

**THE NATIONAL COMPANY LAW TRIBUNAL**

**COURT VI, NEW DELHI**

**I.A. 5050/2023 & 4747/2023**

**IN**

**Company Petition No. (IB) – 281/(PB)/2019**

**IN THE MATTER OF:**

**BDR FINVEST PRIVATE LIMITED**

.... FINANCIAL CREDITOR

**VERSUS**

**NINEX DEVELOPERS LIMITED**

..... CORPORATE DEBTOR

**AND IN THE MATTER OF IA 5050/2023-**

**MR. VEKAS KUMER GARG**

Resolution Professional of  
Corporate Debtor

.... APPLICANT/RP

**VERSUS**

**MR. SANDEEP GARG**

Ex- Director of CD

...RESPONDENT NO 1

**BDR FINVEST PVT LTD**

HAVING ITS BRANCH AT:

S 26, 27, 28 GREEN PARK EXTENSION,  
NEAR UPHAAR CINEMA,

NEW DELHI-110016

...RESPONDENT NO 2

**AND IN THE MATTER OF IA 4747/2023-**

**MRS. VINITA GUPTA**

H-71, ROAD NO. 42, WEST PUNJABI BAGH  
DELHI -110026

.... APPLICANT NO 1

**AVIRAJ FINCAP LLP**

H.NO.81, GROUND FLOOR, BLOCK-KU  
PITAMPURA, DELHI - 110034

.... APPLICANT NO 2

**VERSUS**

**MR. VEKAS KUMER GARG**

Resolution Professional of  
Corporate Debtor

...RESPONDENT

**CORAM:**

**SHRI. MAHENDRA KHANDELWAL, HON'BLE MEMBER  
(JUDICIAL)**

**SHRI RAHUL BHATNAGAR, HON'BLE MEMBER  
(TECHNICAL)**

**PRESENT**

**For the Petitioner/Financial Creditor:** Mr. Ashish Aggarwal,  
Mr. Gurcharan Singh, Ms. Tanya Aggarwal and Ms. Ramya  
Aggarwal, Advs., Mr. Akhil Sachar, Adv. in IA/5050/2023

**For the RP:** Mr. Rakesh Kumar, Ms. Preeti Kashyap, Mr. Ankit  
Sharma, Mr. Rishab Arora, Advs. in IA/5050/2023.

**For the Applicant:** Adv. Kunal Godhwani in IA/4747/2023.

**For the Reliance Home Finance Limited/Objector:** Mr. Akhil Sachar Adv and Ms. Sunanda Tulsyan Adv in IA No. 5050 of 2023.

**ORDER**

**PER- BENCH**

**Order Pronounced on: 15.02.2024**

1. The application bearing IA 5050/2023 is filed under Section 12A of the Insolvency and Bankruptcy Code, 2016, seeking withdrawal of the Corporate Insolvency Resolution Process (CIRP) in the matter of M/s Ninex Developers Limited. Additionally, IA 4747/2023 is filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016, to raise objections to the withdrawal of CIRP and to admit the claims of the applicants in the CIRP of Ninex Developers Limited. Since both matters are interconnected, we are adjudicating both applications through this common order.

**IA 5050/2023**

**FACTS AND CONTENTIONS OF THE PARTIES**

2. This application has been filed under Section 12A of the Insolvency and Bankruptcy Code, 2016 read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate

Person) Regulations, 2016 for withdrawal of the CIRP in the matter of M/s Ninex Developers Limited.

3. The applicant in the present application has prayed for the following reliefs: -

*a) Allow the present application and with-drawl plan under Section 12A of the Code having 92.50% votes by CoC in this favour recommending for withdrawal of CIRP Proceedings CP No IB 281/PB/2019*

*b) Pass any other/ further order(s) which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the matter.*

4. Briefly stated the facts of the case as mentioned in the instant application, which are necessary for adjudication, are as follows:

i. That this Adjudicating Authority vide order dated 25.07.2019 admitted the CP IB 281/PB/2019 and appointed the applicant as Interim Resolution Professional.

ii. The following is the brief process chart of the activities performed in the ongoing CIRP Process

Sr. No.	Date	Activities
1.	25.07.2019	Admission of the Corporate Debtor into CIRP

2.	30.07.2019	Issuance of Public Announcement by the Resolution Professional for invitation of claims from the creditors of the Corporate Debtor.
3.	12.11.2019	Issuance of FORM-G by the Resolution Professional for invitation of EOI for submission of Resolution Plan. However, no Resolution Plan was received from any of the PRA(s)
4.	28.06.2020	Issuance of second FORM-G by the Resolution Professional. No Resolution Plan was received.
5.	31.07.2020	The Adjudicating Authority allowed a stay on consideration of Resolution Plan by COC on an intervening application as filed by Land Collaborator vide IA-3002 of 2020.
6.	26.05.2023	The Land Collaborator had withdrawn IA-3002 of 2020 and thereby the stay on consideration of the Resolution Plan was vacated by this Adjudicating Authority
3.	21.06.2023	The Resolution Professional had issued another FORM-G wherein a total number of 10 EOI was shortlisted by Resolution Professional.
4	24.08.2023	The COC in its commercial wisdom had decided to go for withdrawal of CIRP than the ongoing Resolution Plan process.

iii. That the members of CoC in its 21<sup>st</sup> meeting held on 24.08.2023 resolved for withdrawal of CIRP which has been approved by COC with 92.5% voting share in accordance with the provision of Section 12A of the Code read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Persons Regulations), 2016.

iv. That the Home Buyer(s) constitute around a total of 72.65% of the voting share of COC. The rest of the voting shares are held by the other financial creditor(s). The home buyer(s) having a total 61.99% strength of the voting power & consisting of a total number of 180 Home Buyers had participated in the voting process wherein the proposal of withdrawal of CIRP was considered. Out of which, 174 home buyers constituting 60.16% of the voting share of the home buyers have voted in favour of withdrawal of CIRP. The details of the same are reproduced below: -

Sr. No.	Category	% Voting Shares	Total Votes casted		Votes in Favour of With-Drawl Plan		Votes against With-drawl Plan		% Favour in the resolution plan
			No. s	%	No. s	%	No. s	%	% Percentag e
1.	Financial Creditor	27.35 %	11	26.15 %	10	19.85 %	1	6.3%	19.85%
2.	Financial Creditor(s) in a Class	72.65 %	180	61.99 %	174	60.16 %	6	1.83 %	*72.65%
		100%	191	88.14 %	184	80.01 %	7	8.13 %	92.50%

- v. That Settlement cum proposal agreement dated 29.07.2023 has been signed between ex director/promotor of the CD and the applicant/RP.
- vi. That as per the withdrawal as presented by Ex. Management and later found viable by the members of committee of creditor(s), the allottees will receive their respective units in terms of the original allotment without making any extra payment.
- vii. That after withdrawal of CIRP and with an adequate monitoring system in place, the Corporate Debtor will be in a position to complete the remaining construction work of the real estate project "Ninex City" in the fastest way and pass on the ownership of the apartments in favour of the home buyer(s).
- viii. That the withdrawal of CIRP will put to an end the ongoing corporate insolvency resolution process which is going on since 2019 by permitting the resolution of the Corporate Debtor through the with-drawl of CIRP wherein the stakeholders of the Corporate Debtor have agreed and considered a with-drawl proposal as

submitted by Ex. Management for early completion of the project. In accordance with the withdrawal proposal, the stakeholders have agreed to have a monitoring system in place for observing the due compliance of an inter-se withdrawal proposal as submitted by the Ex. Management and agreed between the stakeholders / financial creditors including home buyer(s)

ix. That the withdrawal of CIRP may put an end to multiple commercial litigations at various forums like RERA, NCRDC. Besides, various intervening applications around 40 in numbers as filed before this Adjudicating Authority. Most of the matters covered under these applications may get resolved through permitting the present proposal for withdrawal of CIRP.

**OBJECTIONS BY M/S RELIANCE COMMERCIAL FINANCE LIMITED**

5. One of the members of CoC, M/s Reliance Commercial Finance Limited (hereinafter referred to as objector) has objected to the proposed withdrawal and submitted as under: -

- i. That the Objector is a Secured financial creditor with a Voting Share of 6.3%.
- ii. That the Corporate Debtor had availed financial assistance from the Objector vide Application dated 25.12.2015
- iii. That the Objector had lodged a claim dated 05.08.2019 of a sum of Rs.25,18,96,136/- along with interest @ 18.05% per annum with the Resolution Professional. Out of the said claim, a sum of Rs.21,93,68,656/- was admitted by the Resolution Professional.
- iv. That the present Application is an attempt on the part of the Applicant to have an imprimatur of this Adjudicating Authority on the Withdrawal Plan filed along with the present Application. Whereas, under Section 12A, this Adjudicating Authority. may, at its discretion permit a simpliciter withdrawal of the Application under Sections 7, 9, 10 of IBC, 2016. This ploy is a feeble attempt to sanctify the alleged Withdrawal Plan, which is clearly beyond the scope of Section 12A of IBC, 2016.

- v. That the Withdrawal Plan submitted by the Ex-Management/Promoter of the Corporate Debtor is a sham and bogus document, for the following reasons:
- a. The Withdrawal Plan merely states at Clause 13.2 at page 85 of the Withdrawal Plan for the Proposers/Corporate Debtors will pay 75% of the admitted amount, as per the timeline specified in the Schedule of proposed cash flows after passing of the order of this Adjudicating Authority. The said Proposal is completely vague and bogus, as it does not specify any timeline of payment. The Withdrawal Plan is liable to be rejected on this ground alone;
  - b. The Clause 18 of the Withdrawal Plan, which carries a separate heading i.e. "Amounts due to the Government or Government Authorities", conveniently states that upon approval of the withdrawal plan by this Adjudicating Authority, all statutory dues shall stand extinguished and the Corporate Debtor shall not be liable to pay any

amount against such demand. The said Clause is in teeth of the Judgment of the Hon'ble Supreme Court in the case titled as *State Tax Officer (1) Versus Rainbow Papers Limited, in Civil Appeal No.1661 of 2020 (decided on 06.07.2022)*, wherein, it has been held that if a Resolution Plan ignores the statutory demands payable to any Government or a legal authority, altogether, the Adjudicating Authority is bound to reject the Resolution Plan. The Hon'ble Apex Court has further held that if a Company is unable to pay its debts, which should include its statutory dues to the government and/or other authorities and there is no plan which contemplates dissipation of those debts in a phased manner, uniform proportional reduction, the Company would necessarily have to be liquidated and its assets sold and distributed in the manner stipulated in Section 53 of the IBC. It is further observed that the Committee of Creditor cannot secure their own dues at the cost of Statutory dues

owed to any government or governmental authority or for that matter, any other dues. Therefore, the Withdrawal Plan is liable to be rejected on this ground alone;

- c. The Withdrawal Plan is also discriminatory in nature. Even though, on the face of it, the Revival Plan seeks to pay 70% of the admitted amount to the financial creditors, the said Plan is tilted in favour of some of the Creditors
- d. That even the Settlement-cum-Proposal Agreement dated 29.07.2023 is a sham document inasmuch as the said document has neither been signed nor executed by Renu Proptech Private Limited. Further, there is no Board Resolution on record, authorizing the signatory to the Settlement-cum-Proposal Agreement dated 29.07.2023 to settle the disputes with the Corporate Debtor on behalf of Renu Proptech Private Limited. The Settlement-cum-Proposal Agreement dated 29.07.2023 also does not bear the Stamp and signatures of the Authorized

Representative of Renu Proptech Private Limited, either as a party to the Settlement-cum-Proposal Agreement dated 29.07.2023 or as a Confirming Party.

vi. That the mandate of Section 12A of the Code is only with regard to withdrawal of the Application under Section 7 of the IBC, 2016. However, there is nothing in the IB Code or Regulations made thereunder, which permits the ex-Management of the Corporate Debtor to file a Withdrawal Plan, which will be binding on other Members of the CoC including the dissenting Members. Support can be taken from the judgement of Hon'ble Supreme Court in *Arun Kumar Jagatramka Versus Jindal Steel and Power Limited and Another*, reported in (2021) 7 SCC.

vii. That the amount outstanding and payable by the Corporate Debtor inclusive of interest is a sum of Rs.59,84,65,21 0.12 (Rupees Fifty Nine Crores Eighty Four Lakhs Sixty Five Thousand Two Hundred Ten and Twelve Paisa) as on 18.08.2023. The Objector has

chosen not to give its consent to the Withdrawal Plan for the reasons mentioned hereinabove, and thus, being a Secured financial creditor, is entitled in law, if the present Application is allowed, to invoke the proceedings under the SARFAESI Act, 2002, and to auction the mortgaged property to recover its outstanding dues.

viii. That in view of the aforementioned facts and circumstances, the Objector prays that the Application may be dismissed with exemplary costs. However, the Objector respectfully states that being a Secured financial creditor, is entitled in law, if the present Application is allowed, to invoke the proceedings under the SARFAESI Act, 2002, and to auction the mortgaged property to recover its outstanding dues.

6. The Ex-Director has made the following submissions to the objections filed by M/s Reliance Commercial Finance Limited: -

- i. That section 12A of the IBC is the form of collective settlement between the creditor and the Corporate Debtor. The threshold prescribed by the section 12A is much higher than any other provisions of the IBC as well as the Companies Act 2013. It is important to point out that collective bargaining is a tool where in stakeholders can seek settlement with the Corporate Debtor under the provisions of section 12A of the IBC.
- ii. In order to safeguard the interest of the creditors much higher threshold has been prescribed under section 12A of the Code. While allowing the application under 12A of the Code, the Adjudicating authority is supposed to give effect of the will of the commercial wisdom of the committee of the creditors. Any settlement reached between the creditors and the Corporate Debtor are binding between the parties. Section 12A of the Code encourages the settlement between the creditors and the Corporate Debtor and there is no prohibition under section 12A of the Code which prevents the committee of creditors from asking additional commitments from

- Corporate Debtor and its management as well as giving concession to the Corporate Debtor and its management.
- iii. If the hypothesis propounded by the objector is accepted, then the intent and the meaning of the section will be lost. Under section 12A the Adjudicating Authority is supposed to approve any settlement which has been voted upon with more than 90% of the committee of creditors and there is no prohibition or limitation on the type of proposal or negotiations which can take place between the committee of creditors, Corporate Debtor and ex managements. To say that no such settlement can take place between community of creditors and the ex-management goes against the provisions of the IBC and curtails the freedom of taking commercial decision by the committee of creditors.
- iv. That neither in the section nor in the regulations any fetters have been placed on the Ex-management or the committee of creditors as to the nature of settlement which can be arrived at between the parties. It is a settled preposition of law that the Hon'ble court cannot

read something in the language of the section when it is not expressly provided in the section itself. That reliance in this regard is placed on the Judgment of the Hon'ble Apex Court in Brilliant Alloys Pvt. Ltd. V. S. Rajagopal and Ors., in which it was held that Regn. 30-A has to be read along with the main provision S. 12- A IBC which contains no such stipulation (that withdrawal cannot be permitted after issuance of invitation for expression of interest) -Further, this stipulation can only be construed as directory depending on the facts of each case - Thus, in certain cases, withdrawals from the CIRP under S. 12- A IBC could be permitted even after the invitation for Expression of Interest has been issued.

- v. That there are several issues pending between the Corporate Debtor and the financial creditor who has filed the present objection against section 12A proposal. It is important to point out here that the objector itself is undergoing the CIRP process and has been acquired by another company at a valuation which is significantly less than the amount it has borrowed. The objector has

no moral ground to oppose the application filed under section 12A. Authum Investment and Infrastructure on 14 October 2022 acquired debt-ridden Reliance Commercial Finance Limited (RCFL) for hefty discount of over 70%. RCFL, which according to its website has been re-branded as Reliance Money, is a non-banking finance company (NBFC) with assets under management of Rs 11,000 crore which are taken over for a price of approx. 3,000 crores.

- vi. That the calculation given by the financial creditor is highly inflated. It is worth stating that there was a restructure of Loan in the Year 2018 and during restructure pending interest / penalties / penal interest till restructure was capitalised by the lender. Various issues pertaining to the claim amount earlier to be adjudicated or decided upon by the competent authority.
- vii. That the proposed revival plan of the Corporate Debtor specifically provides for escrow account where entire realisation of the booking and the sale of the residential units is to be deposited. Therefore, the Corporate Debtor

as well as the ex-management are fulfilling their original promise with the financial creditors and allottees of the units.

viii. That the charge was created on the assets of the Corporate Debtor and has lost its significance with admission of the company under the insolvency resolution process. The fate of the charge and all other relevant factors are to be considered in accordance with the revival plan of the provisions of the IBC.

ix. That the Corporate Debtor and the ex-management are undertaking to pay 70% of the claim amount admitted by the resolution professional in a time bound manner. It is submitted that this 70% of amount of the claim takes care of the entire principle and significantly pays interest as well. It is submitted that these loans were advanced by the financial creditor on predatory interest rate. Be that as it may the Corporate Debtor as well as the ex-management are bound by their promises made under the revival plan of the Corporate Debtor which is under consideration before this Adjudicating Authority.

It is important to point out that the financial creditor raised multiple objections during the meetings of the committee of creditor and asked for specific timelines for payment schedule and agreeing to his demand specific timelines for provided by amending the revival proposal. By way of the present objections the financial creditor is trying to secure amount over and above what has been provided in the revival proposal and trying to create a class for itself which amounts to discrimination with the other creditors. The Adjudicating Authority should discourage such attempts made by the financial creditor as it will upset the entire commercial rational behind the revival proposal and adversely impact the interest of the allottees who have largely voted in the favour of the revival proposal by reposing trust in the ex-management as well as the Corporate Debtor. It is also important to note that the financial creditor is less than 10% and the revival plan has been approved by more than 90% of the committee of creditors and therefore the objections raised by the financial creditor are unsustainable and

liable to be rejected in terms of the judgement passed by the Supreme Court of India in the case of *Vallal Rck v. Siva Industries and holdings Ltd & Ors.*, Civil Appeal Nos. 1811-1812 of 2022, which held that when 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, the Adjudicating authority or the Appellate authority cannot sit in an appeal over the commercial wisdom of CoC, further, interference would be warranted only when the Adjudicating Authority or the Appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and dehors the provisions of the statute or the Rules - Also, Supreme Court has, time and again, emphasised the need for minimal judicial interference by NCLAT and NCLT in the framework of IBC.

- x. In reply to the contents of paragraph 9 it is submitted that the financial creditor itself has admitted that its share in the committee of creditors is only 6.3% and since the revival proposal is approved by thumping

majority it does not have the necessary legal backing to object the proposal admitted by the committee of creditors.

- xi. That the proposal is binding on the ex-management as well as the Corporate Debtor and therefore there is no legal flaw in making the ex-management as well as Corporate Debtor party to the settlement/revival proposal. It is further submitted that the objection taken by the financial creditor is hyper technical and not maintainable.
- xii. That the flats in questions have been allotted to the allottees and the objector do not have any right to invoke the proceedings under the SARFAESI Act, 2002. Be that as it may there is no fetter on the parties to invoke any legal remedy permissible in accordance with law and if any such remedy is invoked the competent authority will decide its maintainability when in future such application is being made by the financial creditor before the competent authority and no blanket permission to

invoke any particular remedy can be granted to the financial contributor in these proceedings.

**IA 4747/2023**

**FACTS AND CONTENTIONS OF THE PARTIES**

7. This application has been filed under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal Rules 2016 to admit the claim of the Applicants in the Corporate Insolvency Resolution Process of Ninex Developers Limited.

8. The applicants have prayed for the following relief(s)

*a. Kindly, pass an order directing the Respondent to accept the claim of the Applicants as Financial Creditors in Class of Ninex Developers Limited*

*b. Kindly, condone the delay, if any in filing of the claim by the Applicants in the Corporate Insolvency Resolution Process of Ninex Developers Limited;*

*c. Pass any other order(s) or direction as the Hon'ble Tribunal may deem fit*

9. The factual matrix of the present case is as under: -

- i. That the Applicants are one of the many Homebuyers who had been allotted flats in the project undertaken by Ninex Developers Ltd (Corporate Debtor)
- ii. On 16.02.2019 and 18.03.2019, the Corporate Debtor herein executed a Builder Buyer Agreement with Applicant No. 1 for the allotment of the following properties in the project of the Corporate Debtor:
  1. Apartment No. F — 210
  2. Apartment No. B-404
  3. Apartment No. E-604
  4. Apartment No. F -901
  5. Apartment No. B -801
- iii. Prior to the signing of the said agreement between Applicant No. 1 and the Corporate Debtor, Applicant No. 1, on 18.12.2018 paid a consideration of Rs. 4,00,000/- (Rs. Four Lakhs) for each property as the booking amount.
- iv. On 15.04.2019, the Corporate Debtor also entered into a Builder Buyer Agreement with Applicant No. 2 for

the allotment of the following properties in the project of the Corporate Debtor:

1. Apartment No. A -503

2. Apartment No. B-204

- v. On 30.12.2018, Applicant No. 2 had also paid a consideration of Rs. 8,00,000/- (Rs. Eight Lakhs) for each property as the booking amount.
- vi. Upon the payment of consideration, the Applicants were allotted the above-mentioned flats by the Corporate Debtor through various allotment letters
- vii. On 25.04.2022, the Applicants filed their claim in Form - CA as a financial creditor in a class for acceptance of their claim in the CIRP of the Corporate Debtor
- viii. Prior to the submission of claims by the Applicants, the Respondent served upon the Applicants a notice dated 28.03.2022 cancelling the allotment of the above-mentioned properties to the Applicant, the said cancellation notice has been duly replied by the Applicants

- ix. The Resolution Professional, published FORM - G dated 21.06.2023 inviting expression of interest from prospective resolution applicants for the purpose of submitting a Resolution Plan in the CIRP of the Corporate Debtor. As per FORM G published by the Resolution Professional, the last date for submission of expression of interest for the purpose of submitting a Resolution Plan was 06.07.2023. It is submitted that till date, no Resolution Plan has been approved by the Committee of Creditors.
- x. That in terms of Section 7 of the Code, any amount raised from an allottee under a real estate project shall be considered as a Financial Debt. Hence, the claim of the Applicant, being allottees under the project of the Corporate Debtor will be considered as Financial Debt under Section 5(7) of the Code
- xi. That in terms of FORM - A published by the Resolution Professional of the Corporate Debtor, the last date for submission of claims was 10.08.2019. However, the Applicants herein were not aware about the pending

CIRP against the Corporate Debtor and hence, failed to submit their claims in the stipulated time as mentioned in the public, announcement. However, upon gaining knowledge of the same and without any further delay, submitted its claim against the Corporate Debtor

- xii. The claim of the applicants was rejected by the RP.
- xiii. That the period of 90 days provided for submission of proof of claims in Regulation 12 of the CIRP Rules is directory in nature and not mandatory. The Principal Bench vide order dated 06.06.2019 in the matter of *Edelweiss Asset Reconstruction Co. Pvt. Ltd. v. Adel Landmarks Ltd* has made it clear that claims cannot be rejected on the ground of delay as the provision has been held to be directory
- xiv. That the alleged cancellation of apartments / flats of the Applicants is illegal and contrary to the terms of the Builder Buyer Agreement. The Resolution Professional has failed to show any letter / demand

raised by the Corporate Debtor to the Applicants and not honoured by the Applicants.

- xv. That the Resolution Professional in the cancellation letters has mentioned that the cancellation is in terms of the Builder Buyer Agreement, whereas, it is clearly mentioned in the Builder Buyer Agreement that a period of 30 days is required to be given the Homebuyer to cure the default if any, thus, the cancellation notices being not in accordance with the Builder Buyer Agreement are liable to be set aside by this Adjudicating Authority.
- xvi. The withdrawal plan offers only the refund of the principal amount to the Applicants. Whereas, other homebuyers are being offered their respective flats / apartments. It is submitted that the homebuyers who all fall under same class shall be treated equally. There is a clear discrimination between the treatment offered to Applicants and other homebuyers.
- xvii. That the withdrawal plan has been approved by more than 90 percent of the Creditors in Class. The claim

of the Applicants was not admitted and hence the Applicant does not fall under the class. Even otherwise, the homebuyers who have approved the Resolution Plan are getting their respective apartments / flats under the Withdrawal Plan. Whereas, the Applicants apartments / flats are cancelled and he is being offered only the refund.

xviii. The fact that the Resolution Professional has issued cancellation notices, itself establishes that the details of the Applicants is in the record of the Corporate Debtor and still the Resolution Professional did not accept their claim, thus, it is evident that the Resolution Professional is not acting in the best interest of the Applicants who are homebuyers of the Corporate Debtor.

xix. That this Adjudicating Authority is duly empowered to test the settlement and withdrawal of the CIRP of the Corporate Debtor on merits, if the decision of the Committee of Creditors to withdraw the CIRP is completely arbitrary in nature.

10. The Resolution Professional's submissions are as under:

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- i. The CIRP of CD was initiated vide order dated 25.07.2019
- ii. The Applicant(s) have filed their claim to the Respondent on 25.04.2022 by claiming to be Home Buyer(s) in respect of 7(Seven) Apartments having Apartment No. B-801, F-210, B-404, E-604, F-901, A-503 & B-204 after a period of 1005 days as against the requirements of filing of claim within a period of 90 days from the date of public announcement by the Applicant / resolution professional. The fact of delay in filing of claim becomes more concerning in view of the fact that the Applicants have submitted their claim after receipt of the notice of cancellation of the allotted unit by CD from the Respondent on 28.03.2022.
- iii. The Applicants had the knowledge of commencement of CIRP. This fact is clearly evidenced from the Legal Notice(s) dated 13.04.2022 as sent by the Applicants

in which the Applicants have taken an excuse to the commencement of Corporate Insolvency Resolution Process in relation to Corporate Debtor behind not making the payments which were due from their side to the Corporate Debtor in terms of the allotment letter / builders buyers' agreement.

- iv. In addition to this, the Applicant(s) have again filed the present application challenging the decision of the Respondent for not accepting their claim before this Adjudicating Authority on 29.08.2023 after a period of 16 months from the date of receipt of the information of rejection of the claim from the resolution professional i.e. 02.05.2022.
- v. That the actions of the Applicant(s) in the present matter are clearly convenience based and ill motivated.
- vi. The Applicant have only made the payment of miniscule amount which is even significantly less than the booking amount proposed as part of the allotment letter, builder buyer agreement as executed by and

between Applicant and CD. This may be understood from the following given table.

S. No.	Flat no.	Name of the allottee	Booking Date	Payment description	Due Date	Amount	Actual date of payment	Actual amount paid	Outstanding Amount
1	A-503	Aviraj Fincap LLP		Booking Amount	15-04-2019	13,63,750/-	31-12-2018	8,00,000/-	5,63,750/-
				Within 120 days	13-08-2019	34,09,375/-			34,09,375/-
				Within 240 days	11-12-2019	34,09,375/-			34,09,375/-
				Within 360 days	09-04-2020	34,09,375/-			34,09,375/-
				On intimation of possession		20,45,625/-			20,45,625/-
2	B 204	Aviraj Fincap LLP	15-04-2019	Booking amount	15-04-2019	11,00,750/-	31-12-2018	8,00,000/-	3,00,750/-
				Within 120 Days	13-08-2019	27,51,875/-			27,51,875/-
				Within 240 days	11-12-2019	27,51,875/-			27,51,875/-
				Within 360 Days	09-04-2020	27,51,875/-			27,51,875/-
				On intimation of possession		16,51,125/-			16,51,125/-
3	B 404	Vinita Gupta	16-02-2019	Booking amount	16-02-2019	10,97,000/-	18-12-2018	4,00,000/-	6,97,000/-
				Within 120 days	16-06-2019	27,42,500/-			27,42,500/-
				Within 240 days	14-10-2019	27,42,500/-			27,42,500/-
				Within 360 days	11-02-2020	27,42,500/-			27,42,500/-
				On intimation of possession		16,45,500/-			16,45,500/-
4	B 801	Vinita Gupta	16-02-2019	Booking amount	16-02-2019	11,28,250/-	18-12-2018	4,00,000/-	7,28,250/-
				Within 120 days	16-06-2019	28,20,625/-			28,20,625/-
				Within 240 days	14-10-2019	28,20,625/-			28,20,625/-
				Within 360 days	11-02-2020	28,20,625/-			28,20,625/-
				On intimation of possession		16,92,375/-			16,92,375/-
5	E 604	Vinita Gupta	16-02-2019	Booking amount	16-02-2019	9,01,250/-	18-12-2018	4,00,000/-	5,01,250/-
				Within 120 Days	16-06-2019	22,53,125/-			22,53,125/-
				Within 240 Days	14-10-2019	22,53,125/-			22,53,125/-
				Within 360 days	11-02-2020	22,53,125/-			22,53,125/-
				On intimation of possession		13,51,875/-			13,51,875/-

6	F 210	Vinita Gupta	16-02-2019	Booking amount	16-02-2019	7,10,500/-	18-12-2018	4,00,000/-	3,10,500/-
				Within 120 days	16-06-2019	17,76,250/-			17,76,250/-
				Within 240 days	14-10-2019	17,76,250/-			17,76,250/-
				Within 360 days	11-02-2020	17,76,250/-			17,76,250/-
				On intimation of possession		10,65,750/-			10,65,750/-
7	F 901	Vinita Gupta	16-02-2019	Booking amount	16-02-2019	7,15,750/-	18-12-2018	4,00,000/-	3,15,750/-
				Within 120 days	16-06-2019	17,89,375/-			17,89,375/-
				Within 240 Days	14-10-2019	17,89,375/-			17,89,375/-
				Within 360 days	11-02-2020	17,89,375/-			17,89,375/-
				On intimation of possession		10,73,625/-			10,73,625/-

vii. That in view of the above and taking into account clear contravention of the terms of the builders buyers agreement, the Applicants have clearly lost their rights to retain the allotment of the above apartments in any manner from the very beginning of the allotment of such units itself. Therefore, the above units were cancelled by the Respondent / resolution professional in line with the duties of RP to manage the day-to-day affairs and protect the assets of the Corporate Debtor and further in line with the discussions as having taken place in COC. Besides, Respondent has not caused any prejudice to the rights of the Applicants in any which manner. The Applicant have clearly disclosed the fact of collection of the partial booking amount by the Corporate Debtor from the Applicants in the Information Memorandum as prepared by the Respondent / resolution professional in accordance with the requirements of I&B Code, 2016 for being suitably dealt in the proposed Resolution Plan.

## **ANALYSIS AND FINDINGS**

11. We have gone through the documents on record filed by all the parties and arguments advanced by counsels for all the parties.

12. In the present case, the RP has filed the application bearing IA 5050/2023 for withdrawal of CIRP under section 12A of the Code read with Regulation 30A of IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016. Relevant extract of section 12A and Regulation 30A is reproduced below: -

***12A. Withdrawal of application admitted under section 7, 9 or 10. –***

*The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified*

***30 A. Withdrawal of application***

*(1) An application for withdrawal under section 12A may be made to the Adjudicating Authority –*

- (a) before the constitution of the committee, by the applicant through the interim resolution professional;*
- (b) after the constitution of the committee, by the applicant through the interim resolution professional or the resolution professional, as the case may be:*

13. From the bare reading of the above provisions, it is clear that after initiation of CIRP and after constitution of CoC, approval from 90% members of CoC is required to withdraw the application. In the present case, the members of CoC, with 92.5% voting shares approved the withdrawal of CIRP in its 21<sup>st</sup> meeting held on 24.08.2023.

14. As far as objections from M/s Reliance Commercial Finance Limited (the objector) are concerned, the objector has raised objections to many terms of the Settlement proposal filed by the applicant. The objector submits that the settlement proposal failed to include statutory liabilities. We are of the view that the objector has no locus to question the terms that do not affect the objector directly. No application was filed before us by any statutory authority to object to the proposed settlement proposal. However, we make it clear that this order shall not be construed as waiver to any statutory obligations/liabilities of the Corporate Debtor and the Corporate Debtor shall be responsible to pay all the

statutory dues, as per law. The objector has chosen not to give its consent to the withdrawal and has prayed that, in case the application for withdrawal is allowed, the objector may be allowed to invoke proceedings under the SARFAESI Act, 2002. Such kinds of relief cannot be granted by this Adjudicating Authority, as the appropriate forum to be approached is not this Tribunal. The objector may approach the appropriate forum to enforce the available remedy, if any, in accordance with the law.

15. With regard to the objection raised by applicants in IA 4747/2023, it is observed that the applicants had booked some flats in the project of the CD and paid booking amount on 18.12.2018 and 31.12.2018 and after that no installments were paid by the applicants as per the Builder Buyers Agreement due to which the RP cancelled their allotment. It is pertinent to note that cancellation by RP was done on 28.03.2022 and the application was filed 29.08.2023 (16 months after the knowledge of cancellation of their allotment). The fact of

cancellation of allotment of units of the applicant was duly recorded in the Information Memorandum as prepared by the RP. The applicant failed to abide by the terms of the Builder Buyers Agreement and have not paid a single installment.

16. In the settlement proposal by the ex- Management, the ex-Director proposed to pay the principal amount of the applicants in full. Hence, we see no illegality in the actions of the Resolution Professional.

17. In the matter of *Vallal Rck versus M/s Siva Industries and Holdings Limited and others* Civil Appeal Nos. 1811-1812 of 2022, the Hon'ble Apex Court held that when 90% and more of the creditors, in their wisdom after due deliberations, find that it will be in the interest of all the stakeholders to permit settlement and withdraw CIRP, the Adjudicating authority or the Appellate Authority cannot sit in an appeal over the commercial wisdom of CoC. Relevant paras of the aforesaid judgement is reproduced as under: -

**21. This Court has consistently held that the commercial wisdom of the CoC has been given**

**paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. It has been held that there is an intrinsic assumption, that financial creditors are fully informed about the viability of the Corporate Debtor and feasibility of the proposed resolution plan. They act on the basis of thorough examination of the proposed resolution plan and assessment made by their team of experts. A reference in this respect could be made to the judgments of this Court in the cases of K. Sashidhar v. Indian Overseas Bank and Others , Committee of Creditors of Essar Steel India Limited through Authorised Signatory v. Satish Kumar Gupta and Others, Maharashtra Seamless Limited v. Padmanabhan Venkatesh and Others , Kalpraj Dharamshi and Another v. Kotak Investment Advisors Limited and Another , and Jaypee Kensington Boulevard Apartments Welfare Association and Others v. NBCC (India) Limited and Others<sup>6</sup> .**

22. No doubt that the aforesaid observations have been made by this Court while considering the powers of the CoC while granting its approval to the Resolution Plan.

**23. As already stated hereinabove, the provisions under Section 12A of the IBC have been made more stringent as compared to Section 30(4) of the IBC. Whereas under Section 30(4) of the IBC, the voting share of CoC for approving the Resolution Plan is 66%, the requirement under Section 12A of the IBC for withdrawal of CIRP is 90%.**

**24. When 90% and more of the creditors, in their wisdom after due deliberations, find that it will**

*be in the interest of all the stake-holders to permit settlement and withdraw CIRP, in our view, the adjudicating authority or the appellate authority cannot sit in an appeal over the commercial wisdom of CoC. The interference would be warranted only when the adjudicating authority or the appellate authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute or the Rules.*

*26. It is thus clear that the **decision of the CoC was taken after the members of the CoC, had due deliberation to consider the pros and cons of the Settlement Plan and took a decision exercising their commercial wisdom.** We are therefore of the considered view that neither the learned NCLT nor the learned NCLAT were justified in not giving due weightage to the commercial wisdom of CoC.*

*27. **This Court has, time and again, emphasized the need for minimal judicial interference by the NCLAT and NCLT in the framework of IBC.***

18. In view of the aforesaid judgement of Hon'ble Supreme Court, it is clear that once a withdrawal application is approved by the members of CoC with 90% voting shares, interference by Adjudicating Authority is permissible only if the Adjudicating Authority finds the decision of the CoC to be wholly capricious, arbitrary, irrational and de hors the provisions of the statute or the Rules. The objectors have failed to prove and also, we do not find

any material to arrive at a conclusion that the decision of the CoC is capricious, arbitrary, irrational and de hors the provisions of the statute or the Rules.

19. Accordingly, IA 4747/2023 stands **dismissed** and IA 5050/2023 stands **allowed**.

20. The applicant has prayed for number of waivers, reliefs and concession. As to the waiver, relief and concessions, the ex-management of the Corporate Debtor is at liberty to file necessary application before the forum/ authority in order to avail the necessary relief and concessions, in accordance with law.

21. We direct that the Corporate Debtor be revived and restored to its original position with the following directions: -

- i. The Corporate Debtor shall remain bound to comply with the statutory requirements in accordance with the law.
- ii. The Corporate Debtor shall be responsible to pay all the statutory dues including Income Tax dues, as per law.
- iii. This order shall not be construed as waiver to any statutory obligations/liabilities of the Corporate

Debtor and the same shall be dealt by the appropriate authorities concerned as per relevant laws.

22. The moratorium order passed by this Adjudicating Authority under Section 14 of the Code shall cease to have effect from the date of this order.

23. The RP is directed to handover the assets, documents, records pertaining to the Corporate Debtor to the suspended management of the Corporate Debtor forthwith.

24. Since the Corporate Insolvency Resolution Process (CIRP) has been withdrawn, all the connected IA(s)/CA(s) stands disposed of.

Let a copy of the order be served to the parties concerned.

**SD/-**

**(RAHUL BHATNAGAR)**  
**MEMBER (TECHNICAL)**

**SD/-**

**(MAHENDRA KHANDELWAL)**  
**MEMBER (JUDICIAL)**