on 06.02.2013 under the provisions of the Companies Act, 1956. The registered office of the respondent corporate debtor is situated at B-100, Second Floor, Nariana Industrial Area, Phase-1, Delhi -110028. Since the registered office of the respondent corporate debtor is in Delhi, this Tribunal being Adjudicating Authority has territorial jurisdiction in respect of respondent corporate debtor as per the provisions of sub-section (1) of Section 60 of the Code.

3. The 'Financial Creditors'-Petitioners have proposed the name of Resolution Professional, Mr. Rakesh Kumar Gupta, PARM & SMRN, 701, Vikrant Tower 4, Rajendra Place, New Delhi-110008, email id - rkg.delhi.ca@gmail.com. He has registration No. IBBI/IPA-001/IP-P00833/2017-18/11418. A written communication sent by him in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has also been placed on record (Annexure-4). There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or ICSI Insolvency Professional Agency. In addition,



further necessary disclosures have been made by Mr. Rakesh Kumar Gupta, as per the requirement of the IBBI Regulations. Accordingly, he satisfies the requirement of Section 7 (3) (b) of the Code.

4. It is the case of the petitioners that in the year 2012 they had booked four different residential units, in the project, ELACASA, Sector-107, Gurgaon, Haryana which was proposed to be constructed by the respondent company. All the petitioners have paid a total amount of Rs. 2,02,57,195/- of the total consideration i.e. Rs. 3,61,06,120/- on various dates to the Respondent/Corporate Debtor as per table prepared vide Annexure-5 read with Annexure-6 (at pgs. 70-72). The Four (4) Flat buyer agreements [Annexure-10(colly)] were executed between the parties in May, 2014 (two agreements), February, 2015 & March, 2015. According to clause 11 of the agreement, the Respondent Company undertook to hand over the possession of the said units to the petitioners within a period of thirty six (36) months from the date of receipt of all approvals from the Authorities concerned with grace period of six (6) months. However even after expiry of sufficient long time possession of the said units have not been handed over to the petitioners.

5. According to clause 17 of the agreement, in case project is abandoned or the Respondent Company is unable to give possession,



it has agreed to refund the amounts paid by the petitioners with simple interest @ 6% per annum for the period such amount lying with Respondent Company.

6. There was apparently inordinate delay in delivering the possession of the said residential units. As a result, several correspondences were exchanged between the parties but all in vain. The petitioners have also filed a Police complaint against the Respondent Company with Economic Offences Wing.

7. The Petitioners have also attached other documents to the application to prove the financial debt, the total amount due and payable along with the date of default.

8. It is claimed that the Respondent is liable to pay total amount of 2,56,07,985/- (bifurcation of which is, Rs. 2,02,57,195/- paid amount by the petitioners and Rs. 53,50,790/- a simple interest @ 6%) till November, 2018 to the petitioners.

9. Learned counsel for the Corporate Debtor has opposed the admission of the application and has advanced the following arguments:-

- (i) The constitutional validity of the amendment in Explanation to Section 5(8)(f), Section 21 and Section 25A of the Code on which petitioner relies and claiming the



status of Financial Creditor, is under challenge before Hon'ble Supreme Court in a Writ Petition (C) No. 43/2019 titled as "Pioneer Urban Land and Infrastructure Limited & Anr. v. Union of India & Ors. Vide order dated 21.01.2019, Hon'ble the Supreme Court stayed the further proceedings of the case before this Tribunal. In this way a request was made that till the disposal of the said Writ Petition further proceeding of the case in hand be kept in abeyance.

- (ii) The present application is not maintainable under Section 7 of the Code because there is no default on the part of the Respondent in terms of Section 3 (12) of the Code. Further there is no debt due and payable within the meaning of Section 3 (11) of the Code.
- (iii) Possession could not be handed over only because of the reasons which are beyond the control of the Respondent.
- (iv) Exorbitant claims are sought in the present petition thus the same is not maintainable.
- (v) Comprehensive disputes exist in the present case which warrants an elaborate trial.



(vi) Present petition has been filed contrary to the object and scheme of the Code.

(vii) Alternative remedy of filing complaint before Real Estate Regulatory Authority or Consumer Protection Act lies in the hands of the petitioner.

10. A rejoinder to the reply has been filed by the Financial Creditors reiterating the submissions made in the application and controverting the assertions in the reply.

11. Now we deal with the submissions made on behalf of the petitioners-Financial Creditors.

12. Before embarking upon the discussions of legal issues, we deem it appropriate to first refer to the material clauses of the agreement.

According to clause 11 of the agreement the Corporate Debtor had proposed to handover the possession of the unit within a period of thirty six (36) months from the date of receipt of all approvals from the Authorities concerned with grace period of six (6) months. It is further postulated by clause 17 of the agreement that in case project is abandoned or the Respondent Company is unable to give possession, it has agreed to refund the amounts paid by the petitioners with simple interest @ 6% per annum for the period such amount lying with Respondent Company. It is not disputed that the

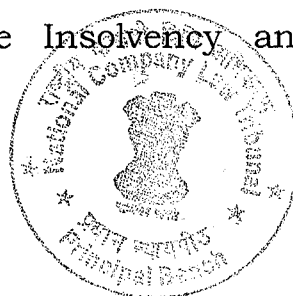


agreements were signed in May, 2014 (two agreements), February, 2015 & March, 2015 nor payments made by the petitioners on various tranches were denied.

13. A perusal of the aforesaid order passed by Hon'ble the Supreme Court in Writ Petition (C) No. 43/2019, we find that in the said order there is no direction issued by Hon'ble the Supreme Court staying the proceedings before NCLT-Adjudicating Authority with respect to the present proceedings. Otherwise also Hon'ble the Supreme Court has not stayed the operation of Section 5 (8) (f), 21 & 25A of the Code in general or globally on which reliance has been placed by the Respondent.

14. In such like cases of home buyers i.e. Real Estate (Residential) a reasonable period of delay of six months to one year might be acceptable. It is pertinent to mention that the possession of the aforesaid units were required to be delivered by or before April 2017 & March 2018, but not later than October 2018, including the grace period of six months. The principles of reasonableness are implied in such like cases. There is extraordinary delay in delivering the possession.

15. It is pertinent to mention here that clause (8) of Section 5 of the Code has been amended by the Insolvency and Bankruptcy



(amendment) Ordinance, 2018 with effect from 6th June, 2018. In view of the revised definition, any amount raised from an allottee under a real estate project is deemed to be an amount having the commercial effect of a borrowing and thus is covered by the definition of 'Financial Debt' under the Code. Definition of 'Financial Debt' has been amended to specifically include dues of home buyer i.e. Real Estate (Residential). The amendment also recognizes home buyer as "Financial Creditor". Accordingly, the home buyer can initiate Corporate Insolvency Resolution Process against defaulting builder or developer, as "Financial Creditor" in terms of Explanation to Section 5 (8) (f) of the Code with effect from 06.06.2018.

16. In light of the aforesaid facts it is patent the petitioners are thus covered by the expression 'Financial Creditor' as has been used in the amended definition of Section 5 (8) (f) of the Code and the explanation appended thereto. In that regard we draw support from the observations made by Hon'ble the Appellate Tribunal in the case of **Rajendra Kumar Saxena V. Earth Gracia Buildcon Pvt. Ltd.** passed in Appeal (AT) (Insolvency) No. 187/2018 wherein it has been held as under:

"By the Insolvency and Bankruptcy Code (Amendment)

Ordinance, 2018 No. 6 of 2018 dated 6th June, 2018 followed



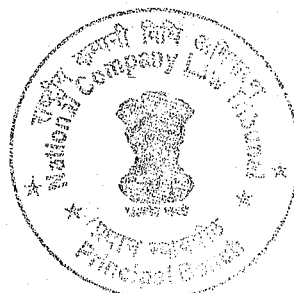
by the Act, in clause (8), in Sub-clause (f), of Section 5 an explanation has been inserted as per which any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.

Thereby, after amendment of the Act, the allottees of real estate project have been treated as 'Financial Creditors'. (Emphasis supplied).

A bare perusal of the aforesaid paragraph of the judgment would show that even without any element of 'assured return' an allottee in the real estate project has to be regarded as a 'Financial Creditors'. The petitioner eminently fulfills the aforesaid condition.

17. The amount has been raised from the petitioners/allottees under a real estate project. In such a situation not only the debt has a commercial effect of borrowings and come within the scope of 'financial debt' but also the petitioners are covered by the definition of expression 'financial creditors'.

18. Therefore, petitioners being financial creditors can invoke Corporate Insolvency Resolution Process under Section 7 of the code against the respondent corporate debtor in case of default in repayment of financial debt.



19. As a sequel to the aforesaid discussion and the material placed on record it is confirmed that applicants-financial creditors had disbursed the money to the respondent corporate debtor as consideration for purchase of different units being shops, service apartments etc. A considerable long period has lapsed, the principal amount disbursed has not been refunded by the respondent corporate debtor nor the possession of the aforesaid units have been handed over to the petitioners. It is accordingly held that respondent corporate debtor has committed default in repayment of the outstanding financial debt which exceeds the statutory limit of rupees one Lakh. Thus, the application warrant admission as it is complete in all respects.

20. Accordingly, in terms of Section 7 (5) (a) of the Code, the present application is admitted.

21. Mr. Rakesh Kumar Gupta, PARM & SMRN, 701, Vikrant Tower 4, Rajendra Place, New Delhi-110008, email id - rkg.delhi.ca@gmail.com, Registration No. IBBI/IPA-001/IP-P00833/2017-18/11418 is appointed as an Interim Resolution Professional.

22. We also declare moratorium in terms of Section 14 of the Code.

It is made clear that the provisions of moratorium are not to apply to



transactions which might be notified by the Central Government and a surety in a contract of guarantee to a corporate debtor. Additionally, the supply of essential goods or services to the Corporate Debtor as may be specified is not to be terminated or suspended or interrupted during the moratorium period. These would include supply of water, electricity and similar other supplies of goods or services as provided by Regulation 32 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

23. In pursuance of Section 13 (2) of the Code, we direct that Interim Insolvency Resolution Professional to make public announcement immediately with regard to admission of this application under Section 7 of the Code. The expression 'immediately' means within three days as clarified by Explanation to Regulation 6 (1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

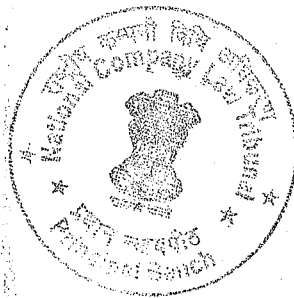
24. We direct the Financial Creditors to deposit a sum of Rs. 2 lacs with the Interim Resolution Professional to meet out the expenses to perform the functions assigned to him in accordance with Regulation 6 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Person) Regulations, 2016. The needful shall be done within three days from the date of receipt of this order by the



Financial Creditors. The amount however be subject to adjustment by the Committee of Creditors as accounted for by Interim Resolution Professional and shall be paid back to the Financial Creditors.

25. The office is directed to communicate a copy of the order to the Financial Creditors, the Corporate Debtor, the Interim Resolution Professional and the Registrar of Companies, NCR, New Delhi at the earliest but not later than seven days from today. The Registrar of Companies shall update its website by updating the status of 'Corporate Debtor' and specific mention regarding admission of this petition must be notified.

13.05.2019
(VINEET)



Sd/-
(M.M.KUMAR)
PRESIDENT

Sd/-
(S.K. MOHAPATRA)
MEMBER (TECHNICAL)

Smukla
22/5/19

सहायक पंजीयक
ASSISTANT REGISTRAR
राष्ट्रीय कम्पनी विधि अधिकरण
NATIONAL COMPANY LAW TRIBUNAL
C.G.O. COMPLEX, NEW DELHI-110003

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