NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal(AT) (Insolvency) No. 645 of 2019

IN THE MATTER OF:

Manoj Kumar ...**Appellant**

Vs

Ample Infrastructure Pvt. Ltd. & Anr. ....**Respondents**

Present:

For Appellant:	**Mr. Shambo Nandy, Mr. Arijit Mazumdar and Ms. Akanksha Kaushik, Advocates**
For Respondents:	**Mr. Raghavebdra Bajaj and Mr. Sanskar Agarwal, Advocates for Respondent No. 1.** **Mr. Saurabh Jain and Mr. Smarth Arora, Mr. Pawan Bhushan, Mr. Tushar Bhushan, Mr. Jitendra Kumar Mr. Anjaneya Singh, Mr. D. Deshpande, Mr. Anil Sutor, Advocates for Intervenors.** **Mr. Sameer Rastogi, Advocate for Respondent No. 1.**

O R D E R

13.11.2019 Heard learned Counsel for Appellant. Ample Infrastructure Pvt. Ltd. filed an application under Section 7 of Insolvency and Bankruptcy Code, 2016 (in short "**IBC**") having no. IB-17/ND/2019 before the Adjudicating Authority (National Company Law Tribunal) New Delhi, Bench – II against M/s Intellicity Business Park Pvt. Ltd., Respondent- Corporate Debtor. It was admitted by the Adjudicating Authority on 27.05.2019 and against the admission of the application, present appeal has been filed by Director of the Corporate Debtor.

2. The Appellant claims that there was a builder-buyer agreement executed between the Financial Creditor and the Corporate Debtor and if the project was incomplete or possession had not been handed over in time, the Financial Creditor had options under builder-buyer agreement.

3. Learned Counsel refers to the agreement dated 03.10.2013 and clause-11 of the same which related to schedule for possession of the unit concerned. Learned Counsel has stated that as per this clause, no doubt, the Corporate Debtor was bound to deliver of possession by October, 2017 and if six months' grace period was to be added, possession was to be given by April, 2018. Learned Counsel stated that even if the possession had not been given as per this clause, Clause 11(b) provides for payment of compensation as mentioned in the clause which reads as under:

> …
>
> *(b) Delay due to reasons beyond the control of the Builder: If the possession of the Said Unit is delayed due to Force Majeure conditions or fire, tempest, flood, violence of any or of a mob, or other irresistible force or if, then the Builder shall be entitled to extension of time for delivery of possession of the Said Unit. The Builder during the continuance of the Force Majeure reserves the right to alter or vary the terms and conditions of this agreement or if the circumstance so warrant, the Builder may also suspend the development for such period as is considered expedient, the Buyer shall have no right to raise any claim, compensation of any nature whatsoever for*

or with regard to such suspension. The Buyer agrees and understands that if the Force Majeure condition continues for a long period, then the Building alone in its own judgment and discretion may terminate this Agreement and in such case only the liability of the Builder shall be to refund the amount without any interest or compensation whatsoever. The Buyer agrees that the Buyer shall have no right claim of any nature whatsoever and the Builder shall be released and discharged of all its obligations and liabilities under this agreement. In case the builder is forced to abandon the said project due to force majeure circumstances or for reasons beyond its control, it shall refund the amount paid by the buyer alognwith simple interest @ 6% p.a. from the happening of such eventuality."

…

4. It is further argued that as per the above clause, allottee was entitled to compensation and if an allottee did not want to take benefit of this clause, the allottee had option to cancel the contract for which there is clause-51 in the agreement which reads as follows:

…

"51. Cancellation/Withdrawal

In the unfortunate event of cancellation/withdrawal of the allotment, the amount paid by the Buyer shall be refunded within six months after deducting amount equal to 15% of basic sale price to partly compensate the Builder for midway scrapping of contract and resultant delay in time schedule and

increase in construction cost of the project due to such cancellation."

...

Submission of the learned Counsel is that the allottee had options to resort to as per agreement and thus could not have filed application under Section 7 of IBC. It is stated that there was no financial default and even in the copy of the format, which has been filed with the rejoinder, Financial Creditor did not state exact default. It is further stated that Clause -8 of the Agreement (page -40) shows that time was essence. Clause -8 reads as follows:

...

8. Time is the essence

The Buyer agrees that time is of essence with respect of payment of Total Sale Price and other charges, deposits and amounts payable by the Buyer as per this agreement and/or as demanded by the Builder from time to time and also to perform/observe all other obligations of the Buyer under this Agreement. The Builder is under no obligation to send any reminders for the payments to be made by the Buyer as per the schedule of payments and for the payments to be made as per demand by the Builder or other obligations to be performed by the Allottee. If payment is not received within the stipulated period or in the event of breach of any of the terms and conditions this agreement by the Buyer, the allotment will be

cancelled and amount received will be refunded without any interest, after deduction of 15% the total cost of the unit."

…

5. It is the submission of the learned Counsel that when there was no financial default, application under Section 7 of IBC should not have been admitted. Learned Counsel for the Appellant prays for setting aside the admission order.

6. Learned Counsel for the Appellant relied on the judgment in the matter of ***"Pravinbhai Raninga Vs. The Kotal Resources and Anr."*** in Company Appeal (AT)(Insolvency) No. 140 of 2018 dated 29th August, 2018 and referred to paragraph-9. It is stated that it is open for the Corporate Debtor or its Directors to point out that the debt is not payable by the Corporate Debtor in law and also and/or in fact.

7. Learned Counsel for the Financial Creditor is heard. He has submitted that admittedly possession was not delivered as per time schedule and there was default and the impugned order itself shows that the Financial Creditor had paid all the necessary instalments which is evident from paragraph-4 of the impugned order. It is stated that the Financial Creditor has not defaulted in payments and still if the Financial Creditor, because of delay, was to cancel the contract, the Financial Creditor would be put to loss being made liable to the deduction of 15% of basic sale price for no fault of the Financial Creditor.

8. Learned Counsel for the Intervenors are present and it is stated that apart from present application of the Financial Creditor, there were various other

allottees who had already filed applications under Section 7 which were pending and as the present application got admitted, those allottees were required to file their claims before Interim Resolution Professional/Resolution Professional, which they have done. It is also pointed out that the revival plan pointed out by the Appellant vide diary No. 15894 (page-14) shows the status of the project. Learned Counsel referred to paragraph -2(b) (i) & (ii) which is as follows:

> ...
>
> *b. Proposal for Revised Project Plan*
>
> *i. All allotments will be shifted to Ascot within 90 days from the zero date.*
>
> *ii. Spine A and Spine B are twin towers with identical characteristics. Currently, Spine A is approximately 15% constructed (Refer picture 1) and Spine B tower construction is yet to be commenced. Under the revised scheme, Spine A tower shall be constructed fully in Phase 1 and Spine B tower shall be constructed in Phase 2."*
>
> ...

9. It is stated by the learned Counsel for the Respondents that there has been construction of only 15% in one Tower and other has not even started, the project was quite incomplete. There are 1881 allottees out of which 861 allottees have filed the claims it is submitted.

10. Having heard learned Counsel for both the sides and having gone through the material pointed out to us and going through the clauses from the agreement

referred to, we find that these fine print clauses are quite loaded in favour of the Corporate Debtor/builder. We do not find substance in the argument that the allottees were required to adopt options as available in the agreement as we find that IBC has given option to the allottees to move before the Adjudicating Authority for relief under IBC and they have been treated as Financial Creditors. When timely possession as per the agreement has not been delivered, although it should have been delivered somewhere in April, 2018, Financial Creditor is entitled to claim that there is default. Merely because in the format, the Financial Creditor did not mention the date of default, considering the admitted facts, the default is apparent on record. There is no dispute that till today, possession has not been handed over and even the affidavit filed by the Corporate Debtor, referred to above, shows poor progress in the infrastructure which has been put up.

For the above reasons, we do not find any merit in the appeal. Appeal filed is rejected.

[Justice A.I.S. Cheema]
Member (Judicial)

(Kanthi Narahari)
Member(Technical)

(V P Singh)
Member(Technical)

Akc/Md