

Company Appeal(AT) (Insolvency) No. 151 of 2021

For Respondent: Mr. Kunal Godhwani, Mr. Abhishek Anand, Mr. Veren Sharma, Advocate for R1-8 and 10- 21

Mr. Sandeep Goel, R1 in person

Mr. Arun Kathpalia, Sr. Advocate with Mr. Abir Roy, Mr. Ishaan Chakrabarti, Mr. Vivek Pandey, Ms. Diksha Gupta, Mr. Kauser Husain, Mr. Aditya Dhupar, Advocates, R23

Mr. Rahul Adlakha, Advocates for R-1 to R-8 and R-10 -21)

With

Company Appeal (AT) (Insolvency) No. 205 of 2021

In the matter of:

Ace Infracity Developers Pvt. Ltd.

...Appellant

Vs.

Three C Homes Pvt. Ltd. & Ors.

...Respondents

Present

For Appellant : Mr. Abir Roy, Mr. Ishaan Chakrabarti, Mr. Vivek Pandey Advocates.

Mr. Arun Katpalia, Sr. Advocate with Ms. Diksha Gupta, Mr. Kauser Husain, Mr. Aditya Dhupar, Advocates

For Respondent: Mr. Sumesh Dhawan, Mr. Rishabh Jain, Ms. Vatsalakak, Adocates for R1

Mr. Gaurav Katiyar (R1)

Mr. Vijay Kishore Saxena, Advocate for R2

Mr. Abhishek Anand, Advocate for R3-10, and R12 -23

Ms. Ankita Bajpai, Advocate

Mr. Kunal Godhwani, Mr. Rahul Adlakha, Mr. Viren Sharma, Advocates for (R3-10 and R12-R23)

Mr. Sandeep Geol, Advocate for R23.

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

Company Appeal (AT) (Ins) No. 151 of 2021

Company Appeal (AT) (Ins) No. 193-194 of 2021

Company Appeal (AT) (Ins) No. 205 of 2021

1. These appeals are filed under Section 61 of the 'Insolvency and Bankruptcy Code, 2016' (in short 'Code') against the impugned order dated 08.02.2021 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Division Bench New Delhi Bench –III), in C.A.No. 3840 of 2020 and I.A No.3385 (ND) of 2020 in company petition I.B No. 432/ND/2019.
2. Since all these appeals have been filed against the common order dated 08.02.2021 passed by the 'Adjudicating Authority' and accordingly, all the appeals have been clubbed for disposal. It is also observed that the three appeals as enumerated above is seeking the common reliefs of setting aside the impugned order dated 08.02.2021 passed by the 'Adjudicating Authority' and connected consequential reliefs.
3. The 'Adjudicating Authority' has rejected the 'Resolution Plan' and has directed the 'Resolution Professional' (RP) to file appropriate application for seeking liquidation order of the Corporate Debtor namely- M/s. Three C Homes Pvt. Ltd. The Adjudicating Authority logic for rejection of 'Resolution Plan' is based on the following factors apart from other reasons explained in the impugned order:
 - i. 'Liquidation value 'of Corporate Debtor is Rs.480.70 Crore while Resolution Plan involves infusion of only Rs.95 crore by the Resolution Applicant and that too over a period of two years.

- ii. 'Resolution Plan' provided by Resolution Applicant assumes that the farmers will forgo their claim of Rs.71.66 Crores in exchange of the Resolution Applicant promised to spend a sum of Rs. 15 Crore towards the development of village Salarpur is an amateurish.
 - iii. 'Resolution Plan' approved by the 'Committee of Creditors' (CoC) is not in compliance of the provisions of the Code and the 'CIRP Regulations 4th Amendment 2020' which came into force on 07.08.2020.
4. The Adjudicating Authority has also seen the implication of Hon'ble Supreme Court Judgment rendered in the case of Maharashtra Seamless limited. Vs. Padambhan Venkatesh as stated below:

"i. the Creditors in Maharashtra Seamless Ltd's case supra was normal Financial Creditor i.e. Indian Bank and no Home Buyers were involved whereas the Financial Creditors is present petition are home Buyers, a category in class.

ii. in the said case, basic issue arose before Hon'ble Supreme Court stemmed out of the fact that in the said matter, the Successful Resolution Applicant was asked to pay an additional amount of Rs.120.54 Crores over and above upfront payment of Rs.477 Crores to financial creditors therein as against Liquidation Value of Rs.597.54 crores. In other words, the upfront amount in comparison to Liquidation Value and shorter by around 20 per cent only."

5. The Adjudicating Authority based on above analysis has come to the conclusion that 'Resolution Plan' does not have any potential to fulfil the dreams of homebuyers which is at just 19.77 % of the liquidation value of Corporate Debtor.
6. The Appellant has submitted that the Adjudicating Authority has not considered the impact of following calculations while considering Rs.95 Crores being released by 'Resolution Applicant':
 - i. Did not include Rs.211 Crores i.e. the quantum of debt due to allottees as after giving the possession of plots to allottees, the debt due to allottees would stand satisfied;
 - ii. Did not include the quantum of Rs.50.70 Crore which shall be paid by Resolution Applicant to Ex-management. Since, the settlement was done after filing of approved resolution plan. Hence, the aforesaid table also did not include the payment of debt due to ex-management;
 - iii. Did not include discounts of Rs.8.18 Crores, as it will reduce the inflow of Rs.95 Crores;
 - iv. Did not include quantum of Rs.1.75 Crores as amount shall be payable to five allottees whose plots are not on maps and layout;
 - v. Did not include quantum of Rs.38.75 Crores waived off in satisfaction of interest due to the allottees (i.e. interest on delay payment);

- vi. Did not include quantum of Rs.5.47 lakhs i.e. payment proposed to the operational creditors.
7. The Appellant has also submitted that the notification purportedly dated 07.08.2020 came into existence only on 08.08.2020 at 10:42 PM whereas CoC meeting e-voting commenced on 08.08.2020 at 3:00PM. As far as the issue of farmers are concerned, these are not contractual obligations.
8. The Appellant has also stated that the Resolution Plan had been approved with 62.9% voting share which would be considered as 100% as per Section 25A (3A) of the Code in favour of the 'Resolution Plan'. They have also raised the issue that the decision of the CoC in respect of commercial issues cannot be challenged by the Adjudicating Authority.
9. While hearing the appeal on 11.06.2021 certain Respondents have withdrawn their objections raised in these appeals as per the instructions of their clients and the same is stated hereunder: *"11.06.2021- Learned Counsel appearing in CA(AT)(Ins.) No. 151 of 2021 and CA(AT)(Ins.) No. 205 of 2021 for Respondent Nos. 3 to 10, 12,13,15 to 23 and in CA(AT)(Ins.) No. 193-194 of 2021 for Respondent Nos. 1-8, 10, 11, 13 to 21 submit that as per the instructions of their client they have withdrawn the objections raised in these Appeals."*
10. While limited Respondents in these three appeals have stated that there are no infirmity in the impugned order passed by the

Adjudicating Authority. It was also stated that the RP has not submitted the 'compliance certificate' as required under the Code. The RP in the 3rd CoC meeting has requested for the formation of sub-committee to appraise and validate the Resolution Plan which is contrary to the provisions of the Code. Section 25(2)(i) mandates that the RP shall represent all the plans at the meeting of the CoC. They have also stated certain infirmity in not providing priority to 'Operational Creditor' over 'Financial Creditor' as required under the Regulations 38 of IBBI (Insolvency Resolution Process for Corporate Person) Regulation 2016. It was also stated by them that the Form-H submitted by the RP is not in compliance of the provisions of the Code and related Regulations. They have also alleged that the Resolution Applicant is acquiring the Corporate Debtor is less than 1/5th of the Liquidation value of the Corporate Debtor.

11. We have carefully gone through the submissions made by the Appellants and concerned Respondents. There is a difference of CoC where they are 'Banks' and 'Institutional lenders' as members, while the CoC in the Homebuyers are not so expert in finance and related valuations. Hence, CoC in case of the commercial organisations will have a different perspective and expertise while in case of Real Estate projects where the CoC are totally comprising of homebuyers may not have the same expertise and perspective. Although, in case of Homebuyers provisions exist for Authorised Representatives but even he cannot be equated with the expertise with the banking

professional will have. We are not passing any comments on specific Authorised Representatives.

12. While the Resolution Plan will generally provide a higher value than the liquidation value but in case of Real Estate Project may not be always feasible and homebuyers are in dire need of getting their homes at the earliest. However, in this case certain reconciliation are required that what is the actual realisable value which the homebuyers are getting whether it is below liquidation value or above liquidation value.
13. There is also a need to look at the CIRP Regulations (4th Amendment) 2020 notified on 07.08.2020 and 5th CoC meeting circulated on 04.08.2020 and held on 08.08.2020.
14. There is a need for impleading Yamuna Expressway Industrial Development Authority (YEIDA) to ascertain status of dispute with farmers and its consequential impact, if any, on this projects.
15. Liquidation is the last resort and this programme of homebuyers needs some calibration and proper evaluation.
16. In view of the aforesaid observations, we are remanding back the matter to the Adjudicating Authority and setting aside their liquidation order with a direction to review the programme in full alongwith the relevant provisions of the code and Regulations and then the Adjudicating Authority is free to pass appropriate order as they think fit and proper in accordance with law. Pending IAs, if any,

stands disposed of. Any interim order(s) passed by this Appellant Tribunal stands vacated. No orders as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

8th July, 2021
New Delhi

Raushan. K