

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-V**

IA 1387/MB-V/2022

In

CP (IB) No. 2995/MB/2019

Under Section 60(5) of IBC, 2016
r/w Rule 11 of the NCLT Rules, 2016

**G. S. Constructions
(through its proprietor Mr. Sushil Uttarwar)**

.... Applicant

V/s

- i. **Mr. Gajesh Labhchand Jain**
- ii. **Mr. Jitendra Kothari**

... Respondents

In the matter of:

Small Industries Development Bank of India

...Financial Creditor

V/s

E & G Global Estates Limited

...Corporate Debtor

Order Dated: 11.08.2023

Coram:

Hon'ble Shri Kuldip Kumar Kareer, Member (Judicial)
Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via videoconferencing):

For the Applicant (s) : Adv. Ranit Basu a/w Adv. Maitri
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For the Respondent (RP) : PCA Ayush Rajani a/w Khushboo
Shah i/b AKR Advisors.

ORDER

Per: Anuradha Sanjay Bhatia, Member (Technical)

1. The above Interlocutory Application, being and IA No. 1387/MB-V/2022, has been filed by **G. S. Constructions**, through its proprietor **Mr. Sushil Uttarwar**, the Applicant, under Section **60 (5)** of IBC, 2016 (hereinafter “**the Code**”) r/w Rule 11 of NCLT, 2016, seeking following reliefs:
 - 1.1 *To quash and set aside the existing Committee of Creditors (hereinafter referred to as “CoC”) of the Corporate Debtor;*
 - 1.2 *Declare all the acts and decisions undertaken by such CoC as void and non-est;*
 - 1.3 *To direct the Respondent No. 1 to call for the outstanding dues of home buyers and allot the completed villas and studios;*
 - 1.4 *To direct the Respondent No. 1 to reconstitute the CoC in compliance with the provisions of the Code;*
 - 1.5 *To direct the Respondent No. 1 to reconsider the Resolution Plans afresh and call for fresh votes on each Resolution Plan or to direct the Respondent No. 1 to recalculate the voting percentage on the Resolution Plan;*
 - 1.6 *To direct the Respondent No. 1 to negotiate and hand over unsold and completed villas and studios to claimants;*
 - 1.7 *To reject the Resolution Plan submitted by Mrs. Asha Sanap as the same has been approved by an invalid and wrongly constituted CoC; and*

- 1.8 *To remove the Respondent No. 1 and 2 from the CIRP of the Corporate Debtor for dereliction of their duties.*

BRIEF HISTORY OF THE CASE:

2. The brief history of the case is as under:

- 2.1 The M/s. G. S. Constro & Infra Pvt. Ltd. & Ors are the investors and shareholders of M/s. E & G Global Estates Limited, the Corporate Debtor, having approximately 48% of the shareholding of the Company. The Corporate Debtor was in need of funds to complete the construction of the Resort Project and therefore M/s. G. S. Constro & Infra Pvt. Ltd. & Ors have infused funds into the Company, on the undertaking that 100% shares would be transferred to them. Accordingly, an MoU dated 10.12.2018 was entered into between the parties, whereby M/s. G. S. Constro & Infra Pvt. Ltd. & Ors paid Rs.75 lakh to SIDBI, towards the part payment of the loan amount, thereby saving the Company from becoming an NPA.
- 2.2 M/s. G. S. Constro & Infra Pvt. Ltd. & Ors vacated the post of 'Additional Directors' since an AGM was never conducted for including them as a Director, but the RoC portal was not updated, and they continued to remain as Additional Directors.
- 2.3 Thereafter, the Financial Creditor, SIDBI, had filed a Company Petition No. 2995 of 2019 under Section 7 of the Code, against the Corporate Debtor. In Part-IV of Form 1, under the head "Particulars of Financial Debt" the total amount claimed to be in default is Rs.3,85,15,033/-.

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- 2.4 The Bench-V, Mumbai, after hearing the Company Petition No. 2995 of 2019, reserved for orders on 05.09.2019. Thereafter, Intervener Application, being MA No. 3182 of 2019, was filed on 19.09.2019 in the Company Petition No. 2995 of 2019, by M/s. G. S. Constro & Infra Pvt. Ltd. and its promoters against the Corporate Debtor. The Applicants in this MA claimed to be the part owners of the Corporate Debtor's Company, came forward to settle the dues of the Corporate Debtor. The draft Consent Terms were also filed before the Bench, by the Intervener Applicant for the Corporate Debtor but the Intervener Applicant as well as the Corporate Debtor never honoured the Consent Terms.
- 2.5 Accordingly, this Tribunal vide Order dated 24.06.2020 admitted the Company Petition No. 2995 of 2019 into CIRP and Dismissed the Intervener Application, MA No. 3182 of 2019 giving the Applicants ample time to settle the dues of Financial Creditor, SIDBI.
- 2.6 By virtue of the Order dated 24.06.2020, the Interim Resolution Professional commenced the Resolution Process and M/s. G. S. Constro & Infra Pvt. Ltd. & Ors. submitted their claim in Form C with the Interim Resolution Professional. The claim was submitted in the capacity of Financial Creditor. The same was rejected by the Interim Resolution Professional. Aggrieved by this, M/s. G. S. Constro & Infra Pvt. Ltd. & Ors. filed an IA No. 1148 of 2020 in CP 2995 of 2019 stating that the Interim Resolution Professional has erred in not making M/s. G. S. Constro & Infra Pvt. Ltd. & Ors., part of the CoC and erroneously considered them as "Related Party" and their amount invested with the Corporate Debtor was not considered as "Financial Debt."

- 2.7 This Tribunal, in IA 1148 of 2020, vide its Order dated 03.12.2020 has dismissed the Application filed by M/s. G. S. Constro & Infra Pvt. Ltd. & Ors. in the following terms:

“47. This Bench, therefore, have no doubt in its mind that any money given to the Corporate Debtor by the Applicants was only and only for the purpose of acquisition of the Company by way of incremental purchase of shares and not a “financial debt”. This Bench is also clear, as has been demonstrated in the other paragraphs, that the set of the Applicants are “related party”, therefore, have no business to be the part of the CoC. The Resolution Professional has rightly taken them as suspended directors of the company.”

- 2.8 Aggrieved by the said order of this Tribunal, M/s. G. S. Constro & Infra Pvt. Ltd. & Ors. filed an Appeal being Company Appeal (AT) (Insolvency) No. 587 of 2021 before the Hon’ble NCLAT wherein Hon’ble NCLAT has upheld the Order of the NCLT, dated 03.12.2020, stating as follows:

“For the forgoing reasons, this Tribunal holds that the Appellants are ‘Related Parties’ and there are no substantial grounds to interfere with the well-reasoned Order of the Adjudicating Authority. Hence this Appeal fails and is accordingly dismissed. No Order as to costs.”

SUBMISSIONS OF THE APPLICANT:

3. The brief submissions on behalf of the Applicant is as under:
- 3.1 The Applicant, G. S. Constructions, is a proprietorship concern of Mr. Sushil Uttarwar and is involved in the business of real estate

construction. Respondent No. 1 is the Resolution Professional (hereinafter referred to as “**RP**”) of the Corporate Debtor. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process by an Order of Court-V NCLT Mumbai, dated 24.06.2020. Respondent No. 2 is the Authorised Representative of a class of creditors i.e. Home Buyers of the Corporate Debtor.

- 3.2 The present Application has been preferred by the Unsuccessful Resolution Applicant, being aggrieved by the manner in which the CoC has been constituted and approval of the Resolution Plan submitted by Mrs. Asha Sanap by the said CoC.
- 3.3 Subsequent to initiation of CIRP, the Interim Resolution Professional (hereinafter referred to as “**IRP**”) invited claims vide public announcement dated 27.06.2020. After the receipt of claims, the IRP constituted the CoC. Thereafter, the IRP was appointed as Resolution Professional of the Corporate Debtor.
- 3.4 The Resolution Professional, who is Respondent No. 1, formed the CoC which comprises of 52 home buyers (represented through Authorised Representative who is Respondent No. 2) constituting approximately 79.60% of CoC and a Financial Creditor being Small Industries Development Bank of India (hereinafter referred to as “**SIDBI**”) constituting approximately 20.40% of CoC.
- 3.5 The Corporate Debtor had started construction of a bungalow resort project name as “E & G Green Court” in Village Kharoli, Taluka Trimbakeshwar, District Nashik, comprising of various 2 and 4 bedroom-hall-kitchen villas and studios. A completion Certificate dated 26.01.2019 has been provided by the Gram Panchayat Office,

Kharoli, Taluka Trimbakeshwar, District Nashik reflecting the completed villas and studios basis the architect's letter dated 14.01.2019.

- 3.6 It was stated by the Applicant that, numerous financial claims submitted by the home buyers were wrongfully admitted by the Resolution Professional, who is Respondent No. 1.
- 3.7 The total claim amount admitted by the Resolution Professional is of Rs.19,95,77,829 (Rs.15,88,64,164/- being claim amount of home buyers and Rs.4,07,13,665/- being claim amount of SIDBI). The Applicant stated that, some home buyers have been wrongly included in the CoC.
- 3.8 Therefore, the CoC ought to be reconstituted in accordance with law and all acts by the erstwhile CoC ought to be declared as non-est. Mrs. Asha Sanap's Resolution Plan ought to be rejected as it has been approved by an invalid and improper CoC. Also, the rejection of this Applicant's claim by the CoC ought to be set aside.

REPLY OF THE RESOLUTION PROFESSIONAL:

4. The RP has filed its reply dated 17.06.2022 stating that the present Application is filed by the suspended Director and the Unsuccessful Resolution Applicant and the same is not maintainable by any stretch of imagination. The Respondent No.1/Resolution Professional further submitted that:

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- 4.1 During the course of pre-admission arguments, qua Section 7 proceedings before this Tribunal, the Applicant had intervened and claimed that he is a suspended Director and directly / indirectly controls approx. 48% of the voting share of the Corporate Debtor and would like to settle the matter with the Original Financial Creditor i.e. SIDBI, but eventually failed to do so.
- 4.2 The Applicant is referring to a “completion certificate” dated 26.01.2019 and an Architect’s letter dated 14.01.2019 both being much prior to the Insolvency Commencement Date and at no point in time did the Applicant ever place these documents on record before this Tribunal to contend that the project has been completed and they can dispose of the units to generate funds to settle outstanding dues of the Financial Creditor. The Applicant also challenged the Orders before Hon’ble NCLAT and did not succeed.
- 4.3 It is undisputed fact that the present Applicant has participated in each CoC meeting and reference is made more particularly to the 7th CoC meeting held on 06.03.2021, wherein the Architect Mr. Amol Chaudhari, whose letter dated 14.01.2019 is being referred to by the Applicant, was invited to the CoC meeting which was held physically, and all the home buyers were also invited and attended the said meeting. In fact, during the said meeting the Architect informed that major repair work needs to be undertaken at the site to prevent substantial site damage and gave an estimate of the costs of approx. Rs.75 to Rs.80 lakh.
- 4.4 During the said 7th CoC meeting the homebuyers also raised their concerns with regard to the resolution plan proposed by the Applicant and the homebuyers stated in the said meeting, that Mr.

Uttarwar has not been able to deliver the present project, even though it was under his supervision. Yet, the Applicant could not place any completion certificate before the CoC members i.e. the Home Buyers, during the 7th CoC meeting held on 06.03.2021.

- 4.5 The Applicant has provided a detailed comprising of voting rights, villa / studio number allotted to each to the 52 home buyers and the Applicant himself provided details as to whether or not the project is completed in so far as each villa / studio allotted to each of the 52-home buyer is concerned. The Applicant contended that the Respondent No. 1 ought to have called upon the home buyers to pay the balance consideration towards their respective property. The Applicant failed to appreciate, in spite of being part of the CoC meetings in his capacity as a Suspended Director, more specifically the 7th CoC meeting when it was also discussed in detail that the property still needs repair work to be undertaken for securing major damage to site, which based on the estimates of Project Architech Mr. Amol Chaudhari, who was referred to by the Applicant himself, proved an estimate of Rs.75 to 80 lakh. The CoC while approving the agenda but never paid towards the said expenses.
- 4.6 The Respondent No. 1 stated that, the Applicant on one hand is seeking certain prayers from this Tribunal to direct the Respondent No. 1 on certain aspects, while in the immediately subsequent prayer also seeks “removal” of Respondent No. 1 and Respondent No. 2 from the present CIRP which nothing else but ultra-virus to the provisions of the Code which only permits the creditors to exercise such right of replacement of Resolution Professional under Section 27 of the code and the Applicant being a Suspended Director and an

Unsuccessful Resolution Applicant has no such authority to seek any such relief.

Findings/ Observations:

5. We have heard the Counsel for the parties and have gone through the record.
 - 5.1 By way of this IA, the Applicant, i.e. Sushil Uttarwar, sole proprietor of GS Constructions has claimed that the Committee of Creditors formed in this case is liable to be set aside and all acts and decisions undertaken by CoC till date are liable to be declared as void and non-est. It has also been requested by the Applicant that the CoC be reconstituted afresh and Respondent No. 1/Resolution Professional be directed to call for the outstanding dues of the home buyers and allot completed Villas and Studio and further that after the reconstruction of the CoC Resolution Plans including the one submitted by the Applicant should be voted upon afresh and the Plan of Mrs. Asha Sanap, already approved, be rejected.
 - 5.2 It has been claimed in the Application that the Applicant's Resolution Plan received approximately 57.46% votes which were more than the votes received by the Plan submitted by Mrs. Asha Sanap but despite this, the Applicant's Plan was rejected. It has been contended on behalf of the Applicant that the Authorized Representative of the Home Buyers was required to vote in accordance with the decision taken by more than 50% of the Home Buyers he represented. According to the Applicant, 23 out of the total 52 Home Buyers were wrongly included in the CoC as their Villas or

Studios had been completed but the same were not allotted to them. Instead of allotting completed Villas and Studios to the Home Buyers, Respondent No. 1 wrongly admitted their claims and, therefore, the very constitution of the CoC was wrong. If Respondent No. 1 had not admitted the claims of Home Buyers, whose villas/studios had been completed, the voting percentage of Home Buyers would have been less with the result that the Plan of Ms. Asha Sanap would not have been approved as SIDBI, which had 42.74% shares in the CoC had not voted.

- 5.3 We have thoughtfully considered the aforesaid contentions raised on behalf of the Applicant, and are of the considered view that the Applicant has miserably failed to prove the averments made in the IA. The Applicant has not been able to substantiate that the 23 Villas and Studios had been completed which should have been allotted to as many number of the Home Buyers which would have changed the Constitution of the Committee. In this regard, it is worthwhile to mention that in 7th CoC meeting held on 6th March 2021, it is recorded that Architect i.e. Amol Chaudhry informed that major repair work was required to be undertaken at the site to prevent damage. It is further recorded in the same meeting that Home Buyers raised concerns with regard to the Resolution Plan proposed by the Applicant as he had not been able to deliver the present project even though it remained under his supervision. The instant Application seems to have been filed by the Applicant on false and frivolous grounds after his Plan was rejected by the CoC.
- 5.4 So far as the inclusion of 52 number of Home Buyers in the CoC is concerned, the Applicant has not able to establish as to why some of

the Home Buyers or as many as 23 Home Buyers should not have been made part of the CoC. As regards, the voting pattern and percentage of the Home Buyers is concerned, Section 25 (3A) of Insolvency and Bankruptcy Code is clear that the Authorized Representative of the Home Buyers is to cast his votes for all the Financial Creditors he represents in accordance with the decision taken by a vote of more than 50% of the voting share of such Financial Creditors he represents. It is further equally well settled that no weightage is to be given to the dissenting percentage of voters who represent a group of less than 50% of such class of Home Buyers/Financial Creditors. Since the majority of the Home Buyers have voted in favour of the Plan, it cannot be said that the Plan of Mrs. Asha Sanap has been wrongly approved or that of the Applicant has been wrongly rejected.

- 5.5 As a result of the above discussion, the above IA is **dismissed** being devoid of any merit.

Sd/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)