

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-V

I.A. 933 OF 2022

IN

C.P.(IB) No. 3169/MB/2019

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

Sabari Reality Private Limited,

101, Sabari Prasad, 11th Road,
Chembur, Mumbai – 400 071

...Applicant

Vs

Sivana Reality Private Limited,

Through its Resolution Professional

Mr. Manish Jaju

Samriddhi Garden, CTS No. 403/C,

LBS Road, Opp. Eshwar Nagar,

Bhandup (west), Mumbai – 400 078

...Corporate Debtor

In the matter of

Spartan Engineering Industries

Private Limited,

...Original Petitioner

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. Ranjeev Carvalho a/w Adv. Rupesh Geete i/b
Satyaki Law Associates

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, Sabari Reality Private 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 to 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.

FACTS OF THE CASE

2. The Applicant is a '**Homebuyer/ Allottee/ Financial Creditors in a Class**' in respect of 25 Flats ("Flats") in Phase-2 of the Corporate Debtor's Project known as 'Sunshine Oakwood' ("Project").
3. By the present Application, the Applicant is objecting to the Resolution Plan ("**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 ("**CoC**"). Under the Resolution Plan, homebuyers, i.e., a class in itself, have been further

classified as **'affected allottees'** and **'unaffected allottees'**, i.e. two separate classes within the class of homebuyers, and accorded differential treatments i.e. one group of allottees are getting the promised area of the flat, in its entirety, termed as unaffected allottees and the other group of allottees getting less than 1/3" of the promised area approx., termed as affected allottees. Further, even within the class of affected allottees, 2 (two) further classes have been created with one class required to pay Rs. 2,850/ per sq. ft., and the other class required to pay Rs. 8,500/- as escalation charges. In all, 3 classes have been created within the class of home buyers. This class within a class is specially created to divide the members within the same class and is, therefore, biased and unfair.

4. It is submitted that the classification is discriminatory and in contravention of the provisions of the IBC. Further, the Resolution Plan extinguishes the claims of the Homebuyers in part or in its entirety and deprives affected allottees of their property, in blatant violation of Article 300A of the Constitution of India. It is submitted that there is no provision under IBC that permits the same. Consequentially, the Resolution Plan is liable to be rejected for violation of Section 30(2)(e) of the TBC. Copy of the Resolution Plan and the clarifications thereto provided by the Successful Resolution Applicant are annexed hereto and marked as "EXHIBIT — A" and "EXHIBIT — B". Copy of the Final Voting Results of the CoC on the Resolution Plan is annexed hereto and marked as "EXHIBIT - C".
5. The Corporate Debtor is a real estate company, constructing 2 (two) projects, namely, Samriddhi Garden, comprising of Wings A, B, C & D (Phase-1 Project) and Sunshine Oakwood, comprising of Wing 'A' and Wing 'B' (Phase-2 Project).
6. By and under a Mortgage Deed dated September 15, 2017, made and entered into between the Corporate Debtor and LIC Housing Finance Limited (**"LIC"**), registered with the Office of the Sub Registrar of Assurances, Kurla under serial no. KRL3-9386 of 2017 (**"Mortgage Deed"**), the Corporate Debtor

mortgaged Wing 'C' & 'D' of the Phase-1 Project and the Phase-2 Project in its entirety in favour of LIC, on the terms and conditions more particularly recorded therein. Copy of the Mortgage Deed is annexed hereto and marked as "EXHIBIT - D".

7. As per the mortgage Deed, the Corporate Debtor was required to take prior written permission of LIC before sale or creation of any third-party rights over the aforesaid mortgaged properties. It is further important to note that the Mortgage Deed with LIC has not been disclosed on the MahaRERA website.
8. Pursuant to initiation of the corporate insolvency resolution process ("CIRP") of the Corporate Debtor, admitted and undisputedly, the claims of all the homebuyers, including the Applicant have been accepted by the Resolution Professional and have been categorised as 'Homebuyers/ Allottees/ Financial Creditors in a Class'. However, the Applicant, amongst several other homebuyers, have been classified as 'affected allottees' in the Resolution Plan by the Successful Resolution Applicant on the ground that no written permission was obtained from LIC by the Corporate Debtor prior to sale of the flats to the said homebuyers.
9. On October 30, 2021, the 18th CoC Meeting was held and the Resolution Plan of M/s. Kabra Estate and Investment Consultants was kept for voting. At this juncture, the Applicant had filed its objections to the Resolution Plan with the CoC, highlighting that the Resolution Plan is in blatant contravention of not only the provisions of IBC, but also the Constitution of India. However, no response was addressed by the Resolution Professional to the same. Copy of the email addressed by the Applicant to the Resolution Professional and the CoC is annexed hereto and marked as "EXHIBIT — E".
10. On November 22, 2021, the voting results were announced and the Resolution Plan was approved with majority.

11. At the very outset, the Applicant states that the constitution of the CoC of the Corporate Debtor is invalid, illegal and bad in law. The Resolution Professional has kept the Applicant out of the CoC in blatant contravention of the provisions of IBC and more importantly, has refused to recognise a binding decree and order of the Hon'ble Supreme Court under Article 142 of the Constitution of India, and has permitted related party entities to participate and vote in the CoC meetings.
12. On perusal of the aforesaid facts, it is amply clear that the Resolution Professional has already classified the Applicant, as well as all similarly placed creditors, as homebuyers/ allottees/ financial creditors in a class. However, in blatant contravention of his own email, the Resolution Professional has failed to provide the Applicant with all consequential rights of a financial creditor in a class and not permitted the Applicant to participate and/ or vote in the ongoing CIRP. The Applicant has written several emails in this regard, but to no avail. It is settled law that once the Resolution Professional has classified a particular creditor in terms of the classification permitted under IBC, the Resolution Professional has no power to alter, amend, modify or revise the classification effected in this regard. However, in blatant contravention of the same, the Resolution Professional has refused to provide the Applicant with all its rights in the CIRP, as a 'homebuyer/ allottee/ financial creditor in a class.'
13. For the sake of completeness, the Consideration Amount under the SPA has not been paid by Vira Group, till date. By a notice dated October 16, 2019, the Applicant called upon Vira Group to pay the Consideration Amount under the SPA and sought specific performance of the SC Order. In response to the said notice, the Advocate for the Vira Group vide their reply dated November 28, 2019, categorically stated that the said demand is bad in law, has no effect and is inconsequential. The reply further called upon the Applicant to withdraw the notice. Both parties did not take any steps in furtherance thereof and the communications exchanged in this regard stand withdrawn. Copies of the notice dated October 16, 2019, and

November 28, 2019, are annexed hereto and marked as “EXHIBIT — Q” and “EXHIBIT — P” respectively.

14. However, in the midst of the CIRP, on August 3, 2021, Vira Group has addressed an email purportedly cancelling the SPA, in so far as the Applicant is concerned (“SPA Cancellation Email”). In response thereto, by an email dated August 16, 2021, the Applicant called upon Vira Group to withdraw the SPA Cancellation E-mail, being in contempt of the SC Order. The SPA Cancellation E-mail is in breach of the SC Order read with Memorandum of Settlement and the SPA. Vira Group has assumed control of the Corporate Debtor post SC Order, managed the day-to-day affairs and driven the company into CIRP. The said email is illegal, void ab initio and non est. It is not anyone’s case that the Applicant interfered with the day-to-day ‘management and affairs of the Corporate Debtor and/ or was involved in any manner whatsoever, post the SC Order. The Respondent is put to strict proof to prove that the Applicant was engaged in any capacity whatsoever with the Corporate Debtor, post SC Order. Vira Group has knowingly accepted the benefit of the SC Order and is estopped from denying the validity of, or the binding effect of the SC Order, upon themselves. In fact, in lieu of the SPA Cancellation B-mail, the Applicant filed Contempt Petition (Diary) No. 20334 of 2021 against the Vira Group before the Hon’ble Supreme Court. By an order dated November 13, 2021, the Hon’ble Supreme Court recognized the rights of the Applicant under the SC Order read with Memorandum of Settlement and the SPA and granted liberty to the Applicant to take appropriate steps in accordance with law, in terms of the Applicant’s rights arising from the same. The Contempt Petition was accordingly withdrawn by the Applicant. Copy of the communications exchanged between the Applicant and Vira Group are annexed hereto and marked as “EXHIBIT — Q (Colly)”. Copy of the order dated November 13, 2021, passed by the Hon’ble Supreme Court in the Contempt Petition is annexed hereto and marked as “EXHIBIT — R”.

15. The Applicant is shocked and surprised by this conduct of the Resolution Professional who has, chosen to keep the Applicant, on the side-lines during the entire CIRP, without taking any steps/ actions to approach this Hon'ble Court in respect of the aforesaid allegations raised against the Applicant and. put a quietus, one way or the other, to the aforesaid pending issues. The Applicant fails to understand the basis for the same and has been engaged in an endless correspondence exchange with the Resolution Professional. The Resolution Professional has chosen to believe the factual rendition of Vira Group as the gospel truth and has failed to take effective control of the management and affairs of the Corporate Debtor as well as go through the records of the Corporate Debtor, despite being seized of the same.
16. Further, the Resolution Professional has resorted to making false and baseless allegations against the Applicant. No steps have been taken in furtherance to these communications by the Resolution Professional to approach this Hon'ble Court and adjudicate the same, in accordance with the provisions of IBC. On one occasion, the Resolution Professional has termed the Applicant's transaction for the Flats as undervalued and fraudulent.
17. Furthermore, on perusal of the voting results, it appears that the Vira Group, through their related party entity, Vira Capital Private Limited and Kalpatru Advisory Services Private Limited, have been permitted to participate in the CoC meetings, as a financial creditor, despite evidently being a related party, in violation of the IBC. The Applicant therefore states that the Resolution Professional is hand-in-glove with Vira Group i.e., the suspended board of directors/ promoters of the Corporate Debtor and is taking all possible steps to extinguish the legitimate rights and claims of bonafide creditors. The Applicant submits that the entire CIRP has been vitiated on account of the illegal actions of the Resolution Professional. Copy of the MCA registration page of Vira Capital Private Limited and

Kalpatru Advisory Services Private Limited are -annexed hereto and marked as “EXHIBIT-S” and “EXHIBIT -T” respectively.

18. The Resolution Professional was aware of the SC Order and the Memorandum of Settlement and the SPA, which is evident from the Information Memorandum. Despite the same, the RP has failed to affect the transfer in the register of members of the Corporate Debtor. Copy of the Information Memorandum is annexed hereto and marked as “EXHIBIT-U”.
19. Section 88 of the Companies Act, 2013, mandates that the company shall keep and maintain the register of members, in such manner which reflects reality at any particular point of time. According to Rule 3(1) of the Management Administration Rules, 2014 every Company limited by shares shall, from the date of registration, maintain a register of its members in Form No. MGT-1. The compliance sought under the aforesaid provisions are mandatory in nature and the Resolution Professional has therefore failed to effectively perform his duties and functions, in management of the affairs of the Corporate Debtor.
20. it is pertinent to note that even the Successful Resolution Applicant recognizes the importance and the binding nature of the Hon’ble Supreme Court’s order dated December 3, 2018, and categorically states that the erstwhile shareholders of the Corporate Debtor, including the Applicant, transferred their entire shareholding in favour of Jayesh Shantilal Vira.
21. However, for reasons unknown, the Resolution Professional has purposefully disregarded the same and continues to identify the Applicant as a shareholder of the Corporate Debtor. On the basis of this misconceived and incorrect understanding of the facts and law and despite being seized of all papers and proceedings pertaining to the Corporate Debtor that the Resolution Professional has chosen to disregard the Applicant’s claims and, consequentially, their rights in the CIRP. Till date, the Applicant has not

been permitted to participate and vote in the CoC meetings, and bald and vague allegations have been raised against the Applicant, categorizing their transactions as undervalued and fraudulent, without any basis whatsoever and/or approaching the Hon'ble NCLT, Mumbai Bench for necessary directions. The Resolution Professional has simpliciter failed to perform his duties and has kept the Applicant out of the entire process, without any finality and/or adjudication to the allegations raised. This is a material procedural impropriety committed by the Resolution Professional, which impairs the Applicant's rights and, consequentially, the CIRP.

22. IBC does not and cannot permit such sub-classification and/ or discriminatory treatment between similarly placed creditors. There is no sub-class of creditors as 'affected allottees' and 'unaffected allottees' under the IBC. The Resolution Professional has adjudicated all flat purchasers as homebuyers/ allottees in a class, and the treatment to all such creditors ought to be the same.
23. The treatment accorded to the affected allottees, in so far as their area is reduced nearly $2/3^{\text{TM}}$ of the original allotment and are further required to pay an exorbitant premium to secure the same, is a double whammy to their rights and entitlements.
24. The entire reason for the classification of allottees/homebuyers as financial creditors under IBC is that: (i) monies raised by homebuyers are used for financing the project being developed by the Developer/ Corporate Debtor; and (ii) homebuyers/ allottees are genuinely interested in obtaining their flats in the project. The Resolution Plan is creating several classes within the class of homebuyer (financial creditor) created by the statute. Thus, the Resolution Plan, therefore, treats equals unequally. Such sub-classification within a class is unheard of and not permitted under the IBC and/ or the Constitution of India. It must be noted that the Resolution Professional is duty-bound by IBC and applicable regulations to classify all creditors of the Corporate Debtors as per the statute. The Resolution Professional has

already done the classification; the Resolution Plan cannot now seek to create further classification on the basis of certain irregularities in the transactions entered into by the Corporate Debtor. It must be noted that the Resolution Professional has not taken any actions basis these irregularities against the alleged offending creditors. It is trite law that classification of creditors cannot be as per the whims, fancies, and desires of the Resolution Professional or the Resolution Applicant.

25. The onus of obtaining the NOC from LIC was cast upon the Corporate Debtor. The allottees, including the Applicant were unaware of the said requirement of a NOC from LIC at the time of allotment. Therefore, now the Applicant cannot be made to bear the brunt of the wrongdoings/failings of the Corporate Debtor being bonafide purchasers for due consideration.
26. The Resolution Plan is violative of Article 300A of the Constitution and deprives affected allottees of their property, which has been sold/ allotted to them under a legally binding instrument. There is no provision under IBC that permits the prospective resolution applicant to extinguish the claims of homebuyers, in part or in its entirety.
27. The Applicant states that if the reliefs claimed under this Application are not granted, grave and irreparable prejudice and harm would be caused to the Applicant. On the contrary, if the reliefs as prayed by the Applicant are granted, no harm and prejudice could be caused to the Corporate Debtor and the matter would have to be adjudicated by this Hon'ble Tribunal.
28. With the above averments, the applicant prays for rejection of the Resolution Plan submitted by M/s Kabra Estate and Investment Consultants, which has been approved by the Committee of Creditors of the Corporate Debtor.

Reply

29. No reply to the Application has been filed by the Respondent.

FINDINGS: -

30. We have heard the Counsel for the Parties and have gone through the record.
31. The above IA 933 of 2022 has been filed by the Applicant i.e. Sabari Reality Private Limited which is a Home Buyer/Allottee/Financial Creditor in respect of 25 Flats in Phase-2 of the Corporate Debtor's project known Sunshine Oakwood Project. Primarily by way of the Applicant is assailing the Plan on the ground that the class of Home Buyers has been further classified as affected allottees and unaffected allottees and such classification is not only discriminatory but is also in contravention of the provisions of the IBC. Moreover, the Resolution Plan extinguishes the claims of the Home Buyers either in part or full and tends to deprive the affected allottees of their property.
32. Now the question arises as to whether or not a Home Buyer individually oppose/object to the Resolution Plan when the Home Buyers as a class has voted by a majority in favour of the Plan.
33. 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.”

34. 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, absolutely no locus to oppose the Plan in the capacity of dissatisfied 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 raising objection 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.

35. As a result of the above discussions, the above IA No. 933 of 2022 is hereby summarily **dismissed**.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
MEMBER (JUDICIAL)