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IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. III)

(Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016)

IA-753/2023
in
IB-717(ND)/2019

IN THE MATTER:-

M/s. Oriental Bank of Commerce (Marge with PNB) Applicant

Versus

M/s. Sidhartha Buildhome Pvt. Ltd.Respondent

And

IN THE MATTER:-

Homebuyers of Sidhartha Buildhome Private Limited Applicant

Versus

Devendra SinghRespondent No. 1

&

Punjab National BankRespondent No. 2

&

Sidharth ChauhanRespondent No. 3

&

Punjab And Sind BankRespondent No. 4

Pronounced on 24.05.2023

IA-753/2023
in
IB-717(ND)/2019
Date of order 24.05.2023



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CORAM:-

**SHRI BACHU VENKAT BALARAM DAS,
HON'BLE MEMBER (JUDICIAL)**

**SHRI ATUL CHATURVEDI,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:-

For the Applicant : Adv. Sandeep Bajaj along with Adv. Deransh Jain,
Adv. Namrata Sharma.

For the Respondent : Mr. Santosh Kumar Raut,
Mr. Abhishek Chahraborty,
Advocates for R-2 in IA-753/2023.
Mr. Arvind Nayyar, Sr. Adv, Adv. Lalit Mohan,
Adv. Akanksha, Adv. Videh Vaish, Adv. Abhay
Gupta, Adv. Shubham Pandey, Adv. Akshay Joshi.
Adv. Deep Bisht for R-3 in IA-779/2023.
Adv. Shiv Mangal Sharma, Adv. Saurabh Rajpal for
R-3 in IA-753/2023.

For the RP : Mr. Alok Dhir, Ms. Varsha Banerjee,
Mr. Kanishk Khetan, Advocates.

ORDER

Per: Bachu Venkat Balaram Das, Member (Judicial)

1. The present application has been filed on behalf of the Homebuyers who are Financial Creditor in a class of the Corporate Debtor (M/s. Sidhartha Buildhome Pvt. Ltd.), through their Authorized Representative, Mr. Dharmendra Kumar with the following prayers:

- a. Allow the present Application and "Approve" the Withdrawal Proposal under Section 12A of the Code having 92.85% votes in its favour thereby, setting aside/quashing the finding/decision of Respondent No. 1 qua the Item No. B-2 of the 27th CoC meeting and/or;
- b. Pass appropriate orders for the revival of the corporate debtor and quash and set-aside the subsequent action/decision



- taken by the Respondent No. 1 after the 27th CoC meeting dated 22.01.2023 and/or;*
- c. Pass any other order as this Hon'ble Tribunal may deem fit in the interest of justice.*

Factual background of the case:

2. In the instant case, the Corporate Insolvency Resolution Process (CIRP) was initiated vide an order dated 04.03.2021 passed by this Tribunal in an application filed under Section 7 of the Code, 2016 by the Oriental Bank of Commerce (Now Punjab National Bank-PNB). One Mr. Devender Singh was appointed as IRP. The IRP made a public announcement on 11.03.2021 in two newspapers namely Times of India (English Edition) and Nav Bharat Times (Hindi Edition) in the Delhi NCR Region, intimating the public about the commencement of CIRP of the Corporate Debtor.

3. Mr. Dharmendra Kumar, the Applicant herein, was chosen to be the Authorized Representative for the Financial Creditors in a class which was recorded in the minutes of the 1st COC meeting dated 09.04.2021. Thereafter, IA No. 1719/2021 was filed under Section 21(6A) (b) of the Code, 2016 seeking appointment of Mr. Dharmendra Kumar as the Authorized Representative of the class of Financial Creditors. This Tribunal vide order dated 27.09.2021 appointed Mr. Dharmendra Kumar, the Applicant herein as the Authorized Representative of the class of Financial Creditors.

4. The Ld. Resolution Professional published a Form G on 07.05.2021, thereby inviting the Expression of Interest (Eol) from the Prospective Resolution Applicants. The last date for submission of Eol was 22.05.2021. Pursuant to the same, the Resolution Professional received 11 Eol from Prospective Resolution Applicants (PRA's).



5. The Ex-Director/promoter of Corporate Debtor Mr. Siddharth Chauhan, Respondent No.3 herein submitted a withdrawal proposal under Section 12A of the Code before the 7th COC meeting dated 06.08.2021 which was rejected. Mr. Siddharth Chauhan (Ex-Director) filed an application bearing IA No. 5638/2021 before this Tribunal seeking directions to consider the Resolution Plan/withdrawal proposal under Section 12A of the Code for voting. This Tribunal vide order dated 07.12.2021 allowed the said application.

6. Pursuant to the said order passed by this Tribunal, the Resolution Professional/Respondent No. 1 placed two Resolution Plans and also the withdrawal proposal under Section 12A of the Code for voting in the 18th CoC meeting dated 15.02.2022. The e-voting was concluded on 22.02.2022, and the Resolution Plans as well as the proposal for withdrawal under Section 12A were rejected by the CoC.

7. Thereafter, the Respondent No. 1 published another Form G on 23.02.2022 inviting EoIs and PRAs. Thereafter, one Resolution Plan was submitted by one of the Prospective Resolution Applicant namely M/s Alpha Corp Development Private Limited.

8. Mr. Siddharth Chauhan, Respondent No. 3 (Ex-Promoter of the Corporate Debtor) again submitted another withdrawal proposal under Section 12A of the Code, 2016 with better terms and conditions for the revival of the Corporate Debtor on 26.12.2022.

9. The Resolution Plan of M/s Alpha Corp Private Limited and the second withdrawal proposal were put for e-voting under Item No. B1 and B2 in the 27th CoC meeting held on 10.01.2023.

10. Even though, the Resolution Plan of M/s. Alpha Corp Private Limited was legally non-compliant but still the Resolution Professional



placed the said plan for e-voting. M/s Alpha Corp was given a couple of opportunities to modify its plan and finally it was sent on 09.01.2023 just a day before the 27th CoC meeting. The said plan was put to voting in the CoC and the Homebuyers and other members were given the timeline to cast their e-vote from 14.01.2023 to 18.01.2023.

11. Item No. B2 of the 27th CoC meeting dated 10.01.2023, was “To consider, deliberate, decide and approve the revised proposal under Section 12A of the IBC, 2016 submitted by Mr. Siddharth Chauhan, Director of Corporate Debtor.”

Voting Analysis & Result:-

The voting analysis and result as recorded in the summary record of e-voting with respect to Item No. B-2 for consideration of proposal under Section 12A of IBC is reproduced below:

Agenda Item No.	Resolution Voted upon	Yes (%)	No (%)	Abstain/No t voted (%)	Total (%)
B2	Voting by Financial Creditors in a class (Homebuyers) as per Section 25A (3) of IBC, 2016	40.15%	29.20%	11.08%	80.43 %
	Voting by	12.42%	-	-	12.42



	Punjab National Bank				%
	Voting by Punjab & Sind Bank	-	7.15%	-	7.15%
	TOTAL	52.57	36.35	11.08%	100%
		%	%		

However, as per the analysis and computation on votes casted in compliance with the provisions of Section 25A(3A) of IBC, 2016, the members of CoC representing 92.85% voting share voted in favour of the Agenda Item No. B2 and 7.15% voting share voted against the Agenda Item No. B2. But the same is not in compliance with the proviso of Section 35A(3A) of IBC, 2016.

Whereas, as per the analysis and computation on votes casted in compliance with the provisions of Section 25A(3) of IBC, 2016, the votes casted in favour of Agenda Item No. B2 is 52.57% which is less than the requisite 90% of the voting share of CoC. The same is deemed to be in compliance with the proviso of Section 25A(3A) of IBC, 2016.

Hence in compliance with the provisions of Section 25A(3) of IBC, 2016 on the instant resolution, the agenda Item B2 is taken as "NOT APPROVED" by the CoC."

12. The Applicants have contended that the Resolution Professional adopted different voting patterns during e-voting in the 18th CoC meeting and during the 27th CoC meeting. The Resolution Professional did not apply his mind properly while doing the computation of the e-voting results. The Applicant has submitted that the majority of Homebuyers to



the tune of voting share 40.15% who participated in the voting process “present and voted” casted their vote in favour of the Item No. B2 and only 29.20% casted against the item No. B2.

13. It is contended that the majority share of the Homebuyers ought to have been treated as a whole i.e., 80.43%, since, the Homebuyers are treated as “**Financial Creditors in a class**”. However, the Resolution Professional while computing the total voting share in favour of the Item B2, considered homebuyers share as only 40.15% and added the same with the voting share of Punjab National Bank having voting share 12.42% (i.e who also voted in favour of Item B2), and computed total voting share as 52.57% (40.15% of homebuyers + 12.42% of Punjab National Bank) in favour of the Item B2 thereby “Not Approving” the withdrawal proposal under Section 12A of Suspended Director on its own whims and fancies.

15. Mr. Arvind Nayyar, Learned Senior Counsel appearing for the Applicant has relied upon the judgment passed by Hon'ble Supreme Court of India in the matter of **Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Versus NBCC (India) Ltd & Ors., Civil Appeal No. 3395 of 2020**, wherein, a three-judge bench of the Hon'ble Supreme Court of India has held that homebuyers of JIL falls in a "class of Financial Creditors" and accordingly any decision of that class taken by more than 50% of the voting share would bind all homebuyers/creditors in such class.

The relevant extract of the judgment of the Hon'ble Supreme Court is reproduced below for ready reference: -

"164.5. To put it in more clear terms qua the homebuyers, the operation of sub-section (3A) of Section 25A of the Code is that their authorized representative is required to vote on the resolution plan in

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accordance with the decision taken by a vote of more than 50% of the voting share of the homebuyers; and this 50% is counted with reference to the voting share of such homebuyers who choose to cast their vote for arriving at the particular decision. Once this process is carried out and the authorized representative has been handed down a particular decision by the requisite majority of voting share, he shall vote accordingly and his vote shall bind all the homebuyers, being of the single class he represents."

164. The expression 'voting share' has been precisely defined in clause (28) of Section 5 to mean the voting rights of a single financial creditor in the Committee of Creditors, which is based on the proportion of the financial debt owed to such a financial creditor vis-a-vis the financial debt owed by the corporate debtor. In the scheme of the Code with Explanation to Section 5(8)(f), the debt owed by the corporate debtor towards allottees of the real estate project is considered to be a financial debt but for that matter, every individual allottee does not become an independent financial creditor of the corporate debtor, if the number of allottees are 10 or more, in terms of the meaning assigned to the expression "class of creditors" in CIRP regulations. The allottees, like the homebuyers of JIL, falling within clause (f) of sub-section (8) of Section 5, do carry the status of financial creditors but they would be falling in a class collectively; and the voting share of that class would be in terms of the financial debt owed to that class as a whole.

16. He also relied upon the Judgment passed by Hon'ble NCLAT in the case of "**John Varghese Vs Value Design build Private Limited & Ors.**" wherein it has been stated that, "We are of the opinion that in the interest of 'Home Buyers', if majority of the 'Home Buyers' ('Allottees') decide to vote in favour of Section 12A to return the 'Corporate Debtor' to



original 'Promoter' for completion of the project, at the instance of one person normally it should not be stopped."

17. On the contrary, the Resolution Professional has contended that he adopted the correct method of computation as provided under the Code. He submitted that the computation of the votes has been done in accordance with the provisions of sub-section 3 of Section 25A of the Code.

17.1. It is also contended that in case of 12A proposal, the vote of each creditor in a class will have to be considered for the purpose of calculating the voting percentage. The results of the voting agenda of Section 12A proposal were calculated and declared in terms of the provisions of Section 25A(3)(A) read with Section 25(A)(3) of the Code. The RP has further stated that the 12A proposal of the promoter was rejected by the Corporate Debtor in the 27th meeting of the COC and as a consequence of the rejection of 12A proposal as well as the Resolution Plan, the Corporate Debtor may go into the liquidation by operation of law.

17.2. It is therefore contended that the Resolution Professional has considered the votes in respect of each Financial Creditor individually instead of considering it as the class of creditors as a single vote in proportion to their voting share percentage.

18. Keeping in view the facts of the present case, the question that is required to be decided by this Tribunal is as to whether the voting done by the Financial Creditors in class "Homebuyers" in a withdrawal proposal under Section 12A of the Code, 2016 shall be counted "Individually" or "in a class" on the basis of majority votes received in the said class" and whether the method adopted by Resolution Professional is correct in law.



Analysis and findings:-

19. In order to determine the above issue, it is pertinent to refer to the relevant provisions of Insolvency and Bankruptcy Code, 2016 which deal with the provisions which prescribe the procedure to be followed in case of withdrawal of an application filed under Section 7, Section 9 or Section 10 of the Code, the provisions of the Code concerning the role of the Authorized Representative and the provisions with respect to the rights and duties of the Authorized Representative of the Financial Creditors etc.

Procedure for withdrawal:-

Provisions dealing with the **Rule 8** of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 permits withdrawal of an application on a request made by the Applicant before its admission.

Section 12A of the Code which was inserted by the Insolvency and Bankruptcy Code “Second Amendment Act 2018” and which came into effect 01.06.2018.

Regulation 30A (1)

Pursuant to the insertion of Section 12A in the Code, Regulation 30A of the 2016 Regulations came to be inserted vide notification dated 3rd July, 2018. The same came to be substituted vide notification dated 25th July 2019.

The **Regulation 30A (1)**, as amended provides that:

“an application for withdrawal under Section 12A may be made to the Adjudicating Authority-



- a. Before the constitution of committee, by the applicant through the interim resolution professional;
- b. After the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be.”

Authorized Representative:-

Section 21 sub-section 6(A) deals with the appointment of Authorized Representative of the Financial Creditors.

We will now examine the provisions which deal with rights and duties of Authorized Representative of the Financial Creditor.

Section 25A reads as under: -

Section 25A: Rights and duties of authorized representative of financial creditors.

¹[25A. (1) The authorised representative under sub-section (6) or sub-section (6A) of section 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

(2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

(3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial



creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.

From a conspectus of the abovementioned provisions, it is seen that Section 25A deals with rights and duties of Authorized Representative of the Financial Creditors. Section 25A authorizes or empowers, the Authorized Representative to participate and vote in the meetings of the Committee of Creditors on behalf of the Financial Creditors he represents in accordance with the prior voting instructions of such creditors obtained through physical or electronic means.

Sub-section 2 of Section 25A casts a duty on the Authorized Representative to circulate the agenda and minutes of the meeting of the Committee of Creditors to the Financial Creditor he represents.

Sub-section 3 of Section 25A says that the Authorized Representative shall not act against the interest of the Financial Creditor he represents and shall always act in accordance with their prior instructions.

First proviso to sub-section 3 envisages that if the authorized representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share”

Second proviso to sub-section 3 stipulates that the Authorized Representative shall abstain from voting on behalf of such creditor who



has not given prior instructions either through physical or electronic means.

Sub-section 3A of Section 25A starts with a non-obstante clause. Under this provision, the Authorized Representative can cast his vote on behalf of all the Financial Creditors, he represents in accordance with the decision taken by a vote of more than 50% of the voting share of the Financial Creditors he represents, who have cast their vote.

20. From a reading of the above provisions, it is clear that these provisions have been enacted in order to give power to an Authorized Representative of the Financial Creditors to cast his vote in the manner prescribed thereunder in all the CoC meetings in which he is required to cast his vote on behalf of Financial Creditors he represents, which includes Resolution Plan approval as well.

21. The only provision which has been carved out in respect of an application filed under Section 12A, which has been provided in the proviso to sub-section 2 of Section 25A, which says that the Authorized Representative shall cast his vote in accordance with the provisions of sub-section 3.

22. At this stage, it is pertinent to refer to the judgment rendered by the Hon'ble Supreme Court, in the case of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Versus NBCC (India) Ltd & Ors. (2022) 1 SCC 401 dated 24.03.2021*, wherein it has been clearly laid down that sub-section 3A deals with Resolution Plan approval. Further the Hon'ble Supreme Court has clearly held that the home buyers shall be treated as a class.

23. Since, the Hon'ble Supreme Court has categorically held that the Home Buyers are treated as a class, we are of the considered view that



the provisions contained in Section 25A including that of the proviso to sub-section 3A would have to be read together and in conjunction with each other and the Home Buyers would have to be treated as a class for all purposes in so far as Section 25A sub-section 1, 2, 3 (including proviso) and sub-section 3A (including proviso) are concerned. In our considered view the Home Buyers cannot be treated differently for different purposes i.e. in one particular way in the case of approval of Resolution Plan and in a different way in the case of dealing with Section 12A application. Therefore, we are of the view that the Resolution Professional ought to have followed the method prescribed under sub-section 3A of Section 25A and come to a conclusion that since more than 50% of the voting has been done in favour of 12A proposal, he should have taken it as 100% since the Financial Creditor have to be treated as a class.

24. From the facts of the present case, we find that the total number of homebuyers who participated in the voting was 651. The number of homebuyers who casted their vote in favour of the Section 12A proposal were 390 and the number of homebuyers who casted their vote against the 12A proposal were 260. One homebuyers chose for abstain from voting which means that 57.82% voting share of Homebuyers was in favour of Section 12A proposal. Further, the 12A proposal was approved by the COC in the 27th meeting held on 10.01.2023 with a majority of votes of 92.85% comprising of 80.43% share of homebuyers (class of creditors) + 12.42% voting share of Punjab and Sind Bank.

25. However, the Resolution Professional has submitted that he has counted the votes of each Home Buyers separately instead of treating them as a class of Financial Creditors. According to the Resolution Professional, the voting share of the Home Buyers is only 40.15 and the voting share of Punjab and Sind Bank is 12.42% and therefore, the



Resolution Professional has come to a conclusion that 52.57% voting (40.15% voting share of Home Buyers and 12.42% voting share of Punjab and Sind Bank) has been received in favour of 12A proposal.

26. Since, we have come to a conclusion that Home Buyers have to be treated as a class for all purposes, be it for the approval of Resolution Plan or for passing a resolution under Section 12A, we are of the considered opinion that the RP has followed a wrong method in calculating the voting shares of Home Buyers.

27. Mr. Arvind Nayar, Learned Senior Counsel has also submitted that the expression "several Financial Creditors" used in the proviso of sub-section 3 of Section 12A should be as "Several class of Financial Creditors" in view of the law laid down by the Hon'ble Supreme Court in Jaypee's case (supra). He further submitted that the purpose for appointment of Authorized Representative shall be defeated if he had to cast his vote in respect of each homebuyers individually because in that case the homebuyers could have casted their votes directly without appointing the Authorized Representative. We are in agreement with the submissions made by Mr. Arvind Nayar, Learned Senior Counsel.

28. We may also note that the Punjab National Bank (Respondent No. 2) has filed a reply supporting the contentions raised by the Applicant herein and submitted that the procedure followed by RP is contrary to the provisions and procedure established by Law.

Conclusion:

From an analysis of the relevant provision and the case laws cited by the Applicant, we are of the considered view that the Resolution Professional has committed an error and followed an incorrect method in counting the votes. Therefore, we approve the withdrawal proposal under



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Section 12A of the Code and permit the Applicant to withdraw the present Petition.

We further set aside all the subsequent actions taken by Respondent No. 1 pursuant to the after 27th CoC meeting held on 21.02.2023.

We direct that the Corporate Debtor Company be revived and restored to its original position. The RP shall handover all assets, documents, records pertaining to the Corporate Debtor Company forth with and file a compliance report within two weeks.

Sd/-

(ATUL CHATURVEDI)
MEMBER (TECHNICAL)

Sd/-

(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)



Bachu
30/05/2023
सहायक पंजीयक
ASSISTANT REGISTRAR
राष्ट्रीय कम्पनी विधि अधिकरण
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