

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-V

I.A. 368 OF 2022

IN

C.P.(IB) No. 3169/MB/2019

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

Yester Investment Private Limited,

A106- 109, Satyam Commercial Centre,
M.G. Road, Ghatkopar (East) Mumbai-
400077

...Applicant

Vs

MANISH MOTILAL JAJU,

Resolution Professional of Sivana Realty
Private Limited

D 502, Neelkant Business Park, Vidya
Vihar (W), Mumbai — 400 086

...Respondent no. 1

**The Committee of Creditors of Sivana
Realty Private Limited**

...Respondent no. 2

LIC Housing Finance Ltd

...Respondent no. 3

Mr. Vithal M. Dahake

(Authorised Representative of
Homebuyers/ Allottees)

...Respondent no. 4

**M/s Kabra Estate and Investment
Consultant**

...Respondent no. 5

Sivana Reality Private Limited

...Respondent no. 6

In the matter of

**Spartan Engineering Industries
Private Limited,**

...Operational Creditor

Vs

Sivana Reality Private Limited

**...Original Respondent/
Corporate Debtor**

Order Pronounced on: 19.07.2023

Coram:

Hon'ble Shri. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via Videoconferencing)

For the Applicant: Mr. Rajan Agarwal a/w Mr. Varun Agarwal,
Advocates i/b RDA Law Office

For the Respondent: Mr. Amir Arsiwala, Advocate a/w Ms. Nidhi shah and
Ms. Nupur Shah (R1)

Per: Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The present Application is filed by the Applicant, namely, **Yester Investment Private Limited**, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("**Code**") read with rule 11 of the National Company Law Tribunal Rules, 2016 ("**NCLT Rules**") objecting to the Resolution Plan submitted by M/s Kabra Estate and Investment Consultants ("**Successful**

Resolution Applicant”) which has been approved by the Committee of Creditors of the Corporate Debtor.

FACTS OF THE CASE

2. The Corporate Debtor is a company involved in the business of real estate business and is actively developing two projects upon a contiguous piece of land located at CTS No. 430/C, LBS Road, Opposite Eshwar Nagar, Bhandup (West), Mumbai 400078. The two (2) real estate projects undertaken by the Corporate Debtor are Samriddhi Garden (Phase 1) (hereinafter referred to as “Project-1”) and Oakwood Plaza (Phase 2) (hereinafter referred to as “**Project-2**”).
3. In the year 2015, the Applicant advanced a total sum of Rs. 7,50,00,000/- (Rupees Seven Crores Fifty Lakhs only) to the Corporate Debtor as interest bearing loan. The Applicant advanced an interest-bearing loan of Rs. 2,50,00,000/- (Rupees Two Crore Fifty Lakhs only) vide cheque dated 13/07/2015 against security of Flat No. 103 and 104 in D-Wing of Project-1 as well as against post-dated cheque bearing no. 300173 for an amount of Rs. 2.50 crores. The Applicant further advanced an interest-bearing loan of Rs. 5,00,00,000/- (Rupees Five Crores only) vide cheque dated 25/07/2015 against security of Flat No. 201, 202, 203 and 204 in D-Wing of Project-1 as well as against post-dated cheque bearing no. 300176 for an amount of Rs. 5.00 crores.
4. The Corporate Debtor vide its letter dated 10/07/2015 and 24/07/2015 acknowledged receipt of Rs. 2.50 crores and Rs. 5.00 crores respectively and committed to repay the total sum of Rs. 7.50 crores on or before 30.09.2017 along with interest due thereon as applicable. Two irrevocable power of attorneys dated 10/07/2015 and 24/07 /2015 were executed in favor of the Applicant authorizing the Applicant to register the agreements for sale of the said flats.

5. The six flats in D wing of Project-1 D-103, D-104, D-201, D-203 and D-204 which were offered as security and for which duly stamped agreements of sale were entered into and registered subsequently are hereinafter collectively referred to as the “said flats”.

6. Somewhere in the year 2017, the Corporate Debtor raised funds through Respondent No. 3, namely LIC Housing Finance Limited (hereinafter referred to as “**LICHFL**”). A Loan Facility Agreement dated 15/09/2017 was executed between the Corporate Debtor, Navketan Premises Private Limited (Co-Borrower), LICHFL (Lender) and Unit Trust of India Investment Advisory Service Ltd. (as Security Trustee).

7. The Applicant submits that the Corporate Debtor could not repay the loan of Rs 7.50 crores along with interest due thereon. Accordingly, in the year 2018, as agreed vide letter dated 10/07/2015 and 24/07/2015 between the Corporate Debtor and the Applicant, agreements for sale of the said flats were duly executed and registered between the Corporate Debtor and the Applicant vide six (06) agreements for sale dated 09/08/2018. Vide its letter dated 31-3- 2018 in the account of each of the said flats, the Corporate Debtor adjusted Rs five lacs from the interest due on the loans towards the sale consideration. It is pertinent to note that income tax as due was deducted from the interest credited to the Applicant from time to time as required.

8. This Tribunal vide order dated 11.08.2020 initiated the CIRP against the Corporate Debtor and admitted the present Company Petition No. 3169 of 2019, and appointed Mr. Nechal Pathan as the Interim Resolution Professional (“IRP”) to carry out the CIRP of the Corporate Debtor.

9. Pursuant to the Public Announcement made on 16/08/2020, by the erstwhile IRP of the Corporate Debtor, the Applicant filed its claims amounting to 7,90,80,000/- in Form CA as a financial creditor in class towards six (06) flats in six (06) forms. Applicant has further submitted the revised claims against six flats on 30/12/2020 as under:

Form CA	Flat No	Amount in INR
30/12/2020	D-103	1,36,80,000.00
30/12/2020	D-104	1,36,80,000.00
30/12/2020	D-201	1,36,80,000.00
30/12/2020	D-202	1,36,80,000.00
30/12/2020	D-203	1,36,80,000.00
30/12/2020	D-204	1,36,80,000.00
Total		8,20,80,000.00

10. The Applicant states that the claims of the Applicant were accepted by the IRP/RP for Rs 1,50,88,548/- each the said flats aggregating to Rs 9,05,31,288/- for the said flats and the claim of the Applicant has been shown accordingly by the Respondent No 1 at all places.
11. In the 7th Meeting of COC held on 01/03/2021, LIC raised issues in connection with unsold units in the Project and contested the admission of certain claims of Homebuyers which were accepted without NOC of LIC.
12. On 03/06/2021, the Respondent No. 1 vide his email called upon the Applicant to provide a copy of NOC obtained from LICHFL before entering into an agreement for sale of six (6) flats with the Corporate Debtor on the grounds that the agreements for sale were executed subsequent to the sanctioning of loan by LICHFL to the Corporate Debtor.
13. In the 10th Meeting of COC held on 09/06/2021, the link for voting on the resolutions placed before the COC was not provided to the Applicant and

back door entry was given to the Respondent No. 5, the successful resolution applicant (“SRA”) to participate in the CIR process.

14. The Respondent No. 1 vide email dated 17/06/2021 informed the Applicant that upon discussion with the forensic auditors and LICHFL, it has been confirmed by LICHFL that LICHFL has not issued NOC to the Applicant and therefore, the Respondent No. 1 is left with no option but to reject the claim of the Applicant.
15. On 30/06/2021, the Respondent No. 1 issued an email through Respondent No. 4 stating that the decision as to the claim of Applicant being under verification is being withdrawn and a revised list of claims was enclosed as per the decision taken at the Eleventh Meeting of COC. Accordingly, the claim of the Applicant was included in the revised list of claims.
16. In the Sixteenth Meeting of the COC held on 11/10/2021, the resolution plan submitted by Respondent No. 5 was discussed. The Respondent No. 5 proposed differential treatment to the Homebuyers with NOC as ‘unaffected’ and without NOC as ‘affected’. It was submitted by the Respondent No. 4 that affected Homebuyers, i.e., who do not have NOC from LICHFL, should not be given anything in the resolution plan. It is pertinent to note that the Respondent No. 4 made the submissions as above at the behest of Homebuyers other than affected Homebuyers which clearly shows that the Respondent No. 4 was pushing the interests of a particular section of Homebuyers as against the Homebuyers categorized as ‘affected’ Homebuyers.
17. In the Eighteenth Meeting of COC held on 30/10/2021, the resolution for approval of resolution plan submitted by Respondent No. 5 was placed before the members of the COC. The resolution for approval of resolution plan of Respondent No. 5 was put for voting and was approved by 99.96%

voting share. The Applicant has voted against the resolution put forth for approval of resolution plan.

18. The Applicant has submitted that the Corporate Debtor was responsible to obtain NOC from the lender-LICHFL and the Applicant is a bonafide purchaser of six flats for valuable consideration and therefore, should not be made to suffer for the wrong doings/ fraudulent conduct of the Corporate Debtor.
19. It has been submitted by the Applicant that the resolution applicant could not have differentiated between the same class/ set of creditors who are otherwise similarly placed as financial creditors (home buyers).
20. It has further submitted that the issue of flats sold without NOC of LIC HFL was first raised for the first time by LIC who was sleeping over this issue till the 7th Meeting of COC.
21. The Applicant has submitted that the impugned Resolution Plan is manifestly arbitrary as it treats equals unequally without any basis. It has further been submitted that LICHFL cannot be given preference over the Applicant who paid value of flats prior to LICHFL coming into the picture.
22. On the above alleged grounds, the Applicant has prayed to allow the present Applicant.

REPLY FILED ON BEHALF OF RESPONDENT NO. 1 (RESOLUTION PROFESSIONAL)

23. With regard to Applicant's contention on sub-classification of homebuyers not permitted by law, it has been submitted by the Respondent no. 1 that there is no discrimination between members of the class of creditors being allottees. However, in order to make the Resolution Plan viable and feasible, there is different treatment to the "affected allottees" and the "unaffected

allottees”. It is further submitted that a resolution plan is not meant to be “equitable” but is meant to be a feasible and viable solution to rescue a failing company from liquidation. It has, therefore, been submitted that it is a settled law that a resolution applicant may seek to provide differential treatment to members of same category of creditors, in order to make the Resolution Plan commercially viable and feasible.

24. It has further submitted that the difference between “affected” and “unaffected” allottees is based on whether the NOC of the secured financial creditor was taken prior to the allotment being made. The secured financial creditor claimed not to have received any funds against its dues as a result of the allotments made without obtaining its NOC and is also being asked to forgo its security interest over these units. It is for this reason that the Resolution Applicant has proposed different treatment for such “affected allottees”.
25. In regard to the allegation of reclassifying the claim of applicant, the Respondent no. 1 denied the contention and submitted that there has not been any dual classification or sub-classification amongst the allottees. It is only for the purpose of ensuring commercial viability of the Resolution Plan that the treatment to certain allottees is different from that of theirs.
26. With regard to cancellation of the agreement, the Respondent no. 1 has submitted that the fundamental nature of a resolution plan is to novate the terms of the agreements between the Corporate Debtor and its stakeholders. It is for this reason that section 31 of the IBC makes a resolution plan binding upon the stakeholders narrated therein. If a Resolution Applicant would be compulsorily bound by the terms of all arrangements / agreements between the Corporate Debtor and third parties, then it would never be able to come up with a viable or feasible resolution plan. This is because the existing arrangements entered into by

the Corporate Debtor being unviable would have been the reason behind its insolvency in the first place.

27. The Respondent no. 1, with the above averments, has prayed for the dismissal of the present Application.

REPLY FILED ON BEHALF OF RESPONDENT NO. 5 (SUCCESSFUL RESOLUTION APPLICANT)

28. The Respondent no. 5 has submitted that that the present Application is misconceived, untenable and not maintainable in law, and ought to be dismissed with costs in as much as admittedly, the resolution plan of the Corporate Debtor is approved by a majority 99.96% of the Committee of Creditors of the Corporate Debtor in the 18th meeting of the Committee of Creditors held on 30th October 2021.

29. The Respondent has submitted that the business decision arrived at by the majority of the Committee of Creditors ought not to be interfered with on equitable grounds and perceptions.

30. The respondent further submitted that the Plan complies with all requirements as prescribed under section 30 of the IBC and is not in contravention of any law for the time being in force, including the IBC. The mode and manner of distribution of proceeds under the Plan is not barred by any law, including the IBC.

31. It has further been submitted that this Tribunal ought not to interfere with the commercial wisdom of the Committee of Creditors, more so at the instance of a single financial creditor.

32. It has submitted that there is no prohibition under the Code or any other law on making differential treatment amongst the same class/ set of creditors.

33. With the above averments, the Respondent no. 5 has prayed for the dismissal of the present Application.

FINDINGS:-

34. We have heard the Counsel for the parties and gone through the record.

35. During the course of arguments, it has been argued vehemently by the Counsel for the applicants that the authorized representative of the home buyers has not done his duty properly and has not looked after the interest of the home buyers, especially those who have been treated as affected home buyers. It has also been argued on behalf of the applicant that though the claim of the applicant was accepted but they have been wrongly categorized as affected home buyers on the ground that they have not obtained NOC from the lender i.e. LIC Housing Finance. It has also been argued that applicants were not under obligation to obtain an NOC from the lender and it was duty of the Corporate Debtor to get the same. Therefore, the applicants cannot be penalized on account of something which is clearly attributable to the Corporate Debtor. It has further been argued on behalf of the applicant that even otherwise as per the RBI Master circular- Housing Finance dated 01.04.2022, it is the builders/developers/Company who are required to indicate in their pamphlets/brochures that they would provide NOC from the mortgagee bank.

36. The Counsel for the applicant has further argued that the resolution plan substantially reduces the area allotted to affected home buyers, as opposed to unaffected home buyers, who are getting flat as per the actual carpet area allotted to them under the agreements. The applicant is being allotted a reduced area of 1860 sq.ft. as against the total area of 5038 sq.ft. and an area of 3163 sq.ft. has been proposed to be distributed between LICHF and the Successful Resolution Applicant.

37. It has further been pointed out that the home buyers are fully protected as per Article 300A of the Constitution of India which provides that no person shall be deprived of its property save by authority of law. It has also been argued on behalf of the applicant that the law laid down in Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. NBCC (India) Ltd. & Ors. cannot be applied to the facts and circumstances of the present case on the ground that the clause of home buyers has been wrongly divided into affected and unaffected home buyers on false and frivolous ground which is not permissible under the law especially when the applicants are not under any fault.
38. On the other hand, the Counsel for the RP has opposed the applications primarily on the ground of maintainability and locus stand of the applicants to file the instant application. In this regard it has been argued on behalf of the RP as well as the other respondents that once a decision is taken by vote of more than 50% of the voting share of the Financial Creditor in a class, the minority of the said class are bound by that decision. It has further been argued that there is absolutely no scope for any particular person within that class to dissent so far as the vote over the Resolution Plan is concerned. Since the plan is approved by 99.96% of the total voting share, even if there was no consensus amongst the home buyers, the resolution plan cannot be rejected merely on the ground that it provides differential treatment to the affected and unaffected creditors in a class. According to the Counsel for the respondents, as per the law laid down in **Jaypee Kensington Boulevard Apartments Vs. NBCC (India) Limited and others (2022) 1 SCC 401**, no individual home buyer or association can maintain any challenge to the Resolution Plan once as particular constituents of a class have voted by majority in favour of the Plan. Moreover, approval of the Plan is a commercial decision of the Committee of Creditors and the Plan has been approved with a whopping majority of 99.96% the same cannot be set-aside by the Adjudicating Authority as the scope of judicial review is limited to the extent provided under Section 31 of the Code.

39. We have thoughtfully considered the contentions raised by the Counsel for the Parties.
40. By way of the above IA, the Applicant has primarily sought to impugn the Resolution Plan on the ground that it distinguishes the Financial Creditors in a class of home Buyers into two different categories namely affected and unaffected Allottees which is not justified. It has also been sought that the so-called affected Allottees are to be treated at par with the unaffected Allottees and, therefore, the Resolution Plan of Respondent No. 5 is liable to be rejected.
41. Now the question arises as to whether the so-called affected Allottees, which otherwise fall within the category of Financial Creditors in the class of Home Buyers, are entitled to object to the Plan in any manner once as a class they have voted in the COC in favour of the Plan with a majority of more than 50% within the class. Rather it has been pointed by the Counsel for the RP that even if the voting pattern of the Home Buyers is separately seen in terms of affected and unaffected Home Buyers, they have voted overwhelmingly in favour of the Resolution Plan. 87.56% of the unaffected category of Home Buyers has voted in favour of the Plan whereas out of the affected Home Buyers 57.63% have voted in favour of the Plan.
42. The answer to the aforesaid question can be found in **Jaypee Kensington Boulevard Apartments Vs. NBCC (India) Limited and others (2022) 1 SCC 401**, wherein the Hon'ble Supreme Court has categorically held as follows:
- (i) *“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 the CIRP Regulations 130. (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.

- (ii) *Specific provisions have been made for voting on behalf of a class of creditors in terms of clause (b) of sub-section (6-A) of Section 21 by the authorised representative. The rights and duties of the authorised representative of financial creditors are also delineated in Section 25-A of the Code and any doubt, as to how he would vote and how his vote is counted, is put to rest by insertion of sub-section (3-A) to Section 25-A. which provides that notwithstanding anything to the contrary contained in sub-section (3), the AR shall cast his vote on behalf of all the financial creditors he represents "in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote".*
- (iii) *It is made explicit that the allottees, even if not a homogeneous group, they could vote only either to approve the resolution plan or to disapprove the same. Divergence of the views within their own class may exist but, when coming to the vote in the Committee of Creditors, their vote would be that of a class.*
- (iv) *Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote over the resolution plan. It is obvious that if this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties*

(like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code.

(v) There is no scope for any homebuyer suggesting himself to be a dissenting financial creditor merely because he was not with majority within the class. His dissatisfaction does not partake the legal character of a dissenting financial creditor.

(vi) The suggestion about the so-called statutory right of appeal has only been noted to be rejected. The homebuyers as a class shall be deemed to have voted in favour of approval of the resolution plan of NBCC; and once having voted so, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. The statute, that is IBC, has itself provided for estoppel against any such attempted opposition to the plan by a constituent of the class that had voted in favour of approval.

(vii) To sum up this part of discussion, in our view, after approval of the resolution plan of NBCC by CoC, where homebuyers as a class assented to the plan, any individual homebuyer or association cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance.”

43. In the light of what has been held by the Hon'ble Supreme Court in the afore-cited judgment it becomes abundantly clear that Home Buyers can vote for or against the Plan only as a class and if there are some Home Buyers pitted against the Resolution Plan, who are otherwise in minority, absolutely no locus to oppose the Plan in the capacity of dissatisfied or dissenting Home Buyers. It is also abundantly clear that such dissenting minority segment within the class of Home Buyers cannot arrogate themselves to be dissenting Financial Creditors. That being the legal position, which is explained in unequivocal terms by the Hon'ble Supreme

Court in Jaypee Kensingtons case (supra), in our considered view, any objection raised by the so-called minority Home Buyers raising objection against the Plan, which have been approved by them as a class, cannot be entertained and are liable to be rejected at the very threshold without going through the merit of such objections. Therefore, the objections raised in the IA are liable to be dismissed as the Applicant has no locus to maintain any such objections against the Resolution Plan.

44. As a result of the above discussions, the above IA No. 368 of 2022 is hereby summarily **dismissed**.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
MEMBER (JUDICIAL)