NATIONAL COMPANY LAW TRIBUNAL

COURT-V, MUMBAI BENCH

Under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 Read with Rule 11 of the National Company Law Tribunal Rules, 2016

I.A. 506 OF 2022
In
CP 3169 OF 2019

1. Jyotsna Kailash Veera

2. Ritesh Kailash Veera

... Applicants

Versus

1. Mr. Manish Motilal Jaju ... Respondent No. 1/ Resolution Professional

2. M/s. Kabra Estate and Investment Consultants ... Respondent No. 2

3. Mr. Vithal M. Dahake ... Respondent No. 3/ Corporate Debtor

In the matter between

Spartan Engineering Industries Pvt. Ltd.

... Petitioner

Versus

Sivana Realty Pvt. Ltd. ... 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

For the Applicant: Mr. Chetan Shah, Advocate i/b Rakesh Agrawal

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

PER: Shri Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The above captioned I.A. was filed by **Jyotsna Kailash Veera** and others (hereinafter referred to as "**Applicants**") against Mr. Manish Motilal Jaju & Ors. (hereinafter referred to as "**Respondents**").

2. The applicant in the present I.A. has prayed for the following reliefs:

   a) This Hon'ble Tribunal is pleased to declare that part of the impugned resolution plan which proposed unaffected home buyers like Applicants to pay escalation charges of Rs. 2850/- per sq. ft. RERA carpet area, as illegal and unlawful, same is arbitrary and discriminatory,

   b) This Hon'ble Tribunal be pleased to direct Respondent no. 1 and 2 to make appropriate changes/amendments into resolution plan and follow the further process of approval following the law.

   c) Direct that the resolution plan should be made fair and equitable towards the various stakeholders.

   d) Reject the resolution plan of respondent no. 2 in the present form.

e) Pending hearing and final disposal of the present application, this Hon'ble Tribunal be pleased to refrain from considering approval to impugned resolution plan submitted by respondent no. 2.

Facts of the case

3. The Applicant by way of two separate registered agreements for sale executed between Applicant no. 1 and her husband Shri Kailash Shamji Veera as a purchaser therein and M/s. Sunshine Housing Pvt. Ltd being Vendor therein purchased residential premises being Flat no. 1201 in C Wing on the building, 12th floor admeasuring 42.41 sq. mtrs. carpet with single car parking in Samriddhi Garden for lump sum consideration of Rs. 90,00,000/- (Rs. Ninety lakhs only), and (b) Flat no. 301 in D Wing on the 3rdfloor admeasuring 74.08 sq. mtrs. carpet with 2 car parkings in the building Samriddhi Garden for lump sum consideration of Rs. 176,00,000/-. The said Sunshine Housing Pvt Ltd. was supposed to provide possession of both the flats by 31st March 2018.

4. Applicant no. 1 and her husband Shri Kailash Veera (now deceased) preferred Complaint No. CC06000000078872 before Real Estate Regulatory Authority for the delay in handing over possession and other reliefs.

5. The RERA was pleased to pass an order wherein they directed Corporate Debtor to pay interest to the complainants therein from 1st April 2018 till the actual date of possession on the actual amount paid at the rate of marginal cost Lending Rate plus 2% as prescribed under section 18 of RERA Act.

6. The Corporate Debtor was admitted to the Corporate Insolvency Resolution Process by the order of this Hon'ble Tribunal. The Applicants have filed their claim in the prescribed form towards Flat No: D-301 with

two parking spaces and Flat No C-1201 with one parking space. Respondent No.1 was appointed as the Resolution Professional.

7. In the 5th meeting of C.O.C, the approval of the plan for Phase-I was discussed and in the 6th meeting implementation of the plan C.O.C was submitted by M/s. Vira Realspace LLP was discussed. The plan submitted by M/s. Vira Realspace LLP was approved.

8. I.A NO: 643 of 2021 was filed by Respondent No.1 for obtaining an order of approval of Resolution Plan for Phase-I. C.O.C was constituted by Respondent No. 1 excluding all home buyers without N.O.C of LIC.

9. In the 16th meeting of C.O.C the resolution plan submitted by M/s. Kabra Estate and investment consultants was discussed.

10. The Resolution Plan submitted by M/s. Kabra Estate and investment consultants was approved. The Applicants have voted against the said resolution plan, as it is unreasonable to ask applicants to pay escalation charges who have paid full, consideration long back and who are entitled to interest on delayed possession as per RERA order.

Reply of the Respondent No. 1

11. The Respondent No. 1 submitted that he is the Resolution Professional of the Corporate Debtor abovenamed and as such he is fully aware of the facts and circumstances of the present case.

12. The Applicant, through the present application, is also seeking to impugn the Resolution Plan approved by the Committee of Creditors at its 18th meeting, which was approved by 99.96% voting share. The Applicant is assailing the Resolution Plan on multiple grounds, which are being dealt with below.

Allegation: Resolutions passed at the 10 meeting of the COC are vitiated due to incorrect constitution of the COC.

(a) The only noteworthy resolution passed at the 10th meeting of the COC (which appears to be the source of concern for the Applicant) was condoning the delay in filing Expression of Interest by one of the resolution applicants.

(b) However, this objection must be treated to be purely academic, as the COC subsequently decided to call for fresh Expressions of Interest by publication of a fresh Form G. This decision was taken at the 13th meeting of the COC. Therefore, the resolutions passed at the 10th meeting of the COC had no bearing on the CIRP of the Corporate Debtor.

Allegation: Sub-Classification of homebuyers not permitted by law

a. The Applicant contends that the approved Resolution Plan contemplates a sub-classification between the homebuyers which is not in accordance with law. Under the terms of the approved Resolution Plan, the allottees are divided into two categories: "affected allottees" and "unaffected allottees". The treatment to "affected allottees" and "unaffected allottees" is different under the terms of the approved Resolution Plan.

b. At the very outset, it is important to note that the homebuyers have overwhelmingly voted in favour of the Resolution Plan. Even the "affected allottees" and the "unaffected allottees" have approved the Resolution Plan in accordance with law.

c. It is submitted that no legal distinction has been made between the "affected allottees" and "unaffected allottees". Allottees in either category are financial creditors belonging to the same class having all rights afforded to them under law. No discrimination has been

meted out to the class of creditors being allottees. However, in order to make the Resolution Plan viable and feasible, there is different treatment to the "affected allottees" and the "unaffected allottees".

d. It is submitted that the law is very clear that a Resolution Plan is a commercial document which is to be approved by the COC in their commercial wisdom. A Resolution Plan is not meant to be "equitable" but is meant to be a workable and viable solution to rescue a failing company from liquidation. It is now settled law that a resolution applicant may seek to provide differential treatment to members of the same category of creditors, if it is necessary in order to make the Resolution Plan viable and feasible.

e. The determination of whether the treatment of creditors is viable and feasible is the sole prerogative of the COC and is not subject to judicial review. The Resolution Applicant has proposed treatment of creditors to be in a certain manner and the COC has approved that scheme in its commercial wisdom. Therefore, there is no scope of judicial review in this regard.

f. It is further pointed out that the difference between "affected" and "unaffected" allottees is based on whether the NOC from the secured financial creditor was taken prior to the allotment being made. The secured financial creditor claimed to have not received any funds against its dues as a result of these allotments but is also being asked to forgo its security interest over these units. Therefore, in order to make the Resolution Plan to become viable and feasible, the Resolution Applicant was required to compensate the secured financial creditor for these units. It is for this reason that the Resolution Applicant has proposed different treatment for such "affected allottees".

g. Therefore, the challenge to the approved Resolution Plan made by the Applicant on this ground cannot be sustained.

Allegation: Approved Resolution Plan cannot re-determine/re- classify claim of the Applicant:

A. The Applicant alleges that the approved Resolution Plan has the effect of re-determining or re-classifying the claim of the Applicant. At the very outset, this allegation must be denied as being absurd and devoid of any supporting material. As has been set out above, the Applicant has always, at all relevant times, been a financial creditor belonging to the class of allottees and has always been entitled to all rights available under law.

B. It goes without saying that a resolution applicant cannot "determine" claims as that is the sole domain of the Resolution Professional. In the present case, the Resolution Applicant has not done so. The Resolution Plan only seeks to deal with the claims of certain allottees in a manner different from others. This is the commercial proposal of the Resolution Applicant which has been approved by the COC in its commercial wisdom. This commercial proposal is what makes the Resolution Plan viable and feasible. As such, this aspect of the Resolution Plan is not subject to judicial review.

Allegation: Cancellation of agreements not in accordance with law:

a. It is submitted that this allegation cannot be sustained. In almost every resolution plan, there is a novation or a cancellation of the terms of agreements between the Corporate Debtor and the stakeholders. Even in the present case, the agreements between the Corporate Debtor and its other financial creditors are also being novated/cancelled.

b. It is submitted that the fundamental nature of a resolution plan is to novate the terms of the agreements between the Corporate Debtor and its stakeholders. It is for this reason that section 31 of the IBC makes a resolution plan binding upon the stakeholders narrated therein. If a Resolution Applicant would be compulsorily bound by the terms of all arrangements / agreements between the Corporate Debtor and third parties, then it would never be able to come up with a viable or feasible resolution plan. This is because the existing arrangements entered into by the Corporate Debtor being unviable would have been the reason behind its insolvency in the first place.

c. It is also submitted that the Hon'ble Supreme Court of India has held that the provisions of the IBC prevail over the provisions of the Real Estate (Regulation and Development) Act, 2016. On this count also, the objections taken by the Applicant cannot be sustained.

Allegation: Legal rights / remedies of affected parties cannot be taken away by a resolution plan:

A. For the reasons set out in the previous paragraph, this allegation cannot be sustained. The purpose of a resolution plan is to bind all the stakeholders and to alter their position vis-à-vis the Corporate Debtor. Without doing so, the Corporate Debtor would continue to remain unviable and would be driven to liquidation.

B. It is submitted that the purpose of section 31 of the IBC would be defeated if objections of this nature are sustained. The concept of a resolution plan is to the restructure/novate / alter the rights and liabilities of the stakeholders of the Corporate Debtor.

13. The other averments made in the Application have been denied as wrong and a prayer for dismissal of the Application has been made.

Reply of Respondent No. 2

14. The Respondent has submitted that the present Application is misconceived, untenable and not maintainable in law, and ought to be dismissed with costs inasmuch as admittedly, the resolution plan of the Corporate Debtor is approved by a majority 99.96% of the Committee of Creditors of the Corporate Debtor in the 18th meeting of the Committee of Creditors held on 30th October 2021. Under the Insolvency & Bankruptcy Code, 2016 ("IBC"), the commercial wisdom of the Committee of Creditors has been given paramount status, and any judicial intervention on equitable grounds or any grounds beyond those contemplated under section 30 and 31 of IBC is impermissible.

15. The feasibility and viability of the resolution plan dated 28th October 2021 ("Plan") as well as the manner of distribution of funds to various classes of creditors has been taken into account by the Committee of Creditors after negotiations with Respondent No. 2, post which the Committee of Creditors of the Corporate Debtor has approved the Plan with an overwhelming majority. The business decision arrived at by the majority of the Committee of Creditors ought not to be interfered with on equitable grounds and perceptions.

16. Further, it is stated that a perusal of the Application clearly reveals that apart from making bald assertions and allegations as regards the Plan, the Applicant has miserably failed to demonstrate and make out any case whatsoever to show that this Tribunal ought to exercise its limited and circumscribed jurisdiction and discretion under section 31 of the IBC to interfere with a resolution plan approved by an overwhelming majority of the Committee of Creditors. It is stated that the Plan complies with all requirements as prescribed under section 30 of the IBC and is not in

contravention of any law for the time being in force, including the IBC. The mode and manner of distribution of proceeds under the Plan is not barred by any law, including the IBC and, therefore, submit that this Hon'ble Tribunal ought not to interfere with the commercial wisdom of the Committee of Creditors.

17. The Committee of Creditors of the Corporate Debtor have, after conscious contemplation, deliberation, and discussion, and despite being aware of the differential treatment, considered and approved the Plan by an overwhelming majority of 99.96%. In the circumstances, the present Application ought to be dismissed with exemplary costs.

18. The present Applicant belongs to the category of 'unaffected homebuyers' which, as a class, has also approved the Plan by an overwhelming majority of 87.56% of the total members of the class. Under the scheme of IBC, 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. In the facts of the present case, the Applicant being a member of a class of unaffected homebuyers cannot suggest himself to be a dissenting financial creditor and object to the Plan. The voting and approval of the Committee of Creditors cannot be set at naught for the purported dissatisfaction of a miniscule minority and such minority must sail along with the views of majority. The Applicant, therefore, has no locus to stand differently and project his individual grievance, and such grievance ought to be rejected on this ground alone.

19. Pursuant to the approval of the Plan, Respondent No. 2 has signed the Letter of Intent given by Respondent No. 1 and has also provided a

performance guarantee in the form of Bank Guarantee of Rs 3,00,00,000/. Thus, Respondent No. 2 as well as the creditors of the Corporate Debtor have taken steps and acted in furtherance and in implementation of the Plan. Therefore, the Respodent submit that as a resolution applicant, irreparable loss, harm and prejudice will be caused to Respondent No. 2 if this Hon'ble Tribunal interferes with a resolution plan duly approved by an overwhelming majority of the Committee of Creditors of the Corporate Debtor, and thus the present Application ought to be dismissed with costs.

20. The Respondent No. 2 is conscious of the registered agreements of the Applicants. In fact, the Respondent No. 2 has, after taking into consideration the aforesaid, classified the Applicant as an unaffected homebuyer under the Plan. The Plan proposed by Respondent No. 2 takes into consideration the interest of all the stakeholders i.e. the secured as well as unsecured financial creditors, unaffected and affected homebuyers and operational creditors. The proposal of the Respondent No. 2 under the Plan is based on value maximisation of the Corporate Debtor and the Committee of Creditors has, in its commercial wisdom has considered the plan and found it feasible and viable and therefore approved the Plan with a 99.96% majority. It is further stated that the order dated 13th March 2020 passed under the provisions of RERA Act is wholly irrelevant to the present proceedings inasmuch as the IBC confers legal force on a resolution plan approved by the committee of creditors, which will have effect notwithstanding anything inconsistent contained in any other law for the time being in force, including the provisions of RERA Act and as such, the provisions of RERA Act have to give way to the provisions of IBC. In any case, a purported order passed under the provisions of RERA Act cannot be used to defeat the commercial wisdom of the committee of creditors under the IBC, which has approved the Plan with an overwhelming majority.

21. The Plan approved by the Committee of Creditors is in conformity with the provisions of IBC and the Regulations made thereunder. It has been further denied that Respondent No. 2 has indulged into any arbitrary, mala fide and fraudulent conduct in carrying out the CIRP of the Corporate Debtor which has vitiated the process of CIRP as alleged. Denying all allegations, Respondent No. 2 has also prayed for the dismissal of the Application.

FINDINGS:-

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

23. This IA 506 2022 has been filed by Applicants i.e. Jyotshna Kailash Vira and Ritesh Kailash Vira who are stated to be falling under the class of Home Buyers/Allottees of the Corporate Debtor. The Applicants are stated to have entered into registered Agreements with the Corporate Debtor for purchasing two flats, ie. Flat No. 1201 in C-Wing 12th Floor for an amount of Rs. 90 Lacs and Flat No. 301 in D-Wing on the 3rd Floor for a sale consideration of 1.76 Crores. The grievance of the Applicant says that they are being made to pay additional sum of Rs. 35,73,586/- towards the cost of the flats in addition to what they have already paid which was full and final payment of the flats. Accordingly, the Applicants have sought to challenge that part of the Resolution Plan which arbitrarily and illegally proposes the unaffected Home Buyers including the Applicants to pay escalation costs of Rs. 2850 per sq. ft.

24. 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.

25. 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 e 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."

26. 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.

27. As a result of the above discussions, the above IA No. 506 of 2022 is hereby summarily dismissed.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
MEMBER (JUDICIAL)