IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-II

I.A. No. 5122 of 2023
In
CP (IB) No. 4362(MB) of 2018

Under section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of the N.C.L.T. Rules, 2016

IN THE MATTER OF

Ashutosh Dhanuka

102, Dhanuka House, P.M. Road, Vile Parle (East), Above TJSB Bank, Mumbai-400 057.

… Applicant

V/s.

Kinjalkumar Madhubhai Chaudhary

Resolution Professional of Shamik Enterprises Private Limited

9-B, Vardan Complex, near Vimal House, Lakhudi Circle, Navrangpura, Ahmedabad, Gujarat- 380 014. **… Respondent**

IN THE MATTER OF

Hindustan Candle Manufacturing Co. Private Limited

… Financial Creditor

V/s.

Shamik Enterprises Private Limited

… Corporate Debtor

Order delivered on: - 05.04.2024.

Coram:

Shri. Kuldip Kumar Kareer, Member (Judicial)

Shri. Anil Raj Chellan, Member (Technical)

Appearances (Hearing in Virtual Mode):

For the Applicant	: Counsel Mr. Aman Kacheria a/w Krushila U.
For the Respondent/RP	: Counsel Mr. Nausher Kohli a/w Amey Hadwale.

ORDER

Per: - Coram.

1. The present Interlocutory Applicant is filed by the Applicant seeking, *inter-alia,* directions to the Respondent to consider and admit the claim of the Applicant of Rs. 3,75,94,904/- (Rupees Three Crores, Seventy-Five Lakhs, Ninety-Four Thousand, Nine Hundred and Four Only), out of which the principal is Rs.2,00,00,000/- (Rupees Two Crores only) along with the interest of Rs. 1,75,94,904/-.

2. Brief facts necessary for disposal of the present Application are as follows:

   a. The Applicant herein was desirous of buying a residential premise in the project named "Om Prabhu Ashish" situated at Vile Parle (East), Mumbai. Hence, based on the representations and assurances made by the Corporate Debtor, the Applicant booked Flat No.1001 on the tenth floor in a building in the said project for a total consideration of Rs. 2,25,00,000/- (Rupees Two Crores and Twenty-Five Lakhs Only).

b. An amount of Rs. 1,00,00,000/- (Rupees One Crore only) was paid by the Applicant to the Corporate Debtor on or around 30.07.2015 vide Cheque No. 028741 towards the booking of the said flat. Thereafter, on 15.08.2015, the Applicant made a further payment of Rs.1,00,00,000/- towards the booking of the subject flat.

c. The Corporate Debtor issued an allotment letter bearing reference no. SEPL/ALL/AL/2608151001, in favour of the Applicant on 26th August, 2015.

d. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process ('CIRP') u/s 7 of the Code vide Order dated February 03, 2022 passed by this Tribunal in Company Petition No. 4362/2018. The Applicant states that he was unaware of the initiation of CIRP until October, 2023.

e. Immediately upon learning that CIRP had been initiated against the Corporate Debtor, the Applicant immediately submitted Claim Form CA dated 26.10.2023, before the Resolution Professional of the Corporate Debtor. On 28th October 2023, the Respondent addressed an email to the Applicant stating that the Applicant's claim cannot be assessed based on the fact that the Committee of Creditors have approved a resolution plan for the Corporate Debtor and that I.A. No. 2021/2023 has been filed by the Respondent for approval of the said plan by the Adjudicating Authority u/s 31 of the Code, which is pending for hearing before this Hon'ble Tribunal.

f. Hence this application.

3. **<u>Submissions on behalf of the Applicant:</u>**

a. Counsel for the Applicant submits that the Applicant had no knowledge or awareness of the initiation of CIRP against the Corporate Debtor and that the claim was filed as soon as the Applicant learnt of the CIRP of the Corporate Debtor. Counsel for the Applicant further submits that the Respondent as a resolution professional ought to have been aware of the monies payable by the Applicant, as also the allotment letters issued in favour of the Applicant.

b. Counsel for the Applicant submits that the Tribunal has the powers to direct the Resolution Professional to accept and admit the claim of the Applicant since the resolution plan is pending approval of the Adjudicating Authority.

c. Counsel for the Applicant submits that the Applicant had made the payments to the Corporate Debtor on the basis of promises, guarantees and assurances of timely completion of the said project. However, the Corporate Debtor has not only failed in completing the real estate project, but also the Corporate Debtor has failed to consider the payments made to it by the Applicant.

d. Counsel for the Applicant has relied upon Order dated 02.01.2024 in I.A. No. 3913 of 2023 in CP(IB) No. 1231/MB/2021 - Reliance Capital Limited through its Administrator Mr. Nageswara Rao Y. v/s. The Imperial

Condominium, passed by the NCLT, Mumbai Bench-I, to buttress his contention that the claim can be entertained even at such a belated stage.

4. **Reply and Submissions of the Respondent**: The reply and submissions of the Respondent is briefly summarized below:

   i. The claim of the Applicant was received by the Respondent/Resolution Professional after the approval of the resolution plan by the CoC when the application had already been moved by the Resolution Professional u/s 31 of the Code for approval of the resolution plan. Therefore, in view of the law laid down by the Hon'ble NCLAT in Mukul Kumar v/s. RPS Infrastructure Ltd. vide Order dated 30.07.2021, the claim of the Applicant cannot be entertained.

   ii. No booking file or diary has been provided by the suspended management which can establish that the Applicant herein booked the subject flat in the said project. Also, there is no agreement to sale executed between the parties even when almost 90% payment was allegedly made by the Applicant against the subject flat. Thus, the claim of the Applicant cannot be verified.

   iii. The claim of the Applicant is in relation to the premises situated at 'Om Prabhu Ashish CHSL' wherein as per the suspended management, the Development Agreement entered into between the Corporate Debtor and Om Prabhu Ashish CHSL has been terminated vide Letter dated 19.11.2021 which is a subject matter of an application u/s 66 of the Code pending before this Tribunal.

5. **<u>Rejoinder of the Applicant (in brief)</u>**:

i. The Applicant had no knowledge of the termination of Development Agreement vide Termination Letter dated 19.11.2021, relied upon by the Respondent. The Applicant submits that the Respondent has not annexed the copy of the said termination letter in his reply. Further, the Applicant had no reason to believe that the Development Agreement between the Society and the Developer (i.e. the Corporate Debtor) had been terminated.

ii. It is incorrect on the part of the Respondent to question the locus of the Applicant as homebuyer in the project of the Corporate Debtor due to the absence of any other claims from homebuyers.

iii. It is admitted that no agreement to sale was executed between the parties even when almost 90% payment was made by the Applicant against the subject property.

<u>Analysis and Decision:</u>

6. We have heard the Counsel appearing for the parties and perused the records. We have given our due consideration to the submissions canvassed across the bar by the learned counsel for the Applicant and the Respondent.

7. This is an application filed by the Applicant seeking, *inter-alia,* directions to the Respondent to consider and admit the claim of the

Applicant. The claim is arising out of the amount purportedly paid towards the booking of the flat in a real estate project which was supposed to be constructed by the Corporate Debtor before initiation of CIRP.

8. The CIRP of the Corporate Debtor was initiated on 03rd February, 2022 and the Respondent was then appointed as an Interim Resolution Professional. As per Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the Respondent made public announcement in Form 'A' on 06.02.2022. Section 15 of the IBC, 2016 read with Regulation 6 of the IBBI Regulations (supra) mandate a public announcement of the CIRP through newspapers. This would constitute deemed knowledge on the Applicant. Therefore, it is not open to the Applicant to take a plea that he was not aware of the CIRP of the Corporate Debtor.

9. The Applicant has admitted that there is no agreement to sale executed between the Applicant and the Corporate Debtor in respect of the flat in question (i.e. Flat No.1001). However, there is an Allotment Letter bearing reference no. SEPL/ALL/AL/2608151001, issued in favour of the Applicant by the Corporate Debtor on 26th August, 2015. We have perused the aforesaid allotment letter. The Allotment Letter dated 26.08.2015 lays down certain terms and conditions. As per Clause 4 of the Terms and Conditions of the aforesaid allotment letter, until the Agreement for Sale as above is executed and registered with the office of Sub-Registrar of Assurances, the Applicant will not have any right, title, interest, or lien, of any nature whatsoever, in the said Flat (i.e. Flat No.1001). Thus, prima facie, we find that it is dubious if the Applicant can be treated as an allottee in order to maintain his claim

via Form CA as a homebuyer so as to be treated as a financial creditor in a class.

10. It is a matter of record and an undisputed fact that the claim has been filed by the Applicant before the Respondent in Form CA on October 26, 2023. It is also true that the Respondent had filed an I.A. No. 2201/2023 for approval of resolution plan by the Adjudicating Authority u/s 31 of the Code. On perusal of the said I.A., it is evident that the Committee of Creditors ('CoC') of the Corporate Debtor had in its 10th meeting conveyed on 30.01.2023, considered the resolution plan dated 27.01.2023 submitted by M/s. Viva Tradecom Private Limited, which was approved by the members of the CoC with 77.21% majority votes in favour of the resolution plan. Thereafter, the Respondent had convened the 11th CoC meeting on 20.02.2023 discussing the distribution of the proceeds from the approved resolution plan amongst the financial creditors other than homebuyers and also discussed on appointment of a liquidator in case if the resolution plan is not approved by the Adjudicating Authority.

11. Thus, it is amply clear and evident that in the present case, the claim has been submitted by the Applicant before the Respondent after the approval of resolution plan by the CoC.

12. Regulation 12(1) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is reproduced hereinbelow:

"12. Submission of proof of claims

(1) A creditor shall submit claim with proof on or before the last date mentioned in the public announcement.

> *Provided that a creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit his claim with proof to the interim resolution professional or the resolution professional, as the case may be, up to the date of issue of request for resolution plans under regulation 36B or ninety days from the insolvency commencement date, whichever is later:*
>
> *Provided further that the creditor shall provide reasons for delay in submitting the claim beyond the period of ninety days from the insolvency commencement."*

Since in the present case, the Applicant has submitted his claim to the Respondent after the approval of the resolution plan, in view of the aforesaid regulation, his claim cannot be entertained.

13. The Applicant has sought for directions to the Respondent to admit his claim; however, the Applicant has neither prayed for condonation of delay nor has the Applicant sufficiently explained to the Tribunal about the cause of delay. The explanation offered by the Applicant that he was unaware of the CIRP of the Corporate Debtor is unacceptable when the public announcement has been made under Section 15 of the Code. Therefore, even if the delay was condonable, no good case has been made out by the Applicant for condonation of delay, as the Applicant has failed to show sufficient cause satisfactorily explaining his delay in filing the claim before the Respondent. Even otherwise, the Applicant has no good case on merits.

14. The Hon'ble Supreme Court has observed in the judgment of Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Ors. reported in (2020) 8 SCC 534 as follows: "*A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up*

which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove."

15. In Mukul Kumar v. RPS Infrastructure Ltd. (Judgment dated 30th July, 2021 in Company Appeal (AT) (Insolvency) No. 1050 of 2020), the Hon'ble NCLAT had held as follows: "*34. With the aforesaid, we are of the view that when the Resolution Plan has already been approved by the CoC and it is pending before the Adjudicating Authority for approval, at this stage, if new claims are entertained the CIRP would be jeopardized and the Resolution Process may become more difficult. Keeping in view the object of the IBC which is resolution of Corporate Debtor in time bound manner to maximize the value, if such request of claimant is accepted the purpose of IBC would be defeated."*. This matter went in appeal before the Hon'ble Supreme Court of India and the law in this regard, as discussed below, has now been settled by the Hon'ble Apex Court.

16. The Hon'ble Supreme Court in RPS Infrastructure Ltd v/s. Mukul Kumar & Anr., vide Judgment dated September 11, 2023 in Civil Appeal No. 5590 of 2021 (neutral citation: 2023 INSC 816) has observed as under:

"21. The mere fact that the Adjudicating Authority has yet not approved the plan does not imply that the plan can go back and forth, thereby making the CIRP an endless process. This would result in the reopening of the whole issue,

particularly as there may be other similar persons who may jump onto the bandwagon. As described above, in Essar Steel, the Court cautioned against allowing claims after the resolution plan has been accepted by the COC.

22. We have thus come to the conclusion that the NCLAT's impugned judgment cannot be faulted to reopen the chapter at the behest of the appellant. We find it difficult to unleash the hydra-headed monster of undecided claims on the resolution applicant."

17. Counsel for the Applicant has relied upon the decision of NCLT, Mumbai Bench-I vide Order dated 02.01.2024 in I.A. No. 3913 of 2023 (supra). However, in view of the judgment of the Apex Court in RPS Infrastructure Ltd (supra), the aforesaid precedent of Mumbai Bench cannot be applied to the facts and circumstances of the present case. Hence, after having due regard to the law as laid down by the Hon'ble Supreme Court in RPS Infrastructure Ltd (supra), we are of the considered view that the claim of the Applicant cannot be entertained at such a belated stage where the resolution plan has been approved by the Committee of Creditors and the same is pending for the approval of the Adjudicating Authority. At this stage, we cannot allow to unleash the hydra-headed monster of undecided claim on the successful resolution applicant. Hence, the present application is liable to be dismissed.

18. In view of the foregoing, **we hereby dismiss I.A. No. 5122 of 2023** in CP(IB) No. 4362/MB/2018 with no order as to costs.

Sd/-	**Sd/-**
ANIL RAJ CHELLAN	**KULDIP KUMAR KAREER**
Member (Technical)	**Member (Judicial)**