

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II**

IA No. 3008 of 2021

In

CP (IB) 2517(MB) of 2018

Under section 60(5) of the Insolvency and
Bankruptcy Code, 2016 read with Rule 11 of the
N.C.L.T. Rules, 2016

IN THE MATTER OF

Mr. Pradeep Patil

Residing at A-203, Triveni Apartments CHS Ltd,
Plot No. 157 and 160, Sector-19, Kharghar, Navi
Mumbai-410210. **...Applicant**

V/s.

Mr. Arun Kapoor

Resolution Professional of Monarch Brookefields
LLP, having his address at: G-601, Army Co-
operative Housing Society, Sector- 9, Nerul (East),
Navi Mumbai, Maharashtra - 400706.

... Respondent

IN THE MATTER OF

M/s. Capri Global Capital Ltd.

IN THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH, COURT II

I. A. No. 3008/2021

In

CP No. 2517/MB/C-II/2018

502, Tower-A, Peninsula Business Park, Senapati
Bapat Marg Lower Parel Mumbai, Maharashtra.

... Financial Creditor

V/s.

M/s. Monarch Brookefields LLP

Survey No. 113/O Akurli, Village Panvel, Raigarh,
Maharashtra – 410206.

... Corporate Debtor

Order Pronounced on: - 12.04.2024.

Coram:

Shri. Anil Raj Chellan : Member (Technical)

Shri. Kuldip Kumar Kareer : Member (Judicial)

Appearances (in Physical Mode):

For the Applicants : Mr. Nitish Bangera, PCS.

For the Respondent : Mr. Amir Arsiwala a/w Nupur Shah
and Vidit Divya Kumat.

ORDER

Per: Shri. Kuldip Kumar Kareer, Member Judicial.

1. This is an application filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('Code') seeking following reliefs:

- a. To not approve the resolution plan until flat buyer's issues are being resolved;
- b. Name of the Applicant be included in the list of flat buyers;
- c. That the Applicant be allotted Flat No. 1103 Virginia along with covered car parking in his name;

Case of the Applicant in brief:

- 2. The Applicant was initially allotted flat on the first floor bearing Flat No.103 in the building named Monarch Brookefields and Wing-Virginia, built by the Corporate Debtor, for a sale consideration of Rs. 40,87,000/- However, the Corporate Debtor told the Applicant that the said flat was already sold to some other party and hence, the Applicant was allotted a new flat on the 11th floor bearing flat no. 1103 "Virginia" vide Registered Agreement for Sale dated January 30, 2017 for a consideration of Rs. 40,87,000/-.
- 3. Since the new flat was situated on higher floor, as per direction of the Corporate Debtor, the Applicant was asked to pay an extra amount of Rs. 8,49,503/- (Extra amount for Flat Rs. 3,21,000/- + Service Tax/VAT of Rs. 2,02,503/- + Stamp Duty Rs.3,26,000/-). Hence, the Applicant paid a total amount of Rs. 49,36,503/- for purchase of the said flat. The payment of Rs. 49,36,503/- was made in favour of Mr. Gopal Thakur, who is the Designated Partner of the Corporate Debtor.
- 4. It is further pertinent to note that the Designated Partners of the Corporate Debtor have taken payments in their account and executed the agreement

for sale in favour of the Applicant for the floor for which they had no permission received from Municipal Authority. The designated partners have taken cheques and deposited the same in different companies, they had also taken cash from flat buyers and never deposited it in Corporate Debtor's account. They have also sold one flat to two buyers. For all this cheating and fraudulent conduct, the flat buyers filed FIR in police station against Designated Partners and now they are in jail.

5. By an Order dated 27th September, 2019 passed by this Hon'ble Tribunal in the above-captioned Company Petition, the Corporate Insolvency Resolution Process ('CIRP') was initiated against the Corporate Debtor. The Applicant had filed his claim with the IRP/RP of the Corporate Debtor and the claim was admitted and the name of the Applicant was reflected at Serial No. 268 against Flat No. 1103 in the List of Buyer. However, as per the approved resolution plan in 13th CoC Meetings dated 15.11.2021 and 19.11.2021, the Applicant is only entitled to 25% of the claim amount and not entitled to any flat. Hence this application.

6. **Reply of the Respondent:** The Respondent has filed his Reply in the above-captioned matter on Affidavit dated 14th April, 2022. The contentions placed by the Respondent are briefly stated as under:

I. It is not the case of the Applicant that the approved resolution plan is illegal, unlawful or in contravention of section 30(2) of the Code. The real grievance of the Applicant appears to be that he will only be entitled to 25% of his admitted claim under the terms of approved resolution plan. Therefore, this is essentially a challenge to the

commercial/business terms, as set out in the approved resolution plan.

- II. It is submitted that the financial creditors belonging to the class of homebuyers have collectively voted in favour of the approved resolution plan and, therefore, it is not open to the Applicant to seek to individually challenge the same at this belated stage. It is now settled position of law as per the decision rendered by the Hon'ble Supreme Court of India in Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v/s. NBCC (India) Ltd reported in (2022) 1 SCC 401 that an individual creditor belonging to a class of creditors does not have any locus standi to challenge a resolution plan when the class as a whole has already voted in favour of the same resolution plan.
- III. It is an admitted position that the Applicant had paid a sum of Rs. 40,87,000/- to the Corporate Debtor for acquiring a residential flat and for this reason, he has been recognised as a financial creditor belonging to the class of allottees. While the Applicant has a registered agreement for sale, it is an admitted position that the Corporate Debtor did not have the permission to construct 11th floor in building wing named Virginia. The permission to construct any floor beyond the 11th Floor was withdrawn by the concerned municipal authority and this fact is not in dispute. As per the approved resolution plan, the allottees are divided into three categories viz. Category A, Category B and Category C. The Applicant falls under Category 'C' whereby the flat purchasers falling

under this category are those who either do not have any registered agreements in the favour, or who have registered agreements which were executed after the flats allotted to them became illegal/unlawful under the revised sanctioned plans. These flat purchasers would be entitled to 25% of their admitted principal claim at the end of the term of the approved resolution plan. Alternatively, they may choose to purchase new flats from the resolution applicant at prevailing market rates in which case they would be entitled to credit of 25% of their admitted principal amount.

- IV. It is reiterated that it was not the Respondent's decision that the Applicant be entitled to only for 25% of the claim amount, but rather it is the business decision of the resolution applicant which has been approved by the CoC. It is not open to the Applicant to seek to challenge the commercial wisdom of CoC at this stage, especially when he himself is the member of CoC. While the Applicant had paid Rs. 40,87,000/- towards the purchase of flat, his claim has been admitted to the extent of Rs. 63,68,258/- which includes interest in accordance with the provisions of IBC.

ANALYSIS AND FINDINGS

7. We have heard the learned counsel for both the parties and perused the record.
8. Counsel for the Applicant submits that the Applicant is entitled to possession of Flat No.1103 Virginia along with covered car parking, though the permission has not been received. Counsel for the Applicant submits

that 11th floor on which the Applicant had booked the flat, turned out to be illegal since permission for the same was withdrawn, however, the Applicant cannot be punished for acts of illegalities on the part of builder/Corporate Debtor. Counsel for the Applicant submits that the acts of cancellation of allotment and refund of money that too only to the tune of 25% of the admitted claim, both by the RP, are patently illegal and the Applicant is still entitled to allotment though the flat in question turned out to be illegal for no fault or blame attributable to the Applicant.

9. Counsel for the Respondent/RP submits that the Applicant had sought to acquire a flat in the project of the Corporate Debtor which did not exist as no permission was received or obtained for that entire floor. The Applicant cannot be equated with other allottees as it is a debatable question whether the allotment of an illegal unit could amount to “allotment” in law at all. Thus, in the opinion of the Id. Counsel for the Respondent, the Applicant cannot be treated at par with other homebuyers who have a genuine claim against sanctioned units in the project. Counsel for the Respondent submits that it is not the case of the Applicant that the approved resolution plan is illegal, unlawful, or in contravention of Section 30(2) of the Code in any manner. Therefore, the Id. Counsel submits that the proposed payment to be made to the Applicant, who is classified as Category ‘C’ to the approved resolution plan, only to the tune of 25% of the Applicant’s admitted claim out of the proceeds of resolution plan, is a business decision based on commercial considerations and therefore, the same is not amenable to judicial review by this Tribunal. Hence, the instant application should be dismissed.

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10. We have meticulously examined the submissions canvassed across the bar on behalf of the Applicant as well as on behalf of the Respondent and after having heard those submissions and going through the records, we give our findings hereinbelow.
11. By way of this application, the Applicant herein is seeking prayers to stay the resolution plan which has been approved by the CoC and not to approve the same until flat buyer's issues are resolved, and for the allotment of Flat No. 1103 in project 'Virginia' in the said project with covered car parking in the name of the Applicant.
12. We find that the Applicant's claim was admitted by the Respondent during the CIRP of the Corporate Debtor to the tune of Rs. 63,68,258/-, out of which the principal amount is Rs. 40,87,000/- and remainder is interest on principal in accordance with the provisions of Code. The resolution plan submitted by one M/s. Planet Builders and Developers was approved by the CoC in its 13th Meeting held on 15.11.2021 and 19.11.2021. It is not the case of the Applicant that the approved resolution plan is illegal, unlawful, or in contravention of Section 30(2) of the Code in any manner. The Applicant has not challenged her categorisation in the resolution plan, but only *inter-alia* prayed for allotment of flat in the real estate project, 'Virginia' which was constructed by the Corporate Debtor.
13. As per the terms of the approved resolution plan, the Applicant has been classified as Financial Creditors in a Class belonging to the allottees, wherein the Applicant has been categorised in Category 'C'. The criteria to

be classified in Category 'C' is either payment should have been received towards flat which had valid Commencement Certificate ('CC') at the time of purchase but registered after the amended CC or allotted but remained unregistered, or payment were received towards flats with invalid CC irrespective of being registered or unregistered. As per the proposal, these flat buyers will be paid 25% of their admitted principal at the end of the plan i.e. T+730 days. The flat buyers can also opt to purchase new flats after approvals for balance/additional or future FSI from the Resolution Applicant at prevailing or current market rates in case of which 50% of their admitted principal will be adjusted towards the new deal. All of these decisions have been taken and approved by the CoC in its commercial wisdom and therefore, in the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of CoC; and there is no scope for substituting any commercial term of the resolution plan approved by CoC. Hence, on this ground alone, the present application deserves to be dismissed.

14. The Respondent stated in his reply that financial creditors belonging to the class of homebuyers have collectively voted in favour of the approved resolution plan and therefore, it is not open to the Applicant to seek to individually challenge the same at this belated stage. This fact has not been disputed, denied or rebutted by the Applicant as no rejoinder has been filed by the Applicant. The Hon'ble Supreme Court of India in *Jaypee Kensington Boulevard Apartments Welfare Association v/s. NBCC (India) Ltd* reported in (2022) 1 SCC 401 has observed at Para 211 of the Judgment

that there is no scope for any homebuyer suggesting himself to be a dissenting financial creditor merely because he was not with majority within class. His dissatisfaction does not partake the legal character of a dissenting financial creditor. The Hon'ble Apex Court has further observed at Para 214 that once the homebuyers as a class having voted in favour of approval of the resolution plan, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. Hence, in view of the judgment of the Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association (supra) and in view of the facts and circumstances of the instant case, we are of the considered view that the Applicant has no locus in raising objection to the resolution plan since the class of allottees to which the Applicant belongs, have already voted in favour of the impugned resolution plan.

15. In view of the above findings, we are not inclined to allow this application and accordingly, we pass the following orders:

ORDER

- a. **I.A. No. 3008 of 2021 is hereby dismissed.**
- b. Parties to bear their own costs;
- c. This I.A. accordingly stands disposed of.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)