

**IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

R.A.No.02 of 2020 in
C.P.(IB)No.389/BB/2019
U/r 11 of the NCLT Rules, 2016 &
Section 60 (5) (C) of the IBC, 2016
R/w Section 420 (2) of the Companies Act, 2013

Between

M/s.Skylark Mansions Private Ltd.

Represented by its Authorized Signatory

Shri Saleem Shariff

No.37/21, Skylark Chambers,

Yellappa Chetty Layout,

Ulsoor Road, Sivanchetti Gardens,

Bangalore – 560 042.

- Applicant/Respondent/CD

And

M/s.Skylark Ithaka Buyers

Welfare Association

Consisting of 255 Homebuyers

No.202, Falcon Nest,

1st Cross, Kaggadasapura,

Bangalore – 560 093.

- Respondents/Petitioners

Date of Order: 16th April, 2020

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)

Parties/Counsels Present:

For the Applicant

: Shri Shashikiran Shetty ,Senior
Counsel with Prashanth Kumar S.T.

ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. R.A.No.02 of 2020 in C.P.(IB)No.389/BB/2019 is filed by M/s.Skylark Mansions Private Limited represented by its Authorized Signatory Mr. Saleem Shariff (hereinafter referred to as 'Applicant/Respondent')

U/R 11 of the NCLT Rules 2016 & Section 60(5)(C) of the IBC, 2016, R/w Section 420(2) of the Companies Act, 2013, by seeking the following reliefs:

- a. To review the order dated 07.02.2020 in C.P.(IB)No.389/BB/2019 passed by this Adjudicating Authority by considering the above facts and circumstances by suspending the above order for a period three (3) months;
 - b. To pass any such other order/s as this Adjudicating Authority deems fit and proper in the facts of the case in the interests of justice;
2. Brief facts of the case, leading to filing of the present Review Application, are as follows:
- (1) C.P.(IB)No.389/BB/2019 was filed by M/s.Skylark Ithaca Buyers Welfare Association, U/s 7 of the IBC, 2016, R/w Rule 4 of the I&B (AAA) Rules, 2016, which was admitted by the Adjudicating Authority, vide order dated February 7th, 2020, by initiating CIRP, appointing Mrs. Ramanathan Bhuvaneshwari as the IRP, imposing moratorium etc.
 - (2) Thereafter, the Interim Resolution Professional, published "Public Announcement/Notice" in FORM A on 20/21.02.2020, in two newspapers, i.e. 'Business Standard' in English language and 'Varthabharati' in Kannada language on 21.02.2020 by calling for claims from the Creditors of the Corporate Debtor with proof on or before 03.03.2020 to IRP and also asked the Financial Creditors belonging to Class as listed against the entry No.12 shall indicate its choice of Authorised Representative (AR) among the three Insolvency professionals, listed against entry No.13 to act as AR of the class- Home Buyers in Form CA. Accordingly, the IRP collated the claims received, verified and admitted claims subject to evidence produced by them, and thereafter constituted Committee of Creditors on 10th March 2020, which is as follows:

Sl. No.	Creditors name	Status	Date of submission on of claim	Amount claimed Rs.	Amt. admitted Rs.	Voting Power %	Remarks
1.	HDFC Ltd.	Financial Creditor	02.03.2020	51,10,23,462	16,84,15,951	2.83%	Home loan provider, shall be reduced once the respective home buyers submit their claims
2.	Home Buyers	Financial Creditor	03.03.2020	5,79,22,28,238	5,79,22,28,238	97.17%	663 No. of Home Buyers
	Total			6,30,32,51,700	5,96,06,44,189	100%	

(3) The Home Buyers/Financial Creditors consisting of the highest Number of 474 out of 663, have proposed Mr. Raghuram Manchi to be their Authorized Representative. The Operational Creditors claimed amount is Rs.2,09,79,082/-.

3. The following grounds have been raised in instant Review Application, in support of reliefs as sought for:

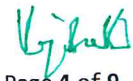
(1) It is alleged that the impugned order passed by this Adjudicating Authority is unilateral, as the Applicant/Respondent has not placed the facts and materials, which will adequately elucidate and establish the facts and prove that Corporate Debtor is solvent and is not primarily related to construction and development of the real estate project Skylark Ithaca and there exist no privity of contract between the Applicant and the Respondent, It is not under legal obligation to either construct and complete the real estate project Skylark Ithaca.

(2) The impugned order caused a greatest hardship and irreparable loss to the Applicant/Respondent. Though, the



Respondents/Petitioners have failed to submit any documents/materials in support of their claims/demands/averments, the Respondents/Petitioners have failed to establish prima facie case so as to initiate CIRP against it. On the other hand, the Applicant/Respondent has not been given a fair opportunity to bring the facts on record and to place the documents/materials on record in support of the facts and has been made to suffer gravely by virtue of the impugned.

- (3) The Applicant/Respondent has not been in receipt of any amount in form of sale consideration towards construction of the residential units in the Real Estate Project Skylark Ithaca, as there exists no primary contractual relationship between the Applicant/Respondent and the Members of the Respondents/Petitioners.
- (4) The Applicant is an ongoing concern and is financially sound and close to 450 employees are currently working/associated with it. The Petitioners have filed false and concocted Application/Petition, U/s 7 of the Code, 2013 before Adjudicating Authority. The Applicant's total business runs into Crores. When this is the size of business and business continues day to day. There are hundreds of vendors and employees, who are dependent on the running of the business of the Applicant. Given this situation, the Applicant/Respondent has more than sufficient liquidity and has cash flow to take care of its liability and the alleged liabilities by the Respondents/Petitioners are not the liabilities of Applicant/Respondent. So long as there is sufficient cash flow, even if there exist operational losses, the Applicant/Respondent can meet all its liabilities and cannot be said to be insolvent.
- (5) The Applicant is involved in construction, completion and development of the other real estate residential projects and the said constructions are at various stages. The impugned order dated 07.02.2020 initiating the Corporate Insolvency Proceedings



against the Applicant/Respondent would completely halt all such development and construction activities and all allottees, banking institutions, non-banking institutions, vendors, contractors, employees and labourers would be put to greatest hardship and irreparable loss. The impugned order has caused grave hardship and injury to the Applicant/Respondent and has affected the business and reputation of the Applicant/Respondent in the Real Estate Market. The Applicant/Respondent undertakes to pay the Interim Resolution Professional fees, as the Adjudicating Authority may order under this matter.

4. Heard Shri Shashikala Shetty, learned Senior Counsel for the Applicant and Shri Jashua H.Samsuel learned Counsel for Respondent. We have carefully perused the pleadings of the Parties and the extant provisions of the Code, its rules and extant provisions of Companies Act, 2013 and the impugned order passed in the case.
5. The main point arise for consideration is whether the instant Review Application is maintainable, U/s 60 (5) of the Code, R/w Section 420(2) of the Companies Act, 2013 to review the order passed by this Adjudicating Authority.
6. The Adjudicating Authority, after affording reasonable opportunity to the Applicant/Respondent, as detailed in the order, admitted the case by impugned order dated 7th February, 2020 by initiating CIRP, appointing IRP, imposing Moratorium etc. It is settled position of law, once a case filed under provisions of Code is admitted by Adjudicating Authority, it will become Functus officio and it will not empower to review its own order and only Appellate Tribunal is empowered to examine legality of such order. Accordingly, any person aggrieved by such order, an Appeal can be preferred to Appellate Authority U/s 61 of Code. It is relevant to point out here, that one Xander Finance Pvt. Ltd has filed Company Appeal (AT)(Insolvency) No. 431 of 2020 before the Hon'ble NCLAT, which was ultimately dismissed as withdrawn by



an order dated 18.03.2020, by leaving it to open to the Appellant to seek appropriate remedy before the appropriate forum.

7. Since the instant Application is filed U/s 60 (5) (C) of the IBC, 2016 R/w Section 420 (2) of the Companies Act, 2013, it is relevant to extract those provisions here for ready reference:

Section 60(5) of the IBC, 2016, reads as under:

“60. (5) notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of –

(a) Any application or proceeding by or against the Corporate Debtor or Corporate person;

(b) Any claim made by or against the Corporate Debtor or Corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) Any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the Corporate Debtor or Corporate person under this Code.”

Section 420(2) of the Companies Act 2013, reads as under:

“420. (2) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that *no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.”*

By reading Provisions to Section 60(5) of the Code together, do not authorise the Adjudicating Authority to review its own order. In the instant case, the Applicant is questioning the very admission order passed by the Adjudicating Authority on various grounds as mentioned in it. There is no ambiguity in the Code, once a case is



admitted by Adjudicating Authority under the provisions of Code, any Party aggrieved by order(s)/decisions taken during process of CIRP in question, can move appropriate Application seeking appropriate relief. However, it cannot be interpreted that an Application, as referred to in provisions of Code, include an Application to question the very admission order passed by the Adjudicating Authority by initiating CIRP, appointing IRP, imposing moratorium etc. In those circumstances, only Appeal is appropriate remedy, under Section 61 of the Code. Therefore, the instant Review Application is not at all maintainable.

Moreover, provisions of the Companies Act, 2013, in normal circumstances, do not applicable to provisions of Code, which itself is comprehensive Code with various rules framed thereunder. Even Section 420(2) of Act, as extracted supra, only confers the Tribunal very limited jurisdiction with reference to rectifying mere mistake(s) apparent on the face of record. As stated supra, the Applicant is seeking for review of the impugned order, which is not permissible either under extant sections/rules either under the Code and Companies Act.

8. So far as allegation of the Applicant/Respondent that it was not given sufficient opportunity to put forth its claim before the Adjudicating Authority, before passing the impugned order, is concerned, it is relevant to point out here that Shri Prashant Kumar, learned Counsel representing Applicant/Respondent, while opposing the admission of the Case, has filed brief dated 07.02.2020(refer para 6 of impugned order). The main Company Petition was filed on 25.09.2019, on the file of Adjudicating Authority, and it was admitted only on 07th February, 20120, and paras 7 to 9 of the impugned order, has clearly adverted various opportunities granted to the Applicant/Respondent. Therefore, this allegation is without any basis and not tenable. The record shows that the Adjudicating Authority has granted sufficient



opportunities to the Applicant/Respondent to explore the possibilities of settling the issue. However, they have failed to avail such opportunity. It is relevant to extract para 19 of impugned order, which says “ It is also relevant to point out here that we cannot keep the grievances of more than 250 home buyers pending, that too without any response coming from the Corporate Debtor to show any sort of solution for the issue raised in the instant petition. As per law, even after initiating CIRP, it is permissible for the parties to settle the issue in question and can withdraw the petition with permission of Adjudicating Authority by filing appropriate application” Therefore, since the COC predominantly consists of Home Buyers constituting 97.17 %, and sole financial Creditor is HDFC by holding 2.83 % claim, the Applicant/Respondent can still avail opportunity provided under the provisions of Code. However, the Applicant now contends that there is no privity of Contract exists between the Parties, so as to authorise/empowers the Petitioners to file the main Company Petition itself, which goes to root cause of action, which cannot be gone into by the Adjudicating Authority, after initiation of CIRP, as detailed supra.

9. As detailed supra, the CIRP has already been started, and the CoC was also constituted, and Sri Raghuram Manchi, was also elected Authorised Representative for Home Buyers, and an Application seeking to appoint him as such was filed, and it is pending on the file of this Adjudicating Authority. As stated supra, Appeal filed by M/s.Xander Finance Pvt. Ltd. before the Hon'ble NCLAT vide Company Appeal (AT) (Insolvency) No.431 of 2020, was dismissed as withdrawn, vide order dated 18.03.2020, leaving it open to the Appellant to seek appropriate remedy before the appropriate forum. Therefore, it is not open to the Adjudicating Authority to suspend the impugned order as prayed for.



10. For the aforesaid reasons and circumstances, we are of the considered view that the Applicant/Respondent failed to make out any case so as to grant any relief(s) as prayed for. Therefore, it is liable to be rejected.
11. In the result, R.A.No.02 of 2020 in C.P.(IB)No.389/BB/2019 is hereby rejected. However, this order will not come in the way of Applicant/Respondent to approach the Hon'ble NCLAT, as per law, seeking suitable order(s). No order as to costs.

(ASHUTOSH CHANDRA)
MEMBER, TECHNICAL

(RAJESWARA RAO VITTANALA)
MEMBER, JUDICIAL

Puja