IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT-V

I.A. 2974 OF 2021
IN
C.P.(IB) No. 3169/MB/2019

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

Fervent Synergies Limited,

B-7/8, Satyam) Shopping Centre, M.G. Road,) Ghatkopar East, Mumbai — 400077

...Applicant

Vs

MANISH MOTILAL JAJU,

Resolution Professional of Sivana Realty Private Limited
D 502, Neelkant Business Park, Vidya Vihar (W), Mumbai — 400 086

...Respondent no. 1

Kabra Estate and Investment Consultant

...Respondent no. 2

LIC Housing Finance Ltd

...Respondent no. 3

IDBI Trusteeship Services Ltd

...Respondent no. 4

Nepean Finvest Private Limited

...Respondent no. 5

Mr. Nirav Prakash Shah

...Respondent no. 6

In the matter of

Spartan Engineering Industries Private Limited,

...Operational Creditor

Vs

Sivana Reality Private Limited

...Original Respondent/ Corporate Debtor

Order Pronounced on: 19.07.2023

Coram:

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

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

Appearances (via Videoconferencing)

For the Applicant: Mr. Chirag Bhavsar i/b Vis Legis Law Practice

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

Per: Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The present Application is filed by the Applicant, namely, **Fervent Synergies Limited**, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 **("Code")** read with rule 11 of the National Company Law Tribunal Rules, 2016 **("NCLT Rules")** objecting the resolution plan submitted by M/s Kabra Estate and Investment Consultants **("Successful Resolution Applicant")** which has been approved by the Committee of Creditors of the Corporate Debtor.

2. The Applicant is an allottee and purchaser of various flats in a project known as '*Samriddhi Garden*' developed by the Corporate Debtor at Bhandup,

Mumbai **("the Project")** and is therefore a Financial Creditor holding 3.52% voting share in the Committee of Creditors **("CoC")** of the Corporate Debtor.

3. The Respondent No.1 is the Resolution Professional of the Corporate Debtor (**Sivana Reality Private Limited**) appointed vide order dated 03.11.2020 of this Tribunal. The Respondent No.2 is the Resolution Applicant who has submitted a resolution plan in respect of the Corporate Debtor which has purportedly been approved by a majority of the CoC. Respondent Nos 3 to 6 are the members of the Committee of Creditors of the Corporate Debtor having 26.92%, 26.35%, 1.93% and 0.04% voting rights in the COC respectively.

4. The Applicant and the Corporate Debtor executed ten separate Agreements for Sale, all dated 09.08.2018 in respect of various flats in the aforesaid project being developed by the Corporate Debtor. The details of the various flats purchased by the Applicant as given under:

Sr. No.	Flat no and wing	Carpet Area (sq. mtr)	Purchase Consideration (INR)	Promised Date of Possession
1	101, D	78.14	1,30,00,000/-	31.03.2020
2	102, D	77.84	1,30,00,000/-	31.03.2020
3	1701, D	78.14	1,30,00,000/-	31.03.2020
4	1703, D	77.70	1,30,00,000/-	31.03.2020
5	2101, D	78.14	1,30,75,000/-	31.03.2020
6	2102, D	77.84	1,30,25,000/-	31.03.2020
7	2103, D	77.70	1,30,00,000/-	31.03.2020
8	2104, D	77.69	1,30,00,000/-	31.03.2020

9	2203, D	77.70	1,30,00,000/-	31.03.2020
10	2204, D	77.69	1,30,00,000/-	31.03.2020

5. It has been submitted that the Corporate Debtor represented to the Applicant on availing of financial assistance from Respondent No. 3 and as per the facility documents / sanction letter, the Corporate Debtor, prior to the execution of the Agreements for Sale had applied for and obtained a No Objection Certificate for the sale of the said flats to the Applicant. It has been submitted by the Applicant that the Corporate Debtor failed to deliver the possession to the Applicant despite promising the possession by 31.03.2020.

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

7. It has been submitted that proof of claim was filed by the Applicant vide Form CA dated 24.08.2020. The IRP vide an email dated 13.09.2020 informed the Applicant that its claim had been admitted as a financial creditor of the Corporate Debtor. Subsequently, this Tribunal vide order dated 03.11.2020 appointed the Respondent No.1 as the Resolution Professional ("RP") of the Corporate Debtor.

8. The Applicant has further submitted that the Respondent no. 1 vide an email dated 03.06.2021, called upon the Applicant to provide a No Objection Certificate in respect of the above-mentioned flats sold by the Corporate Debtor. This request was once again made by the Respondent No.1 vide his email dated 13.06.2021.

9. The Applicant received an email dated 17.06.2021 from the Respondent no. 1 whereby applicant was informed that its claim has been rejected as a No-

Objection Certificate was not obtained from Respondent no. 3. The advocate for the Applicant through letter dated 23.06.2021 informed Respondent No. 1 that the claims made by the Applicant were always admitted and were not subject to further verification. It was further informed that the Respondent No. 1 did not have the authority to adjudicate claims.

10. Aggrieved from the above conduct of the Respondent no. 1, the Applicant has filed Interlocutory Application No. 1639 of 2021 challenging the rejection of the claim and seeking directions against Respondent No.1 to accept and admit the Applicant's claim as the financial creditor of the Corporate Debtor.

11. Subsequently, vide an email dated 30.06.2021, the Respondent No.l informed the Applicant that pursuant to the decision taken by the Committee of Creditors during 11th CoC meeting held on 28" June 2021, the claim of Applicant, which was rejected / placed under verification, was restored as of 01.06.2021 as a financial creditor belonging to a class of creditors.

12. The Applicant has submitted that Respondent no. 2 submitted its final resolution plan on 28.10.2021 and the same was approved by a majority of 99.96% of the Committee of Creditors of the Corporate Debtor.

13. The Applicant has further submitted that the resolution plan submitted by Respondent No.2 is ex-facie illegal, contrary to the provisions of the Code and the Regulations framed thereunder as it unfairly distinguishes between the same class of creditors and, therefore, liable to be rejected and set aside.

14. The Applicant has submitted that the resolution plan envisages separate preferential treatment for those allottees / flat purchasers in respect of whose flats the Corporate Debtor has obtained a No Objection Certificate from Respondent No. 3 as against those flat purchasers in respect of whose flats the Corporate Debtor has not obtained a No Objection Certificate from Respondent No. 3. The resolution plan categorises this latter type of flat

purchasers as affected home buyers and allots a significantly lesser area to such flat purchasers under the resolution plan, whereas, the former type of flat purchasers has been categorised as unaffected home buyers who are being allotted the entire area of their respective flats as per their respective Agreements for Sale / allotment letters.

15. It is pertinent to note that out of the ten total flats owned by the Applicant, as per the Resolution Plan, three of them are proposed to be allotted to Respondent No. 3 while three of them would be allotted to the Respondent No. 2. The Applicant vide its emails dated 21.10.2021 and 27.10.2021 brought to the notice of the Respondent No. 1 that the Resolution Plan is patently illegal and the same deserves to be otherwise rejected.

16. During the 18" CoC meeting held on 30" October 2021, the CoC suo moto decided that the differential treatment to affected and unaffected home buyers is valid.

17. It has been submitted by the Applicant that the resolution applicant could not have differentiated between the same class/ set of creditors who are otherwise similarly placed as financial creditors (home buyers).

18. During the meetings of CoC held during the CIRP, it was also discussed that the sale of flats to the affected home buyers i.e. without obtaining No Objection Certificate from the Respondent No.3 was to be treated as a preferential / fraudulent transaction in terms of the provisions of Sections 43 & 66 of the Code and, therefore, the transactions in respect of such flats should be differentially treated. The Applicant has submitted that this is a completely erroneous interpretation of the provisions of Sections 43 & 66 of the Code. The Applicant has further submitted that it is not an entity who has received any money and/or taken any asset in violation of the aforesaid provisions. On the contrary, the Applicant is a bona fide flat purchaser who has in fact, paid monies to the Corporate Debtor to the tune of Rs. 13,11,00,000/- (Rupees Thirteen Crores Eleven Lakhs Only), towards

purchase of the flats and an amount of Rs 72,11,725/- (Rupees Seventy Two Lakhs Eleven Thousand Seven Hundred and Twenty Five only) towards requisite stamp duty and registration charges for the registration of the said Agreements.

19. The Applicant has further submitted that such differential treatment amongst the same class / set of creditors is, in fact, nowhere provided in the Code or the regulations framed thereunder and is completely contrary to the law.

20. In the light of the above grounds, the Applicant has prayed for the rejection of the Resolution Plan.

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

21. It has been submitted by the Respondent No. 1 that under the Final Resolution Plan of the Respondent no. 2, "affected allottees" are those who have been allotted units in the Project of the Corporate Debtor without prior permission of the Respondent No. 3. Further it was submitted that the Applicant is an Affected allottees as it has not been able to produce any no objection certificate issued by the Respondent no. 3 and, therefore, will be treated in the manner set out in Paragraph 7.1.10 of the Final Resolution Plan whereby it is stated that Affected allottees are to be cancelled from the date of sanction of resolution plan and fully paid up units as full and final settlement will be allotted against their claim.

22. It has been further submitted that unaffected allottees are required to make balance payment against the units allotted to them, as set out in paragraph 7.1.11 in the Final Resolution Plan.

23. It has been submitted that the Final Resolution Plan is in accordance with section 30 of the IBC and has provided for the mandatory contents as required under the Regulation 38 of the Applicable regulations.

24. It has further been submitted that it is a settled position of law that there is no embargo upon different treatment for different creditors, even if they fall under the same category of financial creditors, operational creditors, or other creditors.

25. It has submitted that the as per the settled position of law, a Resolution Plan which has been approved by the commercial wisdom of the COC, can only be rejected if it is found to be against section 30 of the IBC which the Applicant has not been able to prove.

REPLY FILED ON BEHALF OF RESPONDENT NO. 2 (SUCCESSFUL RESOLUTION APPLICANT)

26. At the outset, the Respondent No. 2 has denied all the claims, contentions and allegations contained in the said Application.

27. It has been submitted that the Applicant has failed to demonstrate and make out any case to show that this Tribunal ought to exercise its limited and circumstantial jurisdiction and discretion under section 31 of the IBC to interfere with a resolution plan approved by a majority of CoC members.

28. It has been submitted that Committee of Creditors of the Corporate Debtor have considered and approved the Plan with the majority of 99.96% after conscious contemplation, deliberation, and discussion and being fully aware of the differential treatment.

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

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

31. It has further submitted that affected homebuyers with a majority of 57.63% have approved the Resolution Plan and therefore, the contention that majority of home buyers have not approved the plan outght to be dismissed.

32. With the above averments, the Respondent no. 2 has prayed for the dismissal of the present Application.

REPLY FILED ON BEHALF OF RESPONDENT NO. 3

33. It has been submitted that the present Application is not maintainable in law as the applicant cannot file individual application when they are represented through an Authorised Representative who has not been impleaded as a party to the present application.

34. It has further been submitted that the Tribunal is not empowered with the jurisdiction to override the decision of the COC which has with a majority voted for the approval of the present Resolution Plan.

35. It has submitted that the Corporate Debtor had approached the Respondent herein for taking over their loan with ICICI Bank and for grant of a Term loan facility on or about Sept 2017 for carrying out construction and developing two projects namely ‘Samriddhi Garden’ (“Phase 1 Project’) and ‘Oakwood’ (“Phase 2 Project”). The Respondent has further submitted that the flats allotted to Applicants in the year 2018 were mortgaged in favour of the Respondent No. 3 much prior on 15/09/2017 and dealing in respect of the same was subject to the ‘NOC’ being obtained from Respondent no. 3. Any rights of the Applicant would be subservient to the rights of the Respondent no. 3 and therefore, the Applicant cannot claim itself to be the ‘Financial Creditor’.

36. It has further submitted that the Authorised representative of the homebuyers having voted in favour of the Resolution Plan. Therefore, the present Application is not maintainable as the Applicants are in effect seeking to challenge their own vote in the Resolution Plan.

37. With the above averments, the Respondent no. 3 has prayed for the dismissal of the present Application.

FINDINGS:-

38. We have heard the Counsel for the Parties and have gone through the record.

39. This IA has been filed on behalf of the Applicant i.e. Fervent Synergies Limited claiming that the Applicant is a Financial Creditor holding 3.52% voting share in the Committee of Creditors, being an allotte and purchaser of various flats in the project namely 'Samriddhi Garden' being developed by the Corporate Debtor. By way of the instant IA, the Applicant is seeking a declaration that the Resolution Plan dated 28.10.2021 is illegal and the same be quashed and set aside and Respondent No. 1 be restrained from taking any steps towards the approval of the Resolution Plan submitted by Respondent No. 2 i.e. Kabra Estate and Investment Consultant. Thus, the Applicant is seeking to set aside the Resolution Plan in the capacity of a Financial Creditor/Home Buyer whereas a majority percentage of the Home Buyers as a class have voted in favour of the Plan.

40. Now the question arises as to whether or not a Home Buyer individually can oppose/object to the Resolution Plan when the Home Buyers as a class has voted by a majority in favour of the Plan.

41. The answer to the aforesaid question can be found in **Jaypee Kensington Boulevard Apartments Vs. NBCC (India) Limited and others (2022) 1 SCC 401**, wherein the Hon'ble Supreme Court has categorically held as follows:

(i) "Every individual allottee does not become an independent financial creditor of the corporate debtor if the number of allottees

are 10 or more, in terms of the meaning assigned to the expression "class of creditors" in the CIRP Regulations 130. (The allottees, like the homebuyers of JIL, falling within clause (f) of sub-section (8) of Section 5, do carry the status of financial creditors but they would be falling in a class collectively; and the voting share of that class would be in terms of the financial debt owed to that class as a whole.

(ii) Specific provisions have been made for voting on behalf of a class of creditors in terms of clause (b) of sub-section (6-A) of Section 21 by the authorised representative. The rights and duties of the authorised representative of financial creditors are also delineated in Section 25-A of the Code and any doubt, as to how he would vote and how his vote is counted, is put to rest by insertion of sub-section (3-A) to Section 25-A. which provides that notwithstanding anything to the contrary contained in sub-section (3), the AR shall cast his vote on behalf of all the financial creditors he represents "in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote".

(iii) It is made explicit that the allottees, even if not a homogeneous group, they could vote only either to approve the resolution plan or to disapprove the same. Divergence of the views within their own class may exist but, when coming to the vote in the Committee of Creditors, their vote would be that of a class.

(iv) Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote over the resolution plan. It is obvious

that if this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code.

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

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

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

42. In the light of what has been held by the Hon'ble Supreme Court in the afore-cited judgment, it becomes abundantly clear that Home Buyers can vote for or against the Plan only as a class and if there are some Home Buyers pitted against the Resolution Plan, who are otherwise in minority, have absolutely no locus to oppose the Plan in the capacity of dissatisfied or dissenting Home Buyers. It is also abundantly clear that such dissenting

minority segment within the class of Home Buyers cannot arrogate themselves to be dissenting Financial Creditors. That being the legal position, which is explained in unequivocal terms by the Hon'ble Supreme Court in Jaypee Kensingtons case, in our considered view, any objection raised by the so-called minority Home Buyers against the Plan, which have been approved by them as a class, cannot be entertained and are liable to be rejected at the very threshold without going through the merit of such objections. Therefore, the objections raised in the IA are liable to be dismissed as the Applicant has no locus to maintain any such objections against the Resolution Plan.

43. As a result of the above discussions, the above IA No. 2974 of 2021 is hereby summarily **dismissed.**

Sd/-	**Sd/-**
ANURADHA SANJAY BHATIA	**KULDIP KUMAR KAREER**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**