

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT III**

IA-4096/2022

In

IB-2130(ND)/2019

IN THE MATTER OF IB-2130(ND)/2019:

M/s. Dynacon Project Pvt. Ltd.

..... **Operational Creditor**

Versus

M/s. Today Homes & Infrastructure Pvt. Ltd.

..... **Corporate Debtor**

AND IN THE MATTER OF IA-4096/2022:

M.S. Batra & Sons (HUF) & Ors.

..... **Applicants**

Versus

Mr. Pradeep Kumar Diwan & Ors.

..... **Respondents**

Pronounced On: 05.12.2023

CORAM:

**SHRI ATUL CHATURVEDI
MEMBER (TECHNICAL)**

**SHRI BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)**

PRESENT:

For the Applicants

:Mr. Sudhir Kr. Makkar, Sr. Adv, Ms. Anjali Chauhan, Mr. Rishabh Sharma, Ms. Shraddha Deshmukh, Advs.

For the Respondents

:Mr Shailendra Singh, & Mr. Abhyuday Dhasmana, Mr. Aman Leekha, Advs. for R-9.
Mr. Piyush Singh, Mr. Akshay Srivastava, Mr. Vivek Kr., Advs. for R-1 to 7.
Mr. Om Prakash Sharma, Adv. for R-8

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This application has been filed by the Applicants namely M.K Batra (HUF), S.S Batra and Sons (HUF), Sunder Sham Batra and Mohinder Batra (dissenting Financial Creditors) under Section 60(5) of the IBC, 2016 seeking rejection of the Resolution Plan submitted by Consortium

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of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegencia Apartment Buyers Association.

2. It is submitted that the Applicants are Unsecured Financial Creditors of the Corporate Debtor. It is further submitted that the status of the Applicants as dissenting Financial Creditors has been recognized in Form H filed by the Resolution Professional along with IA-4766/2021, which is an application seeking approval of the Resolution Plan. The Applicants by way of the present application are raising certain issues/objections pertaining to the Resolution Plan which has been filed through IA-4766/2021 under Sections 30 & 31 of the Code, 2016 submitted by the Consortium of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegencia Apartment Buyers Association.

3. Factual Background Of The Case

It is submitted that this Adjudicating Authority vide order dated 31.10.2019 admitted an application filed under Section 7 of the Code by M/s. Dynacon Projects Private Limited seeking initiation of CIRP against the Corporate Debtor, and declared moratorium. Subsequent thereto, the Resolution Professional was appointed and CoC was constituted. Thereafter several CoC meetings were held and the Resolution Professional took various steps as required under the Code and duly published Form G. It is submitted that Form G was amended due to the change in eligibility criteria of the Prospective Resolution Applicants and final Form G was published on 06.11.2020 by the Resolution Professional. The invitation for EoI of the Corporate Debtor gave concessions to the Registered Welfare Associations pertaining to the requisite amount of the Earnest Money Deposit (EMD) wherein the Association was liable to pay Rs. 10 Lakhs while the other Applicants had to submit Rs. 3 Crores as EMD. It is submitted that the CoC has acted in its own interest since the majority voting share was in the hands of the Associations.



4. The Resolution Professional received certain EoIs and after evaluation, a provisional list of eligible PRAs was published on 19.12.2020. Thereafter, the Resolution Professional issued the Request for Resolution Plan (RFRP) dated 29.12.2020. It is pertinent to mention that the RFRP had similar relaxations pertaining to the amount of EMD and Performance Bank Guarantee (PBG) wherein the Association was only liable to submit Rs. 10 Lakhs as compared to Rs. 15 Crores of PBG to be submitted by other Applicants.
5. Subsequently, the Resolution Professional issued the final list of PRAs dated 31.12.2020 which encompassed a total of 9 eligible entities. Out of the total 9 eligible PRAs, four PRAs submitted their Resolution Plan, out of which the Resolution Plans submitted by two PRAs were rejected on account of non-submission of Earnest Money Deposit Amount, as was mandated in the RFRP. The remaining two Resolution Plans, after carrying out the necessary modifications, as per the observations made by the Resolution Professional were placed before the CoC in its 12th meeting dated 10.08.2021, wherein the Resolution Professional certified that the Resolution Plans complies with all the provisions of the Code and its Regulations. The Resolution Plans were put to vote and the Resolution Plan submitted by the Consortium of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegancia Apartment Buyers Association was approved by the CoC with 96.93% voting in its 12th CoC meeting held on 10.08.2021.
6. The Applicants having a voting right of 0.24% abstained from voting and therefore, is a dissenting Financial Creditor to the Resolution Plan. It is submitted that the Applicants did not vote in favour of the Resolution Plan as the said Resolution Plan was not in compliance with Section 30(2)(b) of the Code and Regulation 38(1) of CIRP Regulations. Further, the Resolution Plan did not provided for the payment of debts of Financial Creditors, who did not vote in favour of the Resolution Plan.
7. It is further submitted that as per Section 30(2)(b) of the Code read with the Regulations, the Applicant is entitled to such payment as would be



due to it in terms of Section 53 of the Code and also that such payment has to be paid in priority.

8. It is also submitted that the Resolution Plan so passed, does not provide for priority payments to the Financial Creditors who are dissenting but shall be paid in priority over the Financial Creditors who voted in favour of the Plan in view of Regulation 38 of the CIRP Regulations as such the Resolution Plan is not in conformity with the Section 30(2)(b) of the Code and is liable to be rejected being non-compliant with the provisions of the Code.
9. The Applicants are also objecting to the Successful Resolution Applicant i.e., the Consortium of the Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegancia Apartment Buyers Association to submit the Resolution Plan. It is stated that the Successful Resolution Applicant is not entitled in law to undertake commercial and economic projects by virtue of its statutory bounds as under the Haryana Registration and Regulation of Societies Act, 2012 (the Act) and therefore, it was not eligible to submit the Resolution Plan and on this ground, alone the Resolution Plan is liable to be rejected.
10. The Applicants have contended that the Consortium of the Welfare Association, constituting the Successful Resolution Applicant does not have the requisite funds to finance the entire project of the Corporate Debtor. It is pertinent to mention herein that Clause 8 of the Plan states that the Resolution Applicant proposes to infuse a sum of Rs. 60 Crores into the Corporate Debtor, out of which Rs. 40 Crores shall be given by a third party, namely, Green City Developers, a Real Estate Developer.
11. It is further stated that the Resolution Plan is not compliant with Regulation 38 of the CIRP Regulations because of the ongoing disputes of the Corporate Debtor with the landowners. The Applicants have raised objections to the Resolution Plan which are as follows:

A. Applicant ought to be paid Liquidation value in priority over other Financial Creditors.



It is stated that the Applicants being dissenting Financial Creditors had filed its claim for an amount of Rs. 5,32,07,008/- and the same was also verified by the Resolution Professional. The Resolution Professional admitted an amount of Rs. 2,51,36,442/-.

It is also stated that in terms of Section 30(2)(b) of the Code, the Financial Creditors, who do not vote in favour of the Resolution Plan, shall be paid in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the Corporate Debtor. The Applicants, therefore, submitted that since the Liquidation value of the Corporate Debtor is Rs. 773,46,91,673/- (Rupees Seven Hundred Seventy Three Crores Forty Six Lakh Ninety One Thousand Six Hundred and Seventy Three Only), the Applicant is entitled to an amount which is much greater than what is proposed under the Plan.

B. Resolution Plan is liable to be rejected on account of fraud committed by the Successful Resolution Applicant.

It is submitted by the Applicants that the Resolution Plan includes a commitment letter from M/s. Green City Developer and a letter dated 16.06.2021 from HDFC Bank stating that the Bank would fund Green City Developers upto Rs. 50 Crores in order to facilitate the implementation of the Resolution Plan.

It is stated that upon enquiry with HDFC Bank by some of the Homebuyers, the Bank has issued a letter dated 10.01.2022 signed by the Branch Manager denying the issuance of any such letter dated 16.06.2021 to the Resolution Applicant. The Applicant therefore contended that the Resolution Applicant has committed fraud and the Resolution Plan is based on forged and fabricated documents.



C. Successful Resolution Applicant not eligible to submit a Resolution Plan.

D. Concessions/Relaxations given to the successful Resolution Applicant for payment of EMD and PBG have vast ramifications.

E. The Plan does not specify the names of the persons constituting the new management.

F. Resolution Plan is silent on the Proposed Resolution Mechanism to resolve the ongoing dispute with the land owners.

12. The Resolution Professional (Respondent No. 11) has filed a reply affidavit denying the allegations made by the Applicant in the present application. It is submitted that the Resolution Plan has been approved by the CoC through e-voting concluded on 16.08.2021 with 96.23% and is now pending for approval before this Adjudicating Authority.

13. It is therefore stated that the CoC in its commercial wisdom has approved the Resolution Plan which cannot be subject to frivolous objections by a minority CoC member having a negligible voting share of 0.24%.

14. It is further submitted that the Applicants being unsecured Financial Creditors of the Corporate Debtor were also part of the CoC but they did not attend even one CoC meeting and have failed to exercise their right to vote on any of the agendas placed for voting through e-voting in these CoC meetings. It is submitted that the Applicants were absent in the 8th, 9th 10th 11th & 12th CoC meetings and also did not vote.

15. Further, in terms of the Implementation Schedule along with timelines provided under Clause 13 of the Resolution Plan, the payments proposed to be made to the dissenting Financial Creditor is “T+120”, i.e., within 180 days from the approval of the Resolution Plan by this Adjudicating Authority. As per the said table, the payments proposed to be made to Financial Creditor and also to Financial Creditors in a class whose bookings are cancelled or refund orders have been passed is “T+730”,



i.e., within 730 days from the approval of the Resolution Plan by this Adjudicating Authority. It is hence evident that no payments have been proposed to be made to assenting Financial Creditors prior to the payments proposed to be made to dissenting Financial Creditors. The Resolution Plan is therefore compliant to Section 30(2)(b) of the Code read with Regulation 38(1)(b) of the CIRP Regulations.

- 16.** The reply on behalf of the Respondent Nos. 1, 3, 7 and 10 are the office bearers of the Callidaor Flat Owners Welfare Association and the Respondent No. 10 i.e., the Consortium of Canary Greens Buyers Welfare Association have filed the reply affidavit opposing the application filed by the dissenting Financial Creditors and supporting the Resolution Plan.
- 17.** The Respondent No. 8, the Green City Developers filed a reply affidavit denying the allegations made by the Applicant that the Green City Developers submitted a forged and fabricated letter dated 16.06.2021 from the HDFC Bank.
- 18.** The HDFC Bank i.e. Respondent No. 9 has also filed a reply affidavit denying the allegations made by the Applicant that the Successful Resolution Applicant has played fraud upon this Tribunal by relying upon a letter issued by Respondent No. 9 that HDFC Bank fund Green City Developer an amount of Rs. 50 Crores to implement the Resolution Plan.
- 19.** Mr. Rishi Verma (Respondent No. 4) and Mr. Shivam Khaneja (Respondent No. 6) who are the office bearers of the Callidaor Flat Owners Welfare Association have also filed a reply affidavit to the present application and supported the Resolution Plan.
- 20.** We have heard the submissions made by Mr. Sudhir Makkar, Learned Senior Counsel appearing for the Applicant and Mr. Sourabh Kripal, Learned Senior Counsel appearing for the Resolution Professional and also perused the records.
- 21.** Mr. Makkar, Learned Senior Counsel vehemently argued that the Resolution Plan has various infirmities and is not compliant with the Section 30(2)(b) of the Code and Regulation 38 the CIRP Regulations.



22. Mr. Kripal, Learned Senior Counsel while opposing the submissions made by Mr. Makkar, Learned Senior Counsel has submitted that the present application has been filed by the Applicants who merely have 0.24% voting share in the CoC and therefore do not have any locus to raise any objection to the Resolution Plan. On perusal of the records, we have found that the Resolution Plan has been approved by 96.23% votes by the CoC. It is also evident from the records that the Applicants who are the dissenting Financial Creditors have abstained from attending the meetings on several occasions and not voted in the said meetings. The Resolution Professional has placed on record the attendance sheets and summary of voting of the 8th, 9th, 10th, 11th & 12th CoC meetings. The Applicants never raised any objections on the CIRP and the Resolution Plan during the CIRP to the Resolution Professional. The Resolution Professional has further contended that as per Note to Clause 13 of the Resolution Plan, the Resolution Applicant has undertaken to provide for the payments to dissenting Financial Creditors in priority over Financial Creditors who voted in favour. The Relevant Clause is reproduced hereunder: -

“Also the Resolution Applicant undertakes to provide for the payment of debts of dissenting Financial Creditors which shall not be less than the amount to be paid to such creditors in accordance with Section 53(1) of the IBC, 2016 in the event of liquidation of the Corporate Debtor. Such amount will be paid in priority over Financial Creditors who voted in favour of the Resolution Plan.”

23. The Hon’ble Supreme Court in the matter of **K. Sashidhar Versus Indian Overseas Bank & Ors.** in Civil Appeal No. 10673 of 2018 has held that the commercial decision of CoC is non-justiciable.

24. In light of the above-quoted judgement, it is clear that the “Commercial wisdom of CoC” is given paramount status. This Adjudicating Authority is not endowed with the powers of jurisdiction or authority to analyse or evaluate the commercial decision of the CoC. The Resolution Plan was



submitted by the Successful Resolution Applicant namely Consortium of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegencia Apartment Buyers Association which was approved by the CoC in its 12th CoC dated 10.08.2021 under Section 30(4) of the IBC by 96.93% voting share, this Adjudicating Authority cannot interfere in the same.

- 25.** Further, the Applicants had never raised any objections on the Resolution Plan to the Resolution Professional in this regard. The law is very well-settled that the Resolution Plan approved by the majority of the CoC members cannot be called into question. In the instant case, the Resolution Plan provides the treatment to the dissenting Financial Creditors. Furthermore, the present application has been filed by a minority group of dissenting Financial Creditors having 0.24% votes which in our considered view is not maintainable.
- 26.** In view of the above-mentioned ground, we are of the opinion that the Applicants have no locus to file this application and, therefore, the same is not maintainable.
- 27.** Accordingly, IA-4096/2022 stands **dismissed** and **disposed of**.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**