

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 7789 of 2024**

AJIT GYANCHAND JAIN

Versus

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (IBBI)

Appearance:

MR PERCY KAVINA SR.ADV. WITH MR.VISHAL J DAVE(6515) for the
Petitioner(s) No. 1

MS. HIRAL U MEHTA(7003) for the Petitioner(s) No. 1

NIPUN SINGHVI(9653) for the Petitioner(s) No. 1

MR NAVIN PAHWA SR.ADV. WITH MR RAVI PAHWA FOR THAKKAR AND
PAHWA ADVOCATES(1357) for the Respondent(s) No. 1**CORAM:HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI****Date : 06/05/2024****ORAL ORDER**

1. Heard Mr.Percy Kavina, learned Senior Counsel appearing with Mr.Vishal Dave, learned advocate for the petitioner and Mr.Navin Pahwa, learned Senior Counsel appearing with Mr.Ravi Pahwa, learned advocate for the respondent.

2. Mr.Kavina, learned Senior Counsel submits that the petitioner herein is constrained to approach this Court in view of the order passed by one member of the respondent - Board and that, the same is contrary to the provision of Section 220 of the Insolvency and Bankruptcy Code, 2016 (for short, the 'Code of 2016'). Submissions are also made on the merits of the matter.

3. Per contra, Mr.Navin Pahwa, learned Senior Counsel appearing with Mr.Ravi Pahwa, learned advocate for the respondent placed reliance on the definition of 'Disciplinary Committee' under the provision of IBBI (Inspection and Investigation) Regulations, 2017

and report of the working group - 1 and submitted that 'Disciplinary Committee' means a committee of whole time member/s constituted by the Board under Section 220(1) of the Code, provided that the whole time member/s in the Disciplinary Committee shall not be associated with the investigation or inspection.

4. Having considered the submissions made by the learned counsel appearing for the respective parties, the identical issue under the provision of Section 220(1) of the Code of 2016 wherein, it is stipulated that the Disciplinary Committee shall consist of "whole time members", whether it can be construed that the disciplinary committee should be constituted comprising of at least two whole time members whereas, in the present case, the coram comprises of a single member, is pending adjudication before this Court in the writ petitions being Special Civil Application Nos.13767 of 2022, 24566 of 2022 and 6988 of 2023. The issue involved in the present petition is also identical in nature.

5. Issue notice, making it returnable on 22.07.2024.

6. In the meantime, order dated 30.04.2024 bearing No.IBBI/DC/212/2024 is directed not to be acted upon till the next returnable date. Direct service is permitted.

Hitesh

(VAIBHAVI D. NANAVATI,J)

INSOLVENCY AND BANKRUPTCY BOARD OF INDIA
(Disciplinary Committee)

No. IBBI/DC/212/2024

30 April 2024

ORDER

This Order disposes of the Show Cause Notice (SCN) No. COMP-11015/48/2023-IBBI/823/1597 dated 06.12.2023 issued to Mr. Ajit Gyanchand Jain, who is an Insolvency Professional (IP) registered with the Insolvency and Bankruptcy Board of India (IBBI/Board) with Registration No. IBBI/IPA-001/IP-P00368/2017-2018/10625 and is a Professional Member of the Indian Institute of Insolvency Professionals of ICAI (IIP-ICAI) having residential address recorded with the Board as 204, Wall Street-1, Ellisbridge, Near Gujarat College, Ahmadabad, Gujarat- 380006

1. Background

- 1.1. The NCLT, Principal Bench, New Delhi ((NCLT/Adjudicating Authority/AA) *vide* order dated 09.03.2021 admitted the application under section 7 of the Insolvency and Bankruptcy Code, 2016 (Code), filed by Asset Care and Reconstruction Enterprises Limited (FC) for initiating Corporate Insolvency Resolution Process (CIRP) against M/s Sare Gurugram Private Limited (Corporate Debtor/CD). *Vide* order of even date, Mr. Ajit Gyanchand Jain was appointed Interim Resolution Professional (IRP) of CD and later confirmed as Resolution Professional (RP).
- 1.2. The Board received a complaint *vide* email dated 11.08.2023 from one of the homebuyers of the CD. Pursuant to such complaint, the Board in exercise of its powers conferred under Section 218 of the Code) read with regulation 7(1) and 7(2) of IBBI (Inspection and Investigation), Regulations, 2017 (Investigation Regulations), appointed an Investigating Authority (IA) to conduct investigation of Mr. Ajit Gyanchand Jain in CIRP of the CD. Accordingly, a notice under regulation 8(1) of the Investigation Regulations was issued to Mr. Ajit Gyanchand Jain on 04.09.2023. He replied *vide* mail dated 14.09.2023. Thereafter, the IA submitted an investigation report to the Board.
- 1.3. The IBBI issued the SCN to Mr. Ajit Gyanchand Jain on 06.12.2023 based on the findings in the investigation report in respect of his role as IRP/RP in the CIRP of CD. Mr. Ajit Gyanchand Jain submitted his reply to the SCN on 20.12.2023.
- 1.4. The IBBI referred the SCN to the Disciplinary Committee (DC) for disposal of the SCN in accordance with the Code and Regulations made thereunder. Mr. Ajit Gyanchand Jain gave additional submissions on 13.03.2024 and availed opportunity of personal hearing before the DC on 15.04.2024 through virtual mode, where he was represented by Mr. Nipun Singhvi, Advocate. Mr. Ajit Gyanchand Jain submitted additional written submission on 19.04.2024.
- 1.5. The DC has considered the SCN, the reply to SCN, and submissions of Mr. Ajit Gyanchand Jain, and proceeds to dispose of the SCN.

2. Alleged Contraventions, Submissions, Analysis and Findings

The contravention alleged in the SCN and Mr. Ajit Gyanchand Jain's written and oral submissions thereof are summarized as follows.

3. Contravention-I

Differential treatment of the decree-holding homebuyers in the resolution plan of the CD.

- 3.1. It was observed that eleven homebuyers (11) had a decree in their favour awarded by various authorities such as Consumer Forum / RERA. Based on the claims filed by them, Mr. Ajit Gyanchand Jain sought legal opinion with regard to the nature of the claim of these decree holders from two different advocates. The relevant extracts of both legal opinions are as under:

First opinion.

"it may be implied that cancellation of allotment by the CD is bad in view of the order and the allottee may be considered to be continuing as an allottee of the residential unit. Consequently, the claim (refund amount plus interest) filed by the Allottee may be treated as a claim of Financial Creditor in a class of the CD."

Second opinion

"...the claims filed by the homebuyers in category of financial creditors should be considered for admission as the position of such homebuyer is same as the other homebuyers because the realisation of the award, decree or judgment is not done before the commencement of the CIRP."

- 3.2. Mr. Ajit Gyanchand Jain also admitted the claim of the aforesaid decree holders as "Creditors in class" based on the said legal opinions. However, it is observed that despite having admitted the claims of these decree holders as "Creditors in class", he has treated the claim of the said decree holders as "Other Creditors" in the resolution plan placed before the CoC, instead of "Creditors in Class".
- 3.3. As per Para 2(vi) of the resolution plan the said decree holders would be fully and finally settled by the resolution applicant by way of payment of Rs.2,87,55,348 (Rupees Two crores eighty seven lakhs fifty five thousand three hundred and forty eight only) to be paid in proportion to their admitted claim amount. Thus, he deprived the decree holders from their legal rights and claims as homebuyers.
- 3.4. As per response of Mr. Ajit Gyanchand Jain to IA, it is observed that he has defended his action on the basis of correspondences entered into between him and the concerned homebuyers. It is observed that the homebuyers have repeatedly questioned his deliberate act of treating them as "other creditors" under the garb of resolution plan. For example, with respect to a query that "The Resolution process is meant to help in providing the homes to home buyers, there is no place for refund even after the decree from the court"; Response of RP was: - "As mentioned previously, the decree holders along with other creditors mentioned in Annexure-16 are being paid INR 2,87,55,348/- in proportion to their claim amount. The resolution plan and annexure 16 of the resolution plan which is attached herewith. Reference be made to the same for such queries."

- 3.5. The above correspondence clearly shows evasive response of Mr. Ajit Gyanchand Jain to hide his action. By such lackadaisical and casual approach, he has shown utter disregard to status of homebuyers as financial creditors in the resolution plan. The facts and circumstances as observed during investigations show lack of integrity and utter negligence in handling the CIRP. The above acts and omissions on his part is unprofessional.
- 3.6. The Board held the prima facie view that Mr. Ajit Gyanchand Jain has contravened section 30(2)(e), 30(2)(f), 208(2)(a) & (e) of the Code, regulation 39(2) of the IBBI (Insolvency Resolution process for Corporate Persons) Regulations, 2016 (CIRP Regulations) and regulations 7(2)(a) & (h) of the IBBI (Insolvency Professionals) Regulations, 2016 (IP Regulations) read with clauses 1, 3 and 14 of the Code of Conduct as specified in the First Schedule to IP Regulations, 2016 (Code of Conduct).

Submissions of IP.

- 3.7. Mr. Ajit Gyanchand Jain submitted that the complainant raised a grievance against (GRC No. 291/2023-24/56) him with the Board earlier also, which was referred to IIIP of ICAI which conducted an enquiry which gave him a clean chit. The details of are annexed herewith as Schedule II is reproduced as:

“2. The allegation raised in the grievance has been duly examined by the Grievance Redressal Committee (GRC) of IIPI. The respondent, in his reply, has submitted that he had duly replied to the emails of the complainant, Respondent has also adduced the copy of correspondences exchanged with the complainant, The other contentions made by the complainant have also been duly considered by the GRC IIPI,

3. After such consideration, based on the information on record, the GRC has not found actionable material in the grievance. The grievance is accordingly closed.”

- 3.8. Mr. Ajit Gyanchand Jain submitted that the complainant filed Civil Contempt Petition before the Hon’ble High Court of Delhi against the successful resolution applicant and RP on the ground that they have not complied with the order dated 6.12.2018 passed by the National Consumer Disputes Redressal Commission (NCDRC). The Civil Contempt Petition has been dismissed at preliminary stage on 14.09.2023. The extract of the order dated 14.09.2023 is reproduced as:

“5 It is stated by Ms. Choudhary, learned counsel that the respondent company was under insolvency and the petitioner was paid pro rata payment of Rs. 11,232,920/- as per the resolution plan, whereas the admitted claim was Bs. 45,59,000/-.

6. The fact that the respondent company was under insolvency after the order and a resolution plan was approved by the NCLT, New Delhi Bench and pursuant to which pro rata payments have been made to the petitioner, I am of the view that there is no intentional and malafide violation of the order doted 16.12 2018 passed by NCDRC in Consumer Case No. 2178/2017.

7. In case the petitioner has any available remedy in law, the petitioner will be at liberty to avail of the same.

8. With these directions, the contempt petition is disposed of.”

- 3.9. The complainant, as a member of the CoC, had attended several CoC meetings for the CD. During these meetings, proposed resolution plans were discussed with the prospective resolution applicants, and he also voted in favour of the approved resolution plan.
- 3.10. Mr. Ajit Gyanchand submitted that the claim submitted by the complainant was admitted in the category of financial creditors in a class. Subsequently, the resolution applicant in its resolution plan, provided for treatment of the claim submitted by the complainant and other similarly situated creditors, who for the ease of reference are being referred to as decree holders. He submitted that in terms of the Code, the duty of RP is limited to the verification of claims, however, the RP has no control over the commercial treatment which may be provided by the resolution applicant. The treatment to stakeholders provided under the resolution plan is not within the ambit of the RP.
- 3.11. The IBC under section 30(2) mandates that the RP should examine each resolution plan received by him to confirm that each resolution plan - (a) provides for the payment of insolvency resolution payment costs in a manner specified by the Board in priority to the payment of other debts of the CD; provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than- (i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or (ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53; whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, 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; (c) provides for the management of the affairs of the CD after approval of the resolution plan; the implementation and supervision of the resolution plan, does not contravene any of the provisions of the law for the time being in force; confirms to such other requirements as may be specified by the Board and provisions as per regulation 38 and regulation 39(1)(2) of the CIRP Regulations. The resolution plan's compliance with the aforesaid provisions is upheld by virtue of the order of the Hon'ble NCLT, Principal Bench approving the resolution Plan.
- 3.12. He submitted that the IBC does not require the resolution professional to review the commercial provisions of the resolution plan, The commercial wisdom rests with the Committee of Creditors which is paramount. In the matter of *K. Sashidhar Vs. Indian Overseas Bank & Ors*, the Hon'ble Supreme Court of India vide its order dated 05.02.2019, held that:

“Besides, the commercial wisdom of the CoC has been given paramount status without any judicial intervention, for ensuring completion of the stated processes within the timelines prescribed by the I&B Code. There is an intrinsic assumption that financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. The opinion on the subject matter expressed by them after due deliberations in the CoC meetings through voting, as per voting shares, is of collective business decision. The legislature, consciously, did not provide any ground to challenge the “commercial wisdom” of the individual financial creditors or their collective decision before the adjudicating authority. That is made non-justiciable.”

3.13. He also submitted that while the RP is mandated to check if a resolution plan complies with the IBC, the ultimate obligation to check the same is on the CoC. This position of law has been settled as far back as 2018 when the Hon'ble Supreme Court first in the matter of the *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and others* vide judgement date 15.11.2019 held as follows:

“A conspectus of all these provisions would show that the Resolution Professionals is required to examine that all the resolution plan submitted by various applicants is complete in all aspects, before submitting all the resolution plans to the Committee of Creditors. The Resolution Professional is not required to take any decision, but merely to ensure that the resolution plans submitted are complete in an all aspects before they are placed before the Committee of Creditors, who may or may not approve it. The fact that the Resolution Professional is also to confirm that a resolution plan does not contravene any of the provisions of law for the time-being in force, including Section 29A of the Code, only means that his prima facie opinion is to be given to the Committee of Creditors that a law has or has not been contravened. Section 30(2)(e) does not empower the Resolution Professional to “decide” whether the resolution plan does or does not contravene the provisions of law. Regulation 36A of the CIRP Regulations specifically provides as follows:-

“(8) The resolution professional shall conduct due diligence based on the material on record in order to satisfy that the prospective resolution applicant complies with-

(a) the provisions of clause (h) of sub-section (2) of section 23;

(b) the applicable provisions of section 29A, and

(c) other requirements, as specified in the invitation for expression of interest.

(9) The resolution professional may seek any clarification or additional information or document from the prospective resolution applicant for conducting due diligence under sub-regulation (8).

(10) The resolution professional shall issue a provisional list of eligible prospective resolution applicants within ten days of the last date for submission of expression of interest to the committee and to all prospective resolution applicants who submitted the expression of interest.

(11) Any objection to inclusion or exclusion of a prospective resolution applicant in the provisional list referred to in sub-regulation (10) may be made with supporting documents within five days from the date of issue of the provisional list.

(12) On considering the objections received under sub-regulation (11) the resolution professional shall issue the final list of prospective resolution applicants within ten days of the last date for receipt of objections, to the committee.”

78. Thus, the importance of the Resolution Professional is to ensure that a resolution plan is complete in all respects, and to conduct a due diligence in order to report to the Committee of Creditors whether it is in order. Even though it is not necessary for the Resolution Professional to give reasons while submitting a resolution plan to the Committee of Creditors, it would be in the fitness of things if he appends the due diligence report carried out by him with respect to each of the resolution plans under consideration, and to state briefly as to why it does or does not conform to the law.”

He submitted that he has followed the process as provided under the code and has submitted due diligence report to the CoC for their consideration.

- 3.14. He further submitted that at the time of submission of the resolution plan the applicable law allowed the resolution applicant to provide specific treatment for decree holders under the resolution plan in this regard and referred *order dated 14.08.2020 passed in the matter of Sushil Ansal Vs. Ashok Tripathi* wherein the NCLAT held that, “*The answer to the question whether a decree-holder would fall within the definition of ‘Financial Creditor’ has to be on emphatic ‘No’ as the amount claimed under the decree is an adjudicated amount and not debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 58 of the I & B Code*’. The distinction of decree holders accordingly, in the resolution plan was not in contravention of the law then prevalent and in force. Even subsequent to the submission of resolution plan, in the matter of *Subhankar Bhowmik v. Union of India vide order dated 14.03.2022* the High Court of Tripura held that, “*It is trite to say that the assets of a corporate debtor inure to the benefit of all creditors, decree holders being one of term, Creditors from “financial creditors” and “operational creditors”, as seen aforesaid is ineligible and take forward the purpose of the IBC. The same cannot be stated to be discriminatory or arbitrary.*” This order of Hon'ble Tripura High Court was subsequently upheld by the Hon'ble Supreme Court as the related civil appeal bearing no. WPCPIL No.04/2022 was dismissed by an order of the Hon'ble Supreme Court dated 11.04.2022. The law prevalent at the time of submission and consideration of the resolution plan was the judgement dated 02.02.2022 [CA(AT)(Ins) No. 991 of 2022] of NCLAT in *Vishal Chelani v. Debashis Nanda*, where the position of law as laid down by the NCLAT was that decree holders are not treated as financial creditors in a class. However, this position was reversed by the Hon'ble Supreme Court of India in the matter of *Vishal Chelani & Ors. W Debashis Nanda vide order dated 06.10.2023 (2023 SCC Online 5C 1324)*. However, it needs to be appreciated that at the time when the plan was submitted, considered by the CoC and ultimately approved by AA, the Hon'ble Apex Court's order was not in force and the legal field was occupied by judgements which upheld distinction between decree holders and other home buyer.
- 3.15. Mr. Ajit Gyanchand Jain finally submitted that he had admitted the claim of the decree holders under the category of creditors in a class based on the legal opinion. However, the resolution applicant has provided a specific treatment to all such creditors which was then approved by the CoC and the AA. As elaborated above, (a) this was in line with the applicable law at the relevant time; (b) the resolution applicant has the discretion to provide the treatment for the stakeholders including the decree holders; (c) the resolution plan has been approved by the committee of creditors in its commercial wisdom which is paramount; (d) the resolution plan has been approved by the AA. He submitted that he has not ‘deprived the decree holders from their legal rights and claims as homebuyers’, he has conducted the CIRP in terms of the Code and the treatment to be provided to the stakeholders is beyond his ambit.
- 3.16. Mr. Ajit Gyanchand Jain further submitted that the complainant has been in communication with him since the commencement of the CIRP, and throughout this period, he has consistently responded to him with all relevant information and analysis, fulfilling his duty as a RP. The complainant has a history of frequent complaints, exemplified by the 68 reminders sent to IIP ICAI even after their order, where they did not find any substantive material against him.
- 3.17. He further submitted that the complainant has purchased the unit from the CD and his allotment of unit was terminated on 21.09.2016 on the grounds of non-payment of balance

dues. The claim submitted by the complainant was admitted in the category of financial creditors in a class, by the RP. The RP has already treated all the decree holders as financial creditors in a class, however, the resolution applicant in its Resolution Plan, provided for treatment of the claim submitted by the complainant and other similarly situated decree holders, as Decree Holders-Other Creditors.

3.18. He submitted that the treatment to stakeholders provided under the resolution plan is not within the remit of the RP, the ultimate obligation to check the same is on the CoC. The RP is mandated to check if a resolution plan complies with the Code under section 30(2) and other requirements as may be specified by the Board and provisions as per regulation 38 and regulation 39 (1) (2) of the CIRP Regulations. The resolution plan's compliance with the aforesaid provisions is upheld by virtue of the order of the Hon'ble NCLT, Principal Bench approving the Resolution Plan. Further these decree holders have purchased the unit from the Corporate Debtor and their allotment of unit was terminated on the grounds of non-payment of balance dues. They asked for a refund of the amount.

Analysis and Findings.

3.19. The issue before the DC is the treatment of homebuyers who hold award/deed as "financial creditors in a class" during CIR process and later changed to "Other Creditors" in the resolution plan of the CD. It is noted that with regard to change in treatment of homebuyers who hold award/deed from "financial creditors in a class" to "Other Creditors", Mr. Ajit Gyanchand Jain had placed reliance on NCLAT order dated 14.08.2020 in the matter of *Sh. Sushil Ansal Vs. Ashok Tripathi and Ors. CA(AT)(Ins)No. 452 of 2020*, that "*The answer to the question whether a decree-holder would fall within the definition of 'Financial Creditor' has to be on emphatic 'No' as the amount claimed under the deed is an adjudicated amount and not debt disbursed against the consideration for the time value of money and does not fall within the ambit of any of the clauses enumerated under Section 58 of the I&B Code*".

3.20. It is necessary to comprehend the chronology of the events. The CD was admitted into CIRP on 09.03.2021. The DC observes that that on 22.04.2021 and 25.06.2021, Mr. Ajit Gyanchand Jain had sought two legal opinions regarding treatment of homebuyers who hold award/deed. Both the legal opinions, in nutshell, implied that the homebuyers who hold award/deed from any authority should be treated as financial creditors in a class. The relevant extracts of both legal opinions are as under:

First opinion.

"it may be implied that cancellation of allotment by the CD is bad in view of the order and the allottee may be considered to be continuing as an allottee of the residential unit. Consequently, the claim (refund amount plus interest) filed by the Allottee may be treated as a claim of Financial Creditor in a class of the CD."

Second opinion

"...the claims filed by the homebuyers in category of financial creditors should be considered for admission as the position of such homebuyer is same as the

other homebuyers because the realisation of the award, decree or judgment is not done before the commencement of the CIRP.”

- 3.21. The DC further observes the submission of Mr. Ajit Gyanchand Jain that he had admitted the claims of such decree holders as financial creditors in a class. Mr. Ajit Gyanchand Jain has stated that RP has no control over the commercial treatment which may be provided by the resolution applicant. It is the resolution applicant who has provided a specific treatment to all such creditors referred to as decree holders. Mr. Ajit Gyanchand Jain has also submitted that he has not ‘deprived the decree holders from their legal sights and claims as homebuyers’, and he has conducted the CIRP in terms of the Code and the treatment to be provided to the stakeholders is beyond his ambit.
- 3.22. From the forgoing discussion, the DC observes that Mr. Ajit Gyanchand Jain had conducted the CIRP prior to the approval of resolution plan, treating homebuyers who hold award/decrees from any authority as financial creditors in a class. The aforesaid claimants, being members of the Committee of Creditors (CoC), must have participated and voted in the CIRP process as financial creditors in a class. However, on the contrary, it is surprising to find that treatment to aforesaid homebuyers holding award/decrees was changed to “*Other Creditors*” in the resolution plan. It is pertinent to mention that it is duty of the RP to ensure that the resolution plan ought to be in consonance with regard to classification of creditors and no differential treatment is accorded to creditors in the resolution plan which could jeopardise the interests of the creditors. Further, with regard to voting mechanism under the Code, only financial creditors have been given voting rights. However, in the present matter, homebuyers who hold award/decrees were treated as financial creditors in a class, participated and voted, on the contrary they have been classified as “*Other Creditors*” in the resolution plan to whom voting rights cannot be bestowed. The DC is of the opinion that Mr. Ajit Gyanchand Jain has treated homebuyers who hold award/decrees in an inconsistent manner, resulting in contentious and convoluted process. It is imperative for an RP to perform his duties with utmost care and due diligence, without any influence from third party and must maintain integrity, be straightforward and forthright. The conduct of Mr. Ajit Gyanchand Jain for treating the homebuyers who hold award/decrees as “financial creditors in a class” during CIRP process and later changed to “*Other Creditors*” in the resolution plan of the CD, the DC finds that Mr. Ajit Gyanchand Jain has failed to act in the interest of the creditors, and conducted the process in an inconsistent, negligent, and non-transparent manner.
- 3.23. Further, the judgements by the NCLAT in Vishal Chelani & Ors. Vs Debashis Nanda & Ors. and by Hon’ble High Court of Tripura in Subhankar Bhowmik vs Union of India were pronounced after resolution plan was approved by the CoC. Hence reliance on these judgments cannot shield inconsistent, convoluted and negligent conduct of Mr. Ajit Gyanchand Jain. The DC upholds his contravention of section 30(2)(e), 30(2)(f), 208(2) (a) & (e) of the Code, regulation 39(2) of the CIRP Regulations, regulations 7(2) (a) & (h) of the IP Regulations read with clauses 1, 3 and 14 of the Code of Conduct.

4. Contravention-II

Non- inclusion of provisions for unclaimed units/flats.

- 4.1. It is observed that resolution plan of consortium of KGK Realty (India) Private Ltd and Dhoot Infrastructure Projects Ltd mentioned that for the units/flats for which no claims had been received as on the date of submission of plan on 20.11.2021, whichever is earlier, no consideration would be paid for such claims. Further, the said plan mentioned that all monies paid in relation to such units/flats shall stand forfeited and all claims in relation to such units/flats shall be fully and finally settled by the Resolution Applicant by way of payment of NIL consideration.
- 4.2. There was a list of 281 flats which was annexed with resolution plan. Accordingly, Mr. Ajit Gyanchand Jain was aware about the details of such units/flats, which were already sold. However, no claims were received against these. Thus, it is observed that he had presented a resolution plan before the CoC, where there was no provision for such unclaimed units/flats, even when Mr. Ajit Gyanchand Jain was aware about the details of such units/flats.
- 4.3. Considering the fact, that real estate projects have large group of people, there is a possibility that all these allottees/ homebuyers could not have been able to file their individual claims. However, details of such allottees/homebuyers were available in the books of accounts and other records of the CD. Therefore, Mr. Ajit Gyanchand Jain was under the duty to safeguard the interest of such homebuyers.
- 4.4. In light of the aforementioned observations, the Board held the *prima facie* view that Mr. Ajit Gyanchand Jain has violated sections 30(2)(e), 30(2)(f), 208(2)(a) & (e) of the Code, regulation 39(2) of the CIRP Regulations and regulations 7(2)(a) & (h) of the IP Regulations read with clauses 1 and 14 of the Code of Conduct as specified in the Code of Conduct.

Submissions of IP.

- 4.5. Mr. Ajit Gyanchand Jain submitted that the Hon'ble Supreme Court in the matter of *Kensington Boulevard Apartments Welfare Association & Ors. v NBCC(India) Ltd. & Ors. vide order dated 24.03.2021* held that :

“However, the NCLT, in paragraph 125 of its order has proceeded to modify the said term of the resolution plan as approved by CoC and has provided that the resolution applicant shall make provision to clear even the dues of unclaimed fixed deposit holders when they would make a claim and such a right will remain in force as long as they were entitled to make a claim under the Companies Act, 2013. [...] This Court specifically held that a resolution applicant cannot be made to suddenly encounter undecided claims after resolution plan submitted by him has been accepted; and in the scheme of the Code, all claims must be submitted to, and decided by,, the resolution professional so that the resolution applicant could proceed on a fresh plate. [...] In the given fact situation and in view of the law declared by this Court, we find no justification for the directions contained in paragraph 125 of the order passed by NCLT. Those directions are required to be annulled.”

- 4.6. In view of the above position of law prevailing at the time where the resolution plan was considered by the CoC, he did not find that the treatment provided for unclaimed units was not in compliance with the provisions of the Code, CIRP Regulations and applicable law. This was the position that the CoC also adopted based on the then prevalent law.

- 4.7. He submitted that he discussed the claims received in all the seven CoC meetings. Additionally, in the 3rd CoC meeting it was observed by the CoC and RP that post submission of resolution plans by PRA but before filing the reconstitution of the CoC prior to sending the notice for meeting with agenda to negotiate on the Resolution Plan, the RP will be accepting the claims. The RP when received the resolution plans on 11.09.2021, called for the 5th CoC meeting on 13.09.2021 and still accepted the claims from the claimants till 30.09.2021. It is further submitted that if new claims keep coming up and are accepted by the RP, the CIRP would be jeopardised and the resolution process will become difficult. Keeping in view the aforesaid repercussions it was discussed in the 6th CoC meeting that the CoC has been reconstituted for the 11th time and filed online with the AA on 01.10.2021, wherein such reconstitution was done on the basis of claims received till 30.09.2021. The same is also discussed in various CoC meetings, relevant discussion of 6th CoC meeting dated 12.10.2021 is reproduced herein below:

“The chairman informed the members that the CoC has been reconstituted for the 11th time and filed online with the Hon'ble NCLT Principal bench, New Delhi on 01st October 2021, wherein such reconstitution was done on the basis of claims received till 30th September 2021.

The chairman apprised the members that a separate petition for the 10th reconstitution of CoC wide IA 4075 of 2021 was filed and has been allowed by the Tribunal.

The chairman apprised the members that as per the minutes of the 3rd CoC meeting and the presentation done in 5th CoC meeting it was decided to keep cut-off date till 30th September, 2021 for accepting the claim of creditors. In current scenario considering that the resolution plans have been received from the resolution applicants, the cut-off date for accepting the claims from the creditors was 30th September 2021 beyond which no claims will be accepted by the Resolution Professional.”

Therefore, as per the minutes of the 3rd CoC meeting and the presentation done in the 5th CoC meeting it was decided to keep cutoff date till 30.09.2021 for accepting the claim of creditors. Considering that the resolution plans have been received from the resolution applicants, the cut-off date for accepting the claims from the creditors was 30th September 2021 beyond which no claims will be accepted by the RP. The said treatment was also upheld by the AA through its order approving the resolution plan.

- 4.8. He submitted that the details regarding submissions on claim were published in accordance with the Code. The same was also made available on the website of the CD and the website of IBBI. Homebuyer representatives and homebuyer associations have publicised the CIRP and the requirement to submit claim. Further, certain delayed claims were accepted even subsequently as per orders of the AA. This evidently shows that all possible measures were taken to ensure that the claims are filed. He referred to the order of AA dated 21.08.2023 wherein it has rejected delayed claims by, *inter alia*, referring to the fact that certain additional claims were accommodated by the successful resolution applicant as per its directions and no further leeway could be provided. The AA observed as follows-

“We are aware of the Judgment passed by Hon'ble NCLAT in the matter of “Puneet Kaur v/s K V Developers”. The benefit of the same has been granted by this Adjudicating Authority to all those allottees whose claims have been rejected by the RP on the ground that it has been filed

belatedly and further applications against the rejection had been listed for hearing before this Adjudicating Authority up to 12.12.2022. However, the delayed claims of homebuyers cannot be considered endlessly as this is beyond the reasonable time-lines. If such claims are allowed, then this Adjudicating Authority will continue to receive further such applications and the case will never reach resolution. Further, it will also cause a hurdle to the Successful Resolution Applicant in executing the Resolution Plan,

While the principles of natural justice and fairness are of paramount importance, in insolvency proceedings, it is equally crucial to uphold the principle of finality and closure in such proceedings. Allowing delayed claims to be considered indefinitely goes beyond reasonable timelines and undermines the efficacy and purpose of the insolvency resolution process. A delay of around 739 days is beyond the reasonable grounds of condonation.”

- 4.9. He submitted that the resolution plan does provide the treatment of unclaimed units at clause 2 (ii) (b) (o) i.e. *“It is hereby clarified that for the units/flats for which no claims have been received by the Resolution Professional as on the date of submission of this Plan by the Resolution Applicant or November 20, 2021, whichever is earlier, (i) all claims in relation to such units/flats shall be fully and finally settled by the Resolution Applicant by way of payment of NIL consideration; (ii) all monies paid in relation to such units/flats shall stand forfeited; (iii) all allotments in respect of such units/flats shall stand cancelled; and (iv) the Resolution Applicant or the Corporate Debtor, as the case may be, shall have the right to deal with/dispose of such units/flats in the manner as it may deem appropriate at its sole and absolute discretion. The list of such units/flats for which no claims have been received by the Resolution Professional within the timelines stated above, is attached herewith as Annexure 17 to the Plan.”*
- 4.10. The resolution plan, inclusive of this paragraph has been approved by the CoC in its commercial wisdom which is paramount, and the resolution plan has also been approved by the AA. He submitted that the RP has no role in this commercial aspect and as per the law then prevalent, in the RP’s diligence this provision was not a provision non-compliant with applicable law. Further, RP has made efforts with respect to seeking claims from the home buyers coordinating with the homebuyer of Phase III, the President of Sare Grand Buyers Association and member of the Committee of SPWA to outreach by RWA has made phone calls and emails to the homebuyers.
- 4.11. He submitted that the details regarding submissions of claim were published in accordance with the Code. Looking at the large number of homebuyers the claim acceptance timeline was further extended in consultation with the members of the CoC from 24.03.2021 till 30.09.2021. The RP has also disclosed all the data related to claims received and unclaimed units through the Information Memorandum (IM) and Virtual Data Room (VDR) to all the perspective resolution applicants and members of the CoC (FCs, Authorised representative of Homebuyers and Homebuyers also). Total Six Resolution Plans were received and one of the Resolution Plan was approved by the COC and further approved by the AA.
- 4.12. He submitted that 22 belated claims were accepted as per orders of the AA by submission of his reply. Further *vide* order dated 24.04.2024 on the approval of the resolution plan claims were admitted on the order of the AA. Therefore, in total 27 units were admitted out of the total 281 units unclaimed, pursuant to the order of the AA. The AA heard all the application listed before

it for more than 1 year 3 months and disposed of 43 IAs before approving the resolution plan (keeping the clause for treatment of unclaimed units in Resolution Plan intact) on 24.04.2023.

- 4.13. He also submitted that the resolution plan does provide the treatment of unclaimed units at clause 2(ii)(b)(o). The AA *vide* dated 21.08.2023 rejected delayed claims by, *inter alia*, referring to the fact that certain additional claims were accommodated by the successful resolution applicant as per its directions and no further leeway could be provided.
- 4.14. He also submitted that six resolution plans were received, a summary of all six Resolution Plans containing their respective Net Asset Value and benefits arising in the six Resolution Plans were put up in the VDR for access of the Homebuyers. The Resolution Plans were voted upon of which the resolution plan provided by the Consortium of KGK Realty (India) Pvt Ltd & Dhoot Infrastructure Projects Limited was approved by the members of the CoC with 100% voting rights.
- 4.15. He submitted that under the Code the duties of the RP are limited to the verification of claims, however the RP has no control over the distribution which is the sole prerogative of resolution applicant. RP cannot compel resolution applicant to pay to any category of stakeholders. RP has to check that resolution plan should comply with all the laws and he performed his duty. Further the matter of resolution plan is still *sub judice*, and he has attached the recent updates with case status of the cases filed with the Hon'ble NCLAT and the Supreme Court filed by various homebuyers.

Analysis and Findings.

- 4.16. The DC observes that Mr. Ajit Gyanchand Jain has not denied his awareness about details of unclaimed units of the CD. In real estate projects, it is the duty of the RP to position the correct and factual details of the units in the Information Memorandum in terms of payment, possession, and ownership, if any. The claim of those homebuyers, who could not file their claims, but whose claims were reflected in the record of the CD, ought to have been taken note of and resolution applicant should have appropriately dealt with them in the Resolution Plan. Non-consideration of such claims, making value of such claims as NIL, forfeiting part payment made by such allottees and cancellation of allotment of such units, in the resolution plan, does not seem to be inequitable. In view of forgoing discussion, the DC holds the contravention and finds that Mr. Ajit Gyanchand Jain has failed to act as per sections 30(2)(e), 30(2)(f), 208(2)(a) & (e) of the Code, regulation 39(2) of the CIRP Regulations and regulations 7(2)(a) & (h) of the IP Regulations read with clauses 1 and 14 of the Code of Conduct as specified in the Code of Conduct.

5. Order.

- 5.1. In view of the forgoing discussion, SCN, reply to the SCN, oral and written submission made by Mr. Ajit Gyanchand Jain, the DC finds Mr. Ajit Gyanchand Jain in contravention of sections 30(2)(e), 30(2)(f), 208(2)(a) & (e) of the Code, regulation 39(2) of the CIRP Regulations and regulations 7(2)(a) & (h) of the IP Regulations read with clauses 1, 3 and 14 of the Code of Conduct .

- 5.2. The DC, in exercise of the powers conferred under section 220 of the Code read with regulation 13 of the Investigation Regulations hereby suspends the registration of Mr. Ajit Gyanchand Jain for a period of two years.
- 5.3. This Order shall come into force after expiry of 30 days from the date of this order.
- 5.4. A copy of this order shall be sent to the CoC/Stake Holders Consultation Committee (SCC) of all the corporate debtors in which Mr. Ajit Gyanchand Jain is providing his services, and the respective CoC/SCC, as the case may be, will decide about continuation of existing assignment of Mr. Ajit Gyanchand Jain.
- 5.5. A copy of this order shall be forwarded to the Indian Institute of Insolvency Professionals of ICAI where Mr. Ajit Gyanchand Jain is enrolled as a member.
- 5.6. A copy of this order shall also be forwarded to the Registrar of the Principal Bench of the National Company Law Tribunal, New Delhi, for information.
- 5.7. Accordingly, the show cause notice is disposed of.

Dated: 30 April 2024
Place: New Delhi

Sd/-
(Jayanti Prasad)
Whole Time Member
Insolvency and Bankruptcy Board of India