

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

IA-2953/2021 IN

CP/IB/4469/(MB)/2019

Under Section 7 of the IBC, 2016

In the matter of

Rajendra Surana & Anr.

...Applicant

V/s.

Jayesh Sangharika & Anr.

...Respondent(s)

In the matter of

Idbi Trusteeship Services Limited

...Financial Creditor

Versus

Ornate Spaces Private Limited

...Corporate Debtor

Order delivered on: **02.05.2023**

Coram:

Mr. Prabhat Kumar

Hon'ble Member (Technical)

Mr. Kishore Vemulapalli

Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant in IA-2953/2021:

Mr. Sandesh Shukla a.w Amit

Singh, Mr. Shivani Deshmukh i.b

Abhay Nevagi, adv.

For the Respondent(s):

Mr. Nausher Kohli a/w Mr. Devesh

Juvekar, Mr. Ashish Parwani, Mr. Dikshat Mehra, Mr. Chintan Gandhi and Ms. Anjali Dhoot i.b Rajani Associates for the RP.

Mr. Akshay Doctor a/w Mr. Parag Sawant and Ms. Priyank Kulkarni i.b P.S. Chambers, Ld. Counsel for the Successful Resolution Applicant.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This is an application filed by Applicant i.e. Rajendra N. Surana and Mr. Kumar Chandru Manwani, the home buyers seeking rejection of the Resolution Plan (“Ashdan Resolution Plan”) filed by Respondent no. 2 i.e. Ashdan* Properties Private Limited; directions to Respondent No.1 i.e. Resolution Professional to invite fresh Expression of Interest for submission of Resolution Plan by Applicants; and directions to COC to resubmit the Resolution Plan after reconsideration of the grievances of the home buyers.
2. It is submitted that Corporate Debtor was admitted to Corporate Insolvency Resolution Process (“**CIRP**”) on 29, June 2020 and the Respondent No.1 was appointed as Insolvency Resolution Professional, later on confirmed as Resolution Professional. The Respondent No.2 submitted the Resolution Plan on 26 August 2021, and revised the same on 28 August, 2021. The plan was approved by COC on 18.09.2021.

- 2.1. The Applicants state that the Ashdan Resolution Plan ignores the interests and legitimate expectations of the homebuyers; the home buyers are left in the lurch by the Corporate Debtor, who has miserably failed to fulfil its contractual obligation to allot flats on time and their miseries continues even under the Ashdan Resolution Plan; overrides the contractual understanding arrived between the Corporate Debtor and each of the homebuyers under their respective agreement for sale and/or the allotment letter, as the Corporate Debtor has agreed to sell flats to each of the homebuyers at the rate of Rs. 13,500/- (Rupees Thirteen Thousand Five Hundred Only) to Rs. 21,000/- (Rupees Twenty-One Thousand Only) per Square Feet, and under the Ashdan Resolution Plan, the homebuyers are required to pay to pay the 95% of launch price, which is more than the contractually agreed consideration; discriminates the home buyers by putting additional burden while no such additional burden is being placed on the actual Financial/Secured Creditors, strikes at the very root of the Impugned Ashdan Resolution Proposal.
3. The Resolution Professional has filed an affidavit dated 28.01.2022 stating that he is not in position to discuss anything on the commercial and various integrities of the Resolution Plan, which has been approved by COC by 80.86% vote in its commercial wisdom; out of 89 home buyers transactions, the transaction of 37 home buyers appears to be fraudulent and are subject matter of IA-1927/2021; Applicant is representing 20 of 37 of these home buyers; 39 home

buyers transactions were initially recorded in the books of the Corporate Debtor as unsecured loans and these were transferred to the booking advance to Grower Tower lender in financial year 2019-20, as observed by transaction auditor; out of 120 allotment in the project, the statutory disclosures filed with the RERA reflected only a total of 39 allottees who had booked flat in the project, therefore, a large number of these allottees including 39 home buyers were in fact unsecured creditors masquerading as home buyers.

4. The Respondent No.2 i.e. Ashdan Properties Private Limited has filed an affidavit in reply dated 31.01.2022 stating that home buyers having voted against the Resolution plan are entitled to only liquidation value; transaction between Corporate Debtor and the home buyers appear fraudulent in nature and has given list of 27 allottees; the Resolution Plan complies with the provision of the Code as interest of all stakeholders has been taken care; Applicant cannot be allowed to substitute the wisdom of the CoC; the Resolution Applicant is not bound by contractual terms of the Corporate Debtor and cannot be made liable under the provision of RERA for the claims of home buyers. It is further stated that FSI available to the Corporate Debtor is of four and beyond that it is merely a contingency; for provision of 152 flats of 650 sq.ft each, the respondent would have to utilise approximately 11000 sq.mts out of total available area of 32,012 sq.mts; The developable carpet area is 3 lakh sq.ft including fungible FSI and not 5,01,179.53 sq.ft.
5. The applicant has filed a rejoinder to the reply received from Respondent No.1 and 2 stating that home buyers are not party to IA-

1927/2021, accordingly, are not aware of the facts contained therein, however, it cannot be said that the transactions of home buyers are fraudulent or preferential; the home buyers shall be put to hardship for another period of 4.5 years or more to receive the possession of complete flats under the plan; the home buyers cannot be put to more arbitrary restrictions which are contrary to the conditions stipulated in a contract between the corporate debtor and home buyers. The applicants have also filed a compilation of documents which contain a copy of resolution dated 31.05.2016 passed by the Board of Directors in relation to issuance of debentures and creation of mortgage for that purpose; debenture trust deed dated 29.06.2016 with IDBI Trusteeship Private Limited; and indenture of mortgage dated 29.06.2016.

6. During the course of hearing, Ld. Counsel for the Applicant in this IA further submitted that the language of the plan and reading of Form-H suggests that they may not get flat even if they agree to the conditions stated in the plan. However, the Ld. Counsel clarified that those conditions, which are found to be equitable in the order of this Adjudicating Authority, shall have to be complied with by the parties represented by the Applicant.

6.1. Counsel for the Applicant further submits that they have reservation on condition stipulating payment of launch price which is yet to be determined. Ld. Counsel for the Applicant further submits that RERA co-exist with IBC and waiver of any remedy available under RERA cannot be sought as a relief under the plan. He further drew our attention that RP has proposed

success fees and he did so in another assignment also, where NCLT had ordered deletion of levy of that success fees and order of NCLT was upheld by Hon'ble NCLAT. He further stated that IBBI reprimanded RP for this act.

6.2. Counsel for the RP apprised this Bench that admitted claim of Edelweiss Asset Reconstruction Company Limited (“Home Buyers category”) and other home buyers includes interest component till date of admission of all respective claims which is same as in case of secured creditors. He further relies upon Hon'ble Supreme Court decision in the matter of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors vs. NBCC (India) Ltd. & Ors.* {**CIVIL APPEAL NO. 3395 OF 2020**}, wherein it was held that the provisions of the Code would override those in the RERA. Consequently, contentions relating to the claims under RERA that do not conform with the resolution plan would be rejected, and the CoC would have full powers to decide the treatment of the agreement that the resolution plan would propose with financial creditors such as homebuyers, accordingly it was contended that waiver of RERA conditions is permissible if sought under the approved Resolution Plan in view of the decision of CoC.

6.3. Ld. Counsel for the Resolution Applicant i.e. R2 clarified that for the purpose of flat buyer category, the MSP stated at Page 392 of the Application in I.A-2374/2022 shall be considered as a launch price.

7. This bench heard both counsel and perused the material on record.

- 7.1. This bench finds merit in the contention of the resolution professional representing Corporate Debtor that the applicant has no locus to file the present application as the applicant is part of class of home buyers and in terms of provisions of the code the applicant along with other home buyers is represented by an Authorized Representative to represent the class. It has been held by Hon'ble Supreme Court in the matter of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors* (Supra), "*That being the position, and the authorised representative having voted in accordance with the instructions given to him from the class of financial creditors i.e., homebuyers, every individual falling in this class remains bound by his vote and any association or homebuyer of JIL cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way of appeal*". Hence, this bench is of the considered view that this application is not maintainable. Having said so, this bench further considers it appropriate to clarify on the contentions raised by the applicant.
- 7.2. The main argument of the applicants is against re-writing the contractual arrangement between the Corporate Debtor and Home-buyers by way of clause(s) contained in the Resolution Plan and putting them in disadvantageous condition vis a vis Secured Financial Creditors.
- 7.3. It was contended before this Bench that clause 18(A)(VII) of financial plan in Resolution Plan read with clause 12.2 of 2374/2022 requiring the Home-buyers to pay 95% of launch price, which discriminates Home-buyers vis a vis Secured

Financial Creditors; and Resolution Applicant will be generating total revenue of Rs. 1,671/- crores (basis Rs. 33,000/- psf for residential unit and Rs. 65,000/- psf for commercial unit, which is fixed as Minimum Selling Price {'MSP'}) as against estimated project cost of Rs. 942.50 crores, hence, it is submitted that the additional burden, proposed to be put on Home-buyers under the Resolution Plan could have been minimised or avoided; while secured financial creditors are proposed to get approx. 33% of their total claim, which includes interest also, the Home-buyers are proposed to get only 5% discount on launch price and principal amount deposited by each of them.

7.3.1. This bench finds that home-buyers have deposited principal amounts on different dates and different amounts have been deposited so far by each of the home-buyers. The proposed Resolution plan provides for deduction of principal amount paid by each one of them against the amount payable by each flat buyer determined as payable in terms of Resolution Plan. This Bench is of considered view that such treatment discriminates home-buyers within that class, as time value of money deposited by each of home-buyer to equalise them in class of home-buyer should be factored. Accordingly, this Bench feels that the amount eligible for deduction from total sum payable by each home-buyer against their entitlement of a flat under the Resolution plan should be the amount of claim admitted by the Resolution Professional in each case.

7.3.2. As regards the applicant's contention that secured financial creditors are entitled for share in 22% of the revenue share as well as 25% of additional revenue realised beyond the MSP is also discriminatory, this Bench feels that the Home-buyers are obligated to pay only 95% of MSP, which results into additional concession of Rs. 10,72,500/- (650 Sqft x 5% of Rs. 33,000) to each home-buyer. It is the case of the applicants that the home-buyers had booked flats in the price range of Rs. 13,500/- psf to Rs. 21,000/- psf and now are asked to pay a price of Rs. 33,000/- psf, while secured financial creditors are getting 33% of their dues in form of 22% share in the revenue realisation. This Bench finds that the Home-buyers are getting deduction of whole of principal and interest admitted in claim by the Resolution Professional alongwith concession of Rs. 10,72,500/- for each flat booking. Under the scheme of the Code, the effort is to revive the Corporate Debtor by resolving its defaults, which is in the best interest of all stake-holders. For this purpose, the legislature has considered it appropriate to repose confidence in the commercial wisdom of CoC to approve a feasible and workable resolution of Corporate Debtor. This Bench does not find any discrimination in so far as treatment within class of home-buyers is concerned. Since, the Resolution plan stipulate share in the sale proceeds to the secured financial creditor which results into 33% realisation for them, while the home buyers are offered 100% of their claim amount. Accordingly, this Bench does not find any perversity in

exercise of commercial wisdom by CoC in approval of plan. Hence, this Bench is not inclined to interfere on this ground.

7.4. As regards clause 11.1 seeking immunity from payment of any compensation for delay in delivery and bar on filing fresh claims before RERA authority, this Bench finds that the Hon'ble Supreme Court in the case of Jaypee Kensington Boulevard Apartments Welfare Association (Supra) held that the provisions of the Code would override those in the RERA. Consequently, contentions relating to the claims under RERA that do not conform with the resolution plan would be rejected and this Bench does not find that any prejudice is caused to the applicants in case their remedy under RERA in relation to past defaults of the Corporate Debtor stands forfeited. Further, it was also held by the Hon'ble Supreme Court that the CoC would have full powers to decide the treatment of the agreement that the resolution plan would propose with financial creditors such as homebuyers, accordingly proposed delivery of the flats after 4.5 years and supersession of the existing flat buyers agreement by the clause(s) of the Resolution plan, to the extent such agreement is in contradiction with the proposed Resolution Plan, cannot be objected so long as the plan is found viable and feasible in the commercial wisdom of the CoC.

7.5. As regards objection on ground of treatment of certain homebuyers as Unsecured Financial Creditors in books of accounts, this Bench notes that the Ld. Counsel for the Resolution Professional has clarified in course of his arguments in IA-

1927/2021 that Unsecured Financial Creditor the conversion of unsecured loan into the flat buyers is already dealt with in the resolution plan and they are acknowledged as home buyers.

7.6. As regards objection to the withdrawal of 5% discount on launch price in case any of home buyers seeks to sell or transfer the booking, this Bench is of considered view that the legislature considers protection of home-buyers interest on the ground that a person books home for its own use and not as investor. Accordingly, this condition cannot vitiate the Resolution Plan, as such condition is purely commercial in nature and does not violate any law also.

8. In view of foregoing, this **IA-2953/2021** is **partly allowed** and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

SVR/02.05.2023

Sd/-

Kishore Vemulapalli
Member (Judicial)