

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, DELHI
BENCH III**

I.A. No. 1311/2021 filed in IB-401(ND)/2017 under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the NCLT Rules, 2016

In the matter of:

Deepak Khanna

...Financial Creditor

Versus

Earth Infrastructure Limited

...Corporate Debtor

In the matter of:

Girwar Singh Jakhar & Ors

...Applicants

Versus

Earth Infrastructure Ltd. & Ors

...Respondents



Order delivered on 23rd July, 2021

Coram:

SHRI P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

**SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER
(TECHNICAL)**

Applicants

Adarsh Kumar Gupta (Advocate)

RP

Mr. Ashish Makhija and Akanksha Vasudeva
(Advocates)

Memo Of Parties

Girwar Singh Jakhar

Flat No.A-303, Pragya CGHS Ltd.,

Plot-1B, Sector-2

Dwarka, New Delhi-110075

....Applicant No.1

Divya Jakhar

Flat No.A-303, Pragya CGHS Ltd.,

Plot-1B, Sector-2

Dwarka, New Delhi-110075

....Applicant No.2

Praveen Kumar Jain

E-184, 2nd Floor,

Naraina Vihar,



Opp. Gyan Mandir Public School,

New Delhi-110028

....Applicant No.3

Versus

Earth Infrastructure Ltd.

Through Resolution Professional

Akash Singhal

G-8 & 9, Hans Bhawan, BSZ Marg,

New Delhi-110002

....Respondent No.1

Alpha Corp Development Private Limited

Resolution Applicant

Golf View Corporate Tower,

6th Floor Sector 42,

Gurugram, Haryana-122002

....Respondent No.2

Roma Unicorn Designex Consortium

Resolution Applicant

D-63/145, Aakash

Builders Lahartara,

Varansi-221002

...Respondent No.3

ORDER

Per: NARENDER KUMAR BHOLA, MEMBER (T)

- 1.Applicants have filed the instant application under section 60(5) of Insolvency and Bankruptcy Code, 2016



(hereinafter referred as “IBC”) r/w Rule 11 of the NCLT Rules, 2016 seeking following reliefs:

- a. Direct the Corporate Debtor/Earth infrastructure Pvt. Ltd. to refund the admitted claim along with interest till the date of final payment in compliance of the decree in favour of the Applicants;
- b. Direct the Resolution Applicants to refund the admitted claim along with interest till the date of final payment in compliance of the decree in favour of the Applicants under the Resolution Plan.

2. The facts that lead to the filing of the application under consideration are as follows:

- i. It is submitted that the applicants are the allottees of the residential units of the “Earth Copia” project against which Hon’ble NCDRC has passed an order of refund in favour of the Applicants and against the Corporate Debtor, therefore the liability to pay the refund amount falls on the shoulders of the Resolution Applicants.
- ii. It is stated that the applicants preferred the consumer complaint before Hon’ble NCDRC being CC

No.480/2017 (Applicant No.1), CC No.481/2017 (Applicant No.2) and CC No.1730/2016 (Applicant No.3) and in all these consumer complaints Hon'ble NCDRC passed a decree for refund of the amount invested along with compensation in the form of simple interest @10% p.a. from the date of each payment till the date on which the entire principal amount is refunded. It is submitted that during the pendency of execution petition, the corporate insolvency proceeding against the Corporate Debtor was initiated and moratorium came into force as per section 14 of IBC. All the three applicants submitted their claim in Form C before the IRP and RP admitted an amount of Rs.1,65,49,410/-, 1,22,73,115/- and Rs.91,99,797/- of the respective applicants. The Applicants also submitted that they are entitled to an additional interest from 06.06.2018 till the filing of the present application i.e., 07.03.2021. It is stated that the applicants are financial creditors and were a member of Committee of Creditors and they voted against the approval of Resolution plan as it was against their



interest and in defiance of a decree passed by the Hon'ble NCDRC. Furthermore, due to inaction and ignorance of the Respondents, the sufferings of applicant no.1 and 2 is only aggravating, therefore, the applicants seek indulgence of this Hon'ble Tribunal to take notice of this fact and direct the respondents to comply with Hon'ble NCDRC Order.

iii. It is further submitted by the Applicants that the Corporate Debtor committed a breach of Contract when it failed to deliver the residential units on time as per the agreement between the parties. As a result, the applicants approached the Hon'ble NCDRC, which in turn, held the Corporate Debtor Company liable for breach of contract and deficiency of service and directed to refund the amount collected with interest in favour of the Applicants. In the circumstances, the allotment of residential units by respondents to the applicants as opposed to what has been directed by the Hon'ble NCDRC amounts to defiance and wilful disobedience of the Court's order. The Applicants also relied on section 25 and 29 of IBC, 2016 in order to



highlight the duties of Ld. Resolution Professional with respect to maintenance of updated list of claims and information memorandum.

iv. It is further stated that the relief so sought will not change the nature and character of the resolution plan in any manner, rather, if the same is allowed, it will help in effective implementation of Resolution Plan. Hence, prayed that relief sought in the application under consideration may be allowed.

3. The Applicants have also filed the written submissions reiterated the submissions made in the application under consideration and further submitted that the primary liability to pay the refund amount falls on the shoulders of the Corporate Debtor and the remaining on resolution applicants. Furthermore, the respondent's reliance on **Sushil Ansal** judgment is hit by doctrine of Prospective Overruling. It stated further that reclassification of creditors is not permissible under the Code as contended by RP. Reliance has also been placed on **Mr. Rajnish Jain Vs. Manoj Kumar Singh, MANU/NL/0456/2020**. It is further argued



that payment to dissenting Financial Creditors can be done in monetary term only and Judgment of Hon'ble Supreme Court in **Jaypee Kensington Boulevard Apartments (Civil Appeal No.3396/2020)** is not applicable as the Applicants are Decree holders/Dissenting Financial Creditors and not dissenting Financial Creditors in a class. Further raised the contentions that process of corporate insolvency was not conducted as per the code and applicable rules and finally, prayed that the application may be allowed.

4. The Resolution Professional also filed written submissions and submitted that the application is filed at a belated stage and is liable to be dismissed on the ground of delay and laches. Furthermore, there is no locusstandi of Applicants to challenge the Resolution plan approved by the Committee of Creditors. It is further stated that Code does not envisage special treatment to decree holders who are merely creditors. Reliance is placed on Hon'ble NCLAT judgment in the matter of **Sushil Ansal [MANU/NL/0319/2020]**. It is



further argued that the principal element of claims of allottees are proposed to be satisfied by way of completing construction and handing over the possession of units to them. Further, although the said applicants cannot claim any refund from the Resolution Applicants, they have been provided with an alternative recourse to transfer or assign the units previously allotted to them, to prospective buyers and recover the monies invested by them in the Corporate Debtor. Therefore, it is abundantly clear that the treatment proposed to be given to the applicants in the resolution plan adequately protects their interests. The present application is liable to be dismissed with heavy cost.

5. We have heard at length counsel for the Applicants and the Counsel for the RP, perused contents of the Application and case laws relied upon by both the parties. The counsel for Applicant has reiterated that his clients, being Decree holders stand on entirely different and better footing as opposed to normal dissenting financial creditors. It is further stated by him that the

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decree issued by Hon'ble NCDRC has attained finality and the same ought to have been respected by RP, CD/Successful Resolution Applicants. As regards payment in terms of decree issued by Hon'ble NCDRC, they contend that they are entitled to receive full decretal amount, as against the mode of payment in respect of Secured Financial Creditors and other Financial Creditors as such and who have dissented from the Resolution Plan, as decided by Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments Vs. NBCC (India) Ltd. & Ors. (Civil Appeal No. 3395/2020). It is further submitted by the counsel for Applicants that his clients being decree-holders stand still on a better footing in comparison to the simplicitor dissenting financial creditors. In particular to buttress his argument, the Counsel has referred to Para 118.3, 119, 120, 120.1, 121, 121.1, 121.2, 122, 123, 123.1, 123.2, 124 & 125 in Jaypee Kensington (supra).

6. In this connection, we have gone through the above paras of the said judgement of Hon'ble Supreme Court.



In particular, para 124 of the said judgement reads as under:

“124. To sum up, in our view, for a proper and meaningful implementation of the approved resolution plan, the payment as envisaged by the second part of Clause (b) of Sub-section (2) of Section 30 could only be payment in terms of money and the financial creditor who chooses to Quit the corporate debtor by not putting his voting share in favour of the approval of the proposed plan of resolution (i.e., by dissenting), cannot be forced to yet remain attached to the corporate debtor by way of provisions in the nature of equities or securities. In the true operation of the provision contained in the second part of Sub-clause (ii) of Clause (b) of Sub-section (2) of Section 30 (read with Section 53), in our view, the expression "payment" only refers to the payment of money and not anything of its equivalent in the nature of barter; and a provision in that regard is required to be made in the resolution plan whether in terms of direct money or in terms of money recovery with enforcement of 1 security interest, of course, in accordance with the other provisions concerning the order of priority as also fair and equitable distribution. We are not commenting on the scenario if the dissenting financial creditor himself choses to accept any other method of discharge of its payment obligation but as per the requirements of law, the resolution plan oughtto carry the provision as aforesaid.”

7. In the instant case admittedly, the applicants have voted against the resolution plan and have a valid, legally enforceable decree from Hon'ble NCRDC in their favour, the enforcement proceedings of the same were already

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going on when the CIRP of Corporate Debtor started. The RP was well aware of the status of Applicants as being Decree holders. It is seen that the information of Decree was also provided in the Information Memorandum as per Section 29(2) read with Regulation 36 (2)(h), 36(2)(d) & 36(4). Therefore, the RP was duty bound to protect the interest of Applicants.

8. The Counsel for RP/Resolution Applicant on the other hand contended that the Resolution Plan already approved by requisite majority provides for handing over of flats to the Applicants herein. It is contended by him that the Applicants herein, who have been classified as "Allottees" under the Resolution Plan, are sufficiently considered by the Resolution Applicant, whereby the principal element of the claims of such Allottees is proposed to be satisfied by way of completing construction and handing over the possession of units to them. Further, although the said Applicants cannot claim any refund from the Resolution Applicants, they have been provided with an alternative recourse to transfer or assign the units previously allotted to them, to

prospective buyers and recover the monies invested by them in the Corporate Debtor.

9. It is further contended by Counsel for the Resolution Applicant that filing of a Resolution Plan is the prerogative of the Resolution Applicant being a business decision. In the present case, the Resolution Plan was approved by the committee of creditors using their commercial wisdom, which has been given supremacy in number of judgments of Apex Court. The treatment of creditors in the Resolution Plan, once approved by committee of creditors, is binding on all creditors unless it is violative of provisions of Section 30(2) of the Code. The Resolution Plan is fully in compliance of the provisions of Section 30(2) of the Code.

10. It is true and undisputed that applicants have decree in their favour from Court of Competent jurisdiction (Hon'ble NCDRC) and said decree has become finality. The same needs to be respected, also keeping in view the finding of Hon'ble Supreme Court to the effect that a dissenting financial creditor cannot be forced to



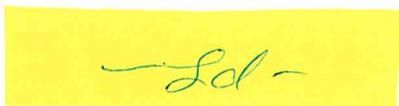
accept discharge of a debt in any mode other than money terms, as extracted at para 6 above. It is also a fact that RP himself has recognised the Applicants herein as Financial Creditors and have been made part of the CoC and now afterwards RP cannot take the plea that the Applicants are not financial creditors. Both RP and the Resolution Applicant were well aware of the status of Applicants herein as decree holders and accordingly, they were expected to provide for adequate and full discharge of the decretal amount in the Resolution Plan.

11. We do not tend to accept the argument of RP to the effect that the Applicant's interests have been protected in the Plan by providing for flats for them as against when the Applicants had clearly opted out of purchasing the flats and NCDRC had given decree in their favour. We are also not agreeable to the suggestion of Counsel for the Respondents that the applicants herein are free to dispose of the flats being offered now by way of transfer, assignment or sale and recover their investment accordingly. Rather on the contrary, the Resolution Applicants are in much better position to sell off the flats

when the Resolution Plan is implemented by them. Accordingly, we are of the considered view that in the given facts and circumstances of the case, when the Applicants are successful decree holder and the said decree has become finality, their debt needs to be discharged in full in monetary terms only.

12. In view of the above findings, we hereby direct the Resolution Applicants (the Respondents) herein to pay in full the decretal amount to each of the Applicants herein as quantified by the Hon'ble NCDRC in CC No.480/2017 (Applicant No.1), CC No. 481/2017 (Applicant No. 2) and CC No.1730/2016 (Applicant No. 3), strictly in accordance with detailed terms of the said decree within a period of six weeks from the date of this order.

13. No order as to costs.



(NARENDER KUMAR BHOLA)

MEMBER (TECHNICAL)



(P.S.N. PRASAD)

MEMBER (JUDICIAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH, DELHI
BENCH III**

I.A. No. 2253/2021 filed in IB-401(ND)/2017 under Section 31 read with 55 & 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 and 154 of the NCLT Rules, 2016

In the matter of:

Deepak Khanna

...Financial Creditor

Versus

Earth Infrastructure Limited

...Corporate Debtor

In the matter of:

Mr. Akash Shinghal

RP for Earth Infrastructure Limited

... Applicant

Order delivered on 23rd July, 2021

Coram:

SHRI P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

**SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER
(TECHNICAL)**

Resolution Professional:

Mr. Ashish Makhija and Akanksha Vasudeva
(Advocates)

CORRIGENDUM

1. The Resolution Professional has filed the instant application under section 31 read with section 55 and 60(5) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC") r/w Rule 11 and 154 of

the NCLT Rules, 2016 seeking rectification/modification in the order dated 05.04.2021 passed by this Hon'ble Tribunal.

2. It is submitted by the Applicant that vide order dated 05.04.2021 in CA No.751/2019, this authority approved the resolution plan of Roma Unicon Designex Consortium (RUD) in respect of Earth Towne Project. In paragraph 18 of the order dated 05.04.2021 is as follows:

“18. The order of moratorium dated 06.06.2018 passed by the Adjudicating Authority under section 14 of IBC shall cease to have effect from the date of passing of this order.”

It is stated by the applicant that CIR Process of the Corporate Debtor is continuing as one of the plans of filed by the Alpha Corp Private Limited for Earth Sapphire, Earth Copia, Earth Techone projects is pending for adjudication of Hon'ble Tribunal in IA No.5 of 2020. Hence prayed for Rectification/Modification of Paragraph 18 of Order dated 05.04.2021.

3. It is further submitted that in Paragraph 19 this Hon'ble tribunal has directed the Applicant to forward all the records relating to the conduct of the CIR Process and the Resolution Plan to the IBBI, so that the Board may record the same on its data base, However, CIR Process is continuing, because of the pendency of IA No.5 of 2020, the direction of the Hon'ble Tribunal to forward all the records to IBBI cannot be complied with at this stage. It is stated that the record relating to the conduct of the CIRP along with Resolution plan to IBBI are required to be filed in Form No.5 and this form is allowed to be filed only once by the Resolution Professional. Hence prayed that the paragraph 19 in the order dated 05.04.2021 may be deleted

4. In exercise of powers under rule 154 of the National Company Law Tribunal Rules, 2016, the order dated 05.04.2021 is rectified as under:

i. Paragraph 18 of the order dated 05.04.2021 in CA No. 751 of 2019 shall be read as:

"18. The Order of moratorium dated 06.06.2018 passed by this Adjudicating Authority under section

14 of IBC shall continue to have effect, notwithstanding this order.”

ii. Paragraph 19 of the order dated 05.04.2021 in CA 751 of 2019 stands deleted.

5. Accordingly, I.A. No. 2253/2021 filed in IB-401(ND)/2017 stands **allowed**.

6. The order is pronounced.



(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)



(P.S.N. PRASAD)
MEMBER (JUDICIAL)