

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

**IA-593/2023 & IA-594/2023
IN CP/IB/4469/(MB)/2019**

Under Section 7 of the IBC, 2016

In the matter of

**M/s Niche Financial Services Private
Limited**

...Applicant

V/s.

Mr. Jayesh Sanghrajka

Resolution Professional/

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 IA-593, 594/2023:

Mr. Omar Hoda a/w Ms. Eesha
Bakshi and Mr. Uday bhatia, 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.

ORDER

Per: Prabhat Kumar, Member (Technical)

1. Both of these applications containing identical facts seeking directions against different persons. In view of this, this Bench feels that the order in one IA shall deal with the other IA, accordingly, this bench proceeds to decide on the facts stated in IA No. 594/2023 and it shall dispose of both IAs.
2. These are application(s) filed by M/s Alpine Corporate Advisors Private Limited (“Applicant”) on 16.01.2023 for seeking direction from this Bench to the Resolution Professional, Resolution Applicant and the Committee of Creditors to correctly classify and categorize the Financial Creditor as an Real Estate Allottee, who was allotted 4 Units viz., Unit No. 905, 906, 1105 and 1106 in “The Grove Towers”, CTS No.s 1 (Pt), 2A (Pt), 3 4 (Pt), 5 (Pt), 6(Pt) admeasuring 6629.18 sq. mtrs in Oshiwara (Next to Oshiwara Police Station), Mumbai-400104; and to include in the Resolution Plan the amounts paid by the Financial Creditor as consideration towards the allotment of the 4 Units paid in accordance with the terms of the allotment agreement dated 21.09.2018.
3. It is stated that the Resolution Professional, Committee of Creditors and the Resolution Applicant have incorrectly classified the allotment amount paid by the Applicant for the 4 Units, i.e., Rs. 4,50,00,000 (Rupees Four Crores

Fifty Lakhs) as loans and liabilities payable by the Corporate Debtor to the applicant. This inadvertency or error, whichever may be the case, has been made despite the fact that

- (i) the Applicant had deducted and deposited the Tax Deductible at Source (TDS) for the allotment amount, i.e., Rs. 4,50,000 in the account of the Corporate Debtor as TDS against Sale of Property;
- (ii) Allotment Agreements for the 4 Units were executed between the Applicant and the Corporate Debtor.

4. The Applicant states that the director of the Corporate Debtor had misled the Applicant into believing that he would be allotted the 4 Units within a stipulated time period and despite repeated follow ups, the Corporate Debtor reassured the Applicant that his amounts had been secured against the allotment of the 4 Units. It is the case of Applicant that it had deducted TDS at rate of 1% on the payment made to the Corporate Debtor under section 194-I of the Income Tax Act and said TDS is duly reflected against the PAN of Corporate Debtor in the TDS returned filed by the Applicant. These facts were intimated to RP vide email dated 28.12.2022. The applicant also place on record copy of four letters of allotment all dated 21.09.2018 allotting Flat No.905, 906, 1105 and 1106 in "The Grove Towers", CTS No.s 1 (Pt), 2A (Pt), 3 (Pt), 4 (Pt), 5 (Pt), 6 (Pt) admeasuring 6629.18 sq. mtrs in Oshiwara (Next to Oshiwara Police Station), Mumbai-400104 and these letters are signed by Mr. Vijay Machindar on behalf of the company. The Applicant has also enclosed screenshot of WhatsApp messages of Mr. Vijay Machindar wherein the Applicant seeks repayment of money in view of delayed construction of the Flat.
5. The Resolution Professional has filed reply dated 28.02.2023 stating that the amount of Rs.4,50,000/- paid by the applicant as recorded as loans (liabilities) in the books of Corporate Debtor's and the name of applicant is not stated in the MIS of allottees. It is further submitted that last date of

submission of claim was July, 2020 and 90 days from commencement of CIRP expires on 27 September 2020. The Applicant filed the claim on 09.12.2022

6. This bench finds that the Applicant was informed by the Resolution Professional vide email dated 29.12.2022 that the Applicant's payments for allotment is recorded as Loans and Liabilities of the Corporate Debtor in its books of accounts as provided to the resolution professional, and the MIS of allottees provided by the Corporate Debtor does not include the name of M/s Alpine Corporate Advisors Private Limited (formerly known as Growmore Corporate Advisors Private Limited) as allottee.
7. This bench heard the Counsel and perused the material available on record.
8. This bench asked the Resolution Professional whether he has objection if the applicant is considered as Financial Creditor in the class of home buyers as the allotment letters are duly signed by the then director of the Corporate Debtor; the payment has been received by the Corporate Debtor and acknowledged in the financial statement even though under different head; deduction of tax at source by the Applicant u/s 194-I of the Income Tax Act and inclusion of such TDS amount in the amount recorded as payable to the applicant in the books of Corporate Debtor shows that the Corporate Debtor had taken cognizance of said tax deduction; and even if the Applicant is not considered as home buyer, the amounts received from it shall have to be considered as financial debt in accordance with classification in the financial statement accepted by the Corporate Debtor itself. The Ld. Counsel for the RP fairly conceded that he shall have no objection in this regard. However, he drew our attention to the fact that claim was received after approval of the plan by the CoC on 18.09.2021 and filing of an application in consequence there to before the adjudicating authority for its approval, which is pending as on date. He further placed on record an email dated 14.02.2023 from Mr. Vijay Machindar, the then director of the Corporate

Debtor, in his reply to IA-592/2023 whereby the said director had stated that the amounts received from M/s Alpine Corporate Advisors Private Limited and M/s Niche Financial Services Private Limited were classified under loans (Liability) head in the books of account as these amounts were to be refunded consequent upon acceptance of our proposal for withdrawal from CIRP u/s 12A of the Code. Since, it didn't take place the director is stated that the said claim can be considered as booking/Homebuyers and can also be included in MIS as well.

9. The Hon'ble NCLAT in case of *Puneet Kaur, through her Attorney Amrit Pal Singh v. K V Developers Private Limited & Ors. Company Appeal (AT) (Insolvency) No. 390 of 2022* held at Para 15 that “*Non-submission of claim within the time prescribed is a common feature in almost all project of real estate. But as law exists today, they cannot be included in the List of Creditors and that too after approval of Plan by CoC. We, thus, do not find any ground to interfere with order of the Adjudicating Authority rejecting their Application for admission of their claim. However, their claims need to be dealt in a manner, which we shall deal in later part of this judgment*”. It further held at Para 18 that “*extinguishment of claim of the Appellant(s) shall happen only after approval of the Plan by the Adjudicating Authority. The argument of the Respondents that since CoC has approved the Resolution Plan, the claim of the Appellant(s) have been extinguished, cannot be accepted as there is no extinguishment of claim of the Appellant(s) on approval of Plan by the CoC*”. Finally, the Hon'ble NCLAT held at Para 27 that “*However, we are of the view that the claim of those Homebuyers, who could not file their claims, but whose claims were reflected in the record of the Corporate Debtor, ought to have been included in the Information Memorandum and Resolution Applicant, ought to have been taken note of the said liabilities and should have appropriately dealt with them in the Resolution Plan. Non-consideration of such claims, which are reflected from the record, leads to inequitable and unfair resolution as is seen in the present case. To mitigate the hardship of the Appellant, we thus, are of the view that ends of justice*

would be met, if direction is issued to Resolution Professional to submit the details of Homebuyers, whose details are reflected in the records of the Corporate Debtor including their claims, to the Resolution Applicant, on the basis of which Resolution Applicant shall prepare an addendum to the Resolution Plan, which may be placed before the CoC for consideration”.

10. Following the decision of the Hon’ble NCLAT in case of Puneet Kaur (Supra), this Bench is of considered view that the Resolution Professional has not committed any error in rejecting the claim of the appellant on the ground of the applicant’s claim having been filed the claim after approval of the resolution plan by CoC. However, it is also held that in decision that the liabilities of the Corporate Debtor get extinguished upon approval of plan by the Adjudicating Authority u/s 31 of the Code, hence, the corporate debtor owed such sums to the Corporate Debtor on the date of approval of Resolution Plan. This Bench further notices that the Hon’ble NCLAT in the said decision has also held that the Resolution Professional is mandated to include all ‘liabilities’ of the Corporate Debtor in the Information Memorandum and should have included these liabilities reflected in the financial statements and books of accounts of the Corporate Debtor. In the present case, this Bench finds that the Resolution Applicant as well as CoC is aware of claim of the applicant. However, this Bench directs the Resolution Professional to confirm inclusion of their claims and obtain an addendum to the Resolution Plan, which may be placed before the CoC for consideration.
11. Having said so, this Bench finds that Edelweiss Investment Adviser Limited is classified as Financial Creditor under the class of home buyers, this bench feels no hesitation in holding that the applicant ought to be classified as home buyers as facts in both the matters are identical.

12. In view of this, the present application is **disposed of** with the aforesaid directions. Accordingly, IA-594/2023 & IA-593/2023 are **partly allowed** by this common order and disposed of.

Sd/-

PRABHAT KUMAR
Member (Technical)

SVR/02.05.2023

Sd/-

KISHORE VEMULAPALLI
Member (Judicial)