NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1162 of 2023

[Arising out of order dated 19.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-V in I.A. No. 2981 of 2021 in CP (IB) - 3169/MB/2019]

IN THE MATTER OF:

SABARI REALTY PRIVATE LIMITED
A/6 Sunil Sadan, MDS Marg,
Chembur, Mumbai – 400 071
Through its Authorised Representative
Hiren Bharani. **...Appellant**

Vs.

1. SIVANA REALTY PRIVATE LIMITED
Through its Resolution Professional
Mr. Manish Jaju
Samriddhi Garden, CTS No. 403/C,
LBS Road, Opp. Eshwar Nagar,
Bhandup (west), Mumbai – 400 078.

2. M/s. Kabra Estate & Investment Consultants
1001, 10th Floor, Kamla Hub,
JVPD Scheme, N. S. Road No.1, Juhu,
Mumbai - 400049.

3. Mr. Pratik Jayesh Vira
Director, Kalpatru Advisory Services Private
Ltd. & Vira Capital Private Ltd.
24/A, Haria House, First Floor, St. Paul
Street, Hindmata, Dadar, East Mumbai,
MH - 400014 **...Respondents**

Present:

For Appellant: Mr. P. Nagesh, Sr. Advocate with Mr. Akshay Sharma, Mr. Prashant Kumar Nair, Advocates

For Respondents: Mr. Abhijeet Sinha, Mr. Dhaval Deshpande, Advocates with Mr. Manish Jaju, RP for R1.

Mr. Arun Kathpalia, Sr. Advocate with Mr. Vishesh, Mr. Vinit Trehan, Mr. Aditya Dhopar, Mr. Nipun Singh Kalra, Mr. Akshay Jain, Advocates for SRA.

Cont'd.../

Mr. Krishnendu Datta, Sr. Advocate with Mr. Lzafeer Ahmad B.F, Mr. Rajdeep Saraf, Ms. Neha Agarwal, Advocates for R3.

With

Company Appeal (AT) (Insolvency) No.1178 of 2023

[Arising out of order dated 19.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-V in I.A. No. 533 of 2022 in CP (IB) - 3169/MB/2019]

IN THE MATTER OF:

SABARI REALTY PRIVATE LIMITED
A/6 Sunil Sadan, MDS Marg,
Chembur, Mumbai – 400 071
Through its Authorised Representative
Hiren Bharani. **...Appellant**

Vs.

1. SIVANA REALTY PRIVATE LIMITED
Through its Resolution Professional
Mr. Manish Jaju
Samriddhi Garden, CTS No. 403/C,
LBS Road, Opp. Eshwar Nagar,
Bhandup (west), Mumbai – 400 078.

2. Mr. Pratik Jayesh Vira
Director, Kalpatru Advisory Services Private Ltd. & Vira Capital Private Ltd.
24/A, Haria House, First Floor, St. Paul Street, Hindmata, Dadar, East Mumbai,
MH - 400014 **...Respondents**

Present:

For Appellant: Mr. P. Nagesh, Sr. Advocate with Mr. Akshay Sharma, Mr. Prashant Kumar Nair, Advocates

For Respondents: Mr. Abhijeet Sinha, Mr. Dhaval Deshpande, Advocates with Mr. Manish Jaju, RP for R1.

Mr. Krishnendu Datta, Sr. Advocate with Mr. Lzafeer Ahmad B.F, Mr. Rajdeep Saraf, Ms. Neha Agarwal, Advocates for R2.

With

Company Appeal (AT) (Insolvency) No.1179 of 2023

[Arising out of order dated 19.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-V in I.A. No. 933 of 2022 in CP (IB) - 3169/MB/2019]

IN THE MATTER OF:

SABARI REALTY PRIVATE LIMITED
A/6 Sunil Sadan,MDS Marg,
Chembur, Mumbai – 400 071
Through its Authorised Representative
Hiren Bharani. **...Appellant**

Vs.

1. SIVANA REALTY PRIVATE LIMITED
Through its Resolution Professional
Mr. Manish Jaju
Samriddhi Garden, CTS No. 403/C,
LBS Road, Opp. Eshwar Nagar,
Bhandup (west), Mumbai – 400 078.

2. M/s. Kabra Estate & Investment Consultants
1001, 10th Floor, Kamla Hub,
JVPD Scheme, N. S. Road No.1, Juhu,
Mumbai - 400049.

3. Mr. Pratik Jayesh Vira
Director, Kalpatru Advisory Services Private
Ltd. & Vira Capital Private Ltd.
24/A, Haria House, First Floor, St. Paul
Street, Hindmata, Dadar, East Mumbai,
MH - 400014 **...Respondents**

Present:

For Appellant: Mr. P. Nagesh, Sr. Advocate with Mr. Akshay Sharma, Mr. Prashant Kumar Nair, Advocates

For Respondents: Mr. Abhijeet Sinha, Mr. Dhaval Deshpande, Advocates with Mr. Manish Jaju, RP for R1.

Mr. Krishnendu Datta, Sr. Advocate with Mr. Lzafeer Ahmad B.F, Mr. Rajdeep Saraf, Ms. Neha Agarwal, Advocates for R2.

J U D G M E N T

ASHOK BHUSHAN, J.

These three Appeals between the same parties' challenges order dated 19.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court -5. Order under challenge in these three Appeals although of the same date are different orders passed in different applications in CP (IB) - 3169/MB/2019. Company Appeal (AT) (Insolvency) No.1179 of 2023 has been filed against order dated 19.07.2023 passed in I.A. No. 933 of 2022 which was filed by the Appellant (Applicant) praying for rejection of the Resolution Plan submitted by M/s Kabra Estate & Investment Consultants (Successful Resolution Applicant), the Respondent No.2 herein. Company Appeal (AT) (Insolvency) No.1178 of 2023 has been filed against order dated 19.07.2023 passed in I.A. No. 533 of 2022 by which application the Applicant has sought rectification of the Register of Member of the Corporate Debtor which application was dismissed by the Adjudicating Authority by the impugned order. Company Appeal (AT) (Insolvency) No.1162 of 2023 has been filed against order dated 19.07.2023 by which I.A. No. 2981 of 2021 filed by the Resolution Professional seeking approval of the Resolution Plan submitted by Respondent No.2 has been allowed. The Resolution Plan was approved by 99.96% voting share of the members of the Committee of Creditors which stood approved by the impugned order dated 19.07.2023

passed by the Adjudicating Authority. The Appellant aggrieved by the above three orders have filed these three Appeals.

2. We now proceed to note the facts and sequence of events giving rise to these three Appeals. The Corporate Debtor earlier known as Sunshine Housing Private Ltd. is a real estate company which owned two projects namely 'Samriddhi Garden', (Phase-1 project) and 'Sunshine Oakwood', comprising of Wing 'A' and 'B' (Phase-2 project). In the year 2008, Appellant alongwith its sister concern – 'Sabari Developers LLP' acquired 11.31% and 26.38% share of the Corporate Debtor, respectively. Appellant also advanced a loan of Rs.7 Crores to the Corporate Debtor. A mortgage deed was executed on 15.09.2017 between the Corporate Debtor and the LIC Housing Finance Limited. The Corporate Debtor mortgaged Wing 'C' and 'D' of the Phase-I and project Phase-II in its entirety in favour of LIC Housing Finance Ltd. As per the mortgage deed, the Corporate Debtor was required to take prior written permission of LIC before sale or creation of any third-party rights over the aforesaid mortgaged properties. In the year 2017, certain disputes arose between the minority shareholders namely Vira Group and Sunshine Housing and Infrastructure Pvt. Ltd. who was the majority shareholder of the Corporate Debtor. A petition under Section 241-242 of the Companies Act, 2013 was filed by the Vira Group against Sunshine Housing and Infrastructure Pvt. Ltd. (SHIPL). Orders passed in the proceedings were carried to the Hon'ble Supreme Court in Civil Appeal No. 4247 of 2018. Allotment letter dated 05.04.2018 was issued by the Corporate Debtor to the Appellant allotting an area of 12515.09 sq. ft. in the project Sunshine

Oakwood for a total consideration of Rs.18,77,20,000/- only. Letter further stated that amount of Rs.14,64,98659/- shall be appropriated from the loan taken by the Corporate Debtor from Appellant and balance amount of Rs.4,12,21,341/- shall be paid on possession and upon obtaining occupation certificate. 25 premises were allotted by the said letter dated 05.04.2018. In Civil Appeal No.4247 of 2018, Hon'ble Supreme Court on 06.08.2018 directed the parties i.e. Vira Group and SHIPL to go to the mediation centre of the Bombay High Court to settle the pending disputes. A Memorandum of Settlement dated 31.10.2018 was entered between the Vira Group and SHIPL where the shareholders of the Corporate Debtor including the Appellant as part of a larger settlement agreed to transfer their entire shareholding in favour of the Vira Group. To give effect to the Memorandum of Settlement, a Share Purchase Agreement dated 31.10.2018 was entered between the Appellant, Jayesh Shantilal Vira, father of Respondent No.3 and the Corporate Debtor. A joint application was also preferred before the Hon'ble Supreme Court, the Hon'ble Supreme Court by order dated 03.12.2018 disposed of the Appeal in terms of the settlement arrived between the parties. On 16.10.2019, Appellant issued a notice to Vira Group alleging failure to issue Allotment letter and failure to pay Share Purchase consideration. The legal notice was replied by Vira Group on 28.11.2019. On 11.08.2020 CIRP was initiated against the Corporate Debtor on an application filed by 'Spartan Engineering Industries Pvt. Ltd.'. Mr. Manish Jaju (Respondent No.2) was appointed as the Resolution Professional. On 11.01.2021, the Appellant filed its claim in Form CA as Homebuyers/Allottees/ Financial Creditors in a class

in respect of 25 flats in the project of the Corporate Debtor. In the Form the Appellant mentioned itself as related party. Appellant's claim was not initially accepted by the Resolution Professional, hence, I.A. No. 1485 of 2021 was filed by the Appellant seeking direction against the Resolution Professional for acceptance of the claim. The Resolution Professional by email dated 06.07.2021 admitted the Appellant's claim as Homebuyers/Allottees/ Financial Creditors in a class in respect of 25 flats. Objections were raised by LIC Housing Finance Ltd. as well as Forensic Auditor appointed by the Resolution Professional regarding admission of the claim. LIC objected to the claim of the Appellant on the ground that LIC has mortgage over the property and for any allotment consent of the LIC was required, which was not taken in regard to allotment in favour of the Appellant. Authorised Representative of the Homebuyers also informed the Appellant that in view of the mortgage deed, NOC of LIC was required for effecting any sale/allotment to flats in the project. A Request was made by the Appellant seeking documents pertaining to CIRP and requesting permission to participate in the voting in the CIRP. Vira Group sent an email dated 03.08.2021 informing that Memorandum of Settlement dated 31.10.2018 has been revoked and cancelled in view of the fact that there was neither any transfer of consideration amount nor any transaction documents were lodged with the Company for transfer of shares. Appellant sent an email dated 06.08.2021 requesting Vira Group to withdraw email dated 03.08.2021. Resolution Professional communication a clarification to the Appellant that Appellant is a related party and could not be permitted to participate in the CIRP. Resolution Plan submitted by

Respondent No.2 was approved by the CoC with 99.96% voting share. With regard to creditors in a class, Resolution Plan has classified them in two categories 'affected allottees' and 'unaffected allottees'. Voting result regarding approval of the Resolution Plan was announced on 22.11.2021. On 18.12.2021, Appellant filed I.A. No. 933 of 2022 objecting to the Resolution Plan. I.A. No. 533 of 2022 was filed by the Appellant for rectification of Register of the Corporate Debtor. Resolution Professional filed I.A. No. 2981 of 2021 for approval of the Resolution Plan immediately after voting result was declared. The Adjudicating Authority by order dated 19.07.2023 allowed I.A. No. 3981 of 2023 approving the Resolution Plan. By separate order dated 19.07.2023, I.A. No. 933 of 2022 filed by the Applicant has been rejected and by order of the same date I.A. No. 533 of 2022 has also been rejected. Challenging the aforesaid three order, these three appeals have been filed.

3. We have heard Shri P. Nagesh, learned senior counsel appearing for the Appellant, Shri Abhijeet Sinha, learned counsel appearing for the Resolution Professional and Shri Arun Kathapalia, learned senior counsel appearing for the Successful Resolution Applicant. Shri Krishnendu Datta, learned senior counsel has appeared for the Respondent No.3 - Kalpatru Advisory Services Pvt. Ltd. in Company Appeal (AT) (Ins.) No. 1179 of 2023.

4. Shri P. Nagesh, learned senior counsel for the Appellant challenging the impugned order submits that Appellant was not related party of the Corporate Debtor. There being already settlement agreement entered between the parties for transfer of shareholding of the Appellant in favour of the Vira

Group, the Appellant was no more related party and was entitled to participate in the CoC which was denied vitiating the entire CIRP process. It is submitted that the Respondent No.3 and its associates inspite of being related party have been allowed to participate in the CoC whereas they having shareholding in the Corporate Debtor could not be member of the CoC. The Resolution Professional allowed the related party of the Corporate Debtor i.e. Kalpatru Advisory Services Pvt. Ltd. (KASPL). KASPL holding 16% shareholding of the Corporate Debtor was also classified as related party in the Transaction Audit Report dated 08.10.2021, hence, KASPL was not entitled to participate in the CoC or to vote. The Resolution Professional has not allowed the Appellant to be member of the CoC on the ground that it holds 11.31% shareholding whereas KASPL despite holding 16% shareholding was allowed to vote as the member of the CoC. It is submitted that the Resolution Plan could not have been provided for cancellation of the allotment of Affected Allottees. Clause 7.1.10.2 of the Resolution Plan stipulates that allotment of the allottees who had not obtained NOC from LIC Housing Finance Ltd. will stand cancelled by the Resolution Plan and their allotted area will be reduced by 80% from the existing allotted area. The classification of class of creditors in Affected and Unaffected is against the provision of the Code. There can be no differential treatment between same class of creditors i.e Homebuyers/allottees. The Unaffected Allottees are allowed to retain their entire area whereas the Affected Allottees are being allotted only 20% of their original area. Classification of the Allottees of the Corporate Debtor in two sub-classes namely 'Affected Allottees' and 'Unaffected Allottees' merely on the basis of

non-issuance of NOC by LIC Housing Finance Ltd. is unjustified. The above classification is completely arbitrary in nature and without any reasonable basis. Obtaining NOC is liability of the Corporate Debtor and not of the Appellant. Appellant has paid the amount to the Corporate Debtor which has been admitted by the Resolution Professional. Learned counsel for the Appellant in support of his various submissions has placed reliance on judgment of this Appellate Tribunal and the Hon'ble Supreme Court, which shall be referred to while considering submissions of the parties.

5. Learned counsel for the Resolution Professional refuting the submission of learned counsel for the Appellant submits that the Appellant has filed its claim as a related party which admittedly alongwith its sister concern - 'Sabari Developers LLP' holds 36.69% shareholding in the Corporate Debtor. As per Memorandum of Settlement dated 31.10.2018, Appellant alongwith its sister concern was to transfer their entire shareholding in favour of the Vira Group, which transfer never took place neither was recorded in the books of the Corporate Debtor. Appellant has not taken any steps by filing any application under Section 59 of the Companies Act, 2013. The Appellant is reflected as the shareholder in the books of accounts of the Corporate Debtor as on the date of commencement of CIRP. The Resolution Professional has rightly classified the Appellant as related party. The Registrar of Companies has not recorded a transfer of shareholding as per the Share Purchase Agreement, indicating incomplete transfer and/or documentary non-compliances. The share transfer itself is incomplete on account of Appellant not receiving the consideration in full for such transfer, this is an

admitted fact. Appellant filed its claim as related party on 08.01.2021 and subsequently after six months has informed that there is error in filing of claim. There is no discrimination in classifying the homebuyers as 'Affected' and 'Unaffected' categories. The allotment made to the group of homebuyers classified as 'Affected Allottees' were those whose allotments were made without taking NOC from the LIC Housing Finance Ltd. to whom the project was mortgaged. Allotment in favour of the Appellant without NOC of LIC was no allotment and rightly been treated as void in the plan, however, fresh allotments have been made in favour of the Affected Parties on the basis of sum received by the Affected Parties. The Resolution Plan has been approved by the homebuyers as creditors in a class. Even homebuyers in Affected group has also by majority has approved the Resolution Plan. The Appellant who is a homebuyer could not be allowed to challenge the approval of the Resolution Plan when creditors in a class by majority has approved the Resolution Plan. The learned Adjudicating Authority has rightly relying on the judgment of Hon'ble Supreme Court in ***"Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Versus NBCC (India) Ltd. & Ors., (2022) 1 SCC 401"*** has dismissed the objection raised by the Appellant to the Resolution Plan. It is submitted that the commercial wisdom of the CoC could not be allowed to be challenged. The CoC in its commercial wisdom has classified the allottees in two groups 'Affected' and 'Unaffected' which has Intelligible Differentia i.e. allotment which was made without NOC of LIC Housing Finance Ltd and allotment which was made with NOC of LIC Housing Finance Ltd., which is a valid classification and could not be said to be

arbitrary and inequitable. Allotment without NOC was in fact no allotment. The Resolution Plan also contains provision for allotment of 20% area to such homebuyers taking into consideration the amount already paid by said allottees. The Appellant alongwith its sister concern – 'Sabari Developers LLP' holds 36.69% shareholding of the Corporate Debtor as per books of accounts since 2008 and they have rightly been categorized as related party. The Respondent No.3 would have become shareholder by Share Purchase Agreement dated 31.10.2018 had it been given effect to but Share Purchase Documents having never being executed, Respondent No.3 never became shareholder.

6. Learned counsel appearing for the Successful Resolution Applicant submits that the Resolution Plan submitted by the Successful Resolution Applicant does not violate any provisions of the Code. It is submitted that the Appellant has no locus to challenge the Resolution Plan which was approved by overwhelming majority of 99.96% of the CoC. When by a vote of more than 50% of the voting share of Financial Creditors within a class a decision is taken, all others within that class, are bound by that decision. Appellant who is part of class of creditors who had already voted for resolution plan, Appellant cannot be allowed to challenge the majority decision. Reliance has been placed on judgment of Hon'ble Supreme Court in ***"Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Versus NBCC (India) Ltd. & Ors., (2022) 1 SCC 401"***. Voting and approval of CoC cannot be set at naught on the basis of any purported dissatisfaction of a miniscule minority of a single homebuyer and such minority has to sail alongwith the view of

majority in terms of the scheme of IBC. Under the Code, the commercial wisdom of the CoC has been given paramount status and any judicial intervention on equitable grounds or any grounds beyond those contemplated under Section 30 and 31 of the IBC is impermissible. It is submitted that there is reasonable classification between the Affected and the Non-affected homebuyers. It is submitted that the Phase-I project is 85% complete, here escalation charges are Rs.2850 per sq. ft. whereas Phase-II project is still at ground level and escalation charges are Rs.8500 per sq. ft. It is submitted that feasibility and viability of the plan has been examined by the CoC.

7. Learned counsel for Respondent No.3 submits that Appellant cannot initiate proceedings for rectification in register after commencement of CIRP. The Appellant had by its notice dated 16.10.2019 held the proposed share transfer to be null and void. Appellant himself has abandoned the Settlement Agreement and Share Purchase Agreement. In the books of accounts and financial statements of the Corporate Debtor Appellant is shown as a shareholder of the Corporate Debtor. Share transfer form was never submitted to the ROC and transfer of shares never took place. Appellant is bound by the commercial wisdom of the CoC. The Respondent No.3 had 16% share of the company through his subsidiary Kalpataru Advisory Services Pvt. Ltd. The Respondent No.3 is not a related party of the Corporate Debtor. Share of the Respondent No.3 in the Corporate Debtor is less than 20%, hence, it is not a related party whereas Appellant is related party by its own admission as per it sown claim form and as per its own Annual Reports which is recorded in the impugned order.

8. We have considered the submissions of learned counsel for the parties and perused the record.

9. From the submissions of learned counsel for the parties following are the issues which arise for consideration:

(i) Whether the Appellant is not a related party and was entitled to vote in the Committee of Creditors?

(ii) Whether the Vira Group being related party consequently Respondent No.3 was also related party and as Director of Kalpataru Advisory Services Pvt. Ltd. could not be member of the Committee of Creditors or voted in the Committee of Creditors?

(iii) Whether the Appellant is entitled to challenge the Resolution Plan which was approved by majority of creditors in class i.e. homebuyers?

(iv) Whether the categorization of the homebuyers in class as 'Affected' and 'Unaffected' homebuyers is violative of Section 30(2)(e) and the Resolution Plan deserve to be set aside on this ground alone?

Issue No.1

10. The Appellant has questioned non-inclusion of the Appellant in the Committee of Creditors. It is undisputed fact that the Appellant holds 11.31% shareholding of the Corporate Debtor and in the CIRP of Corporate Debtor Appellant filed its claim vide Form CA dated 08.01.2021. In the declaration

which was filed alongwith the claim form in Para 5 following has been declared:

> *"5. We are a related party of the corporate debtor, as defined under section 5(24) of the Code."*

11. In the financial statement of the Corporate Debtor, Appellant has been reflected as shareholder on the date of commencement of the CIRP. The Registrar of Companies has not recorded transfer of shares as per the Share Purchase Agreement. Share Purchase Agreement dated 31.10.2018 after the Settlement Agreement between the parties could not be implemented, which is a fact on record. The Appellant itself has filed application for contempt against the Vira Group before the Hon'ble Supreme Court alleging the violation of order of Hon'ble Supreme Court which contempt was permitted to be withdrawn with liberty to the Appellant to take such proceedings as may be advised. Filing of contempt itself recognises that Memorandum of Settlement dated 31.10.2018 was breached. We are of the view that in this proceeding it is not necessary for us to express any opinion as to who is responsible for breach of settlement. Suffice it to say that settlement could not be implemented resulting in non-implementation of Share Purchase Agreement and shares of Appellant and others could not be transferred in favour of Vira Group. The Resolution Professional proceeded to classify the Appellant as related party on account of declaration of the Appellant itself in the claim form that it is a related party. The shareholding of the Appellant still continues in the Corporate Debtor which is not yet been transferred as per the Settlement Agreement. We do not find any error in the decision of the

Resolution Professional classifying the Appellant as related party and not giving the Appellant a seat and voting share in the Committee of Creditors. Issue No.1 is answered accordingly.

Issue No.2:

12. The case of the Appellant is that Kalpatru Advisory Services Pvt. Ltd. (KASPL) is a voting member of the Committee of Creditors. His submission is that KASPL holds 16% shareholding of the Corporate Debtor and Mr. Pratik Jayesh Vira was Director of Corporate Debtor from 01.01.2010 to 19.02.2019 and is also Director of KASPL. Learned counsel for the Appellant has relied on Section 5(24)(d) to submit that KASPL is a related party. According to own case of the Appellant, Mr. Pratik Jayesh Vira who was Director of the Corporate Debtor as well as KASPL resigned on 19.02.2019. Learned counsel for the Appellant has relied on judgment of Hon'ble Supreme Court in ***"Phoenix ARC vs. Spade Financial Services, (2021) 3 SCC 475"***. However, there is no material on record that resignation of Respondent No.3 was with intend to be member of the Committee of Creditors. There being no material or pleading to come to the conclusion that KASPL still continues to be related party by virtue of Section 5(24)(d) whereas after 19.02.2019, Mr. Pratik Jayesh Vira does not continue as Director of the Corporate Debtor and CIRP against the Corporate Debtor commenced on 11.08.2020, more than a year after such resignation. With regard to 16% shareholding of KASPL, learned counsel for the Respondent No.3 has submitted that to attract Section 5(24)(j), the KASPL had to control more than

20% of voting rights in the corporate debtor on account of ownership or a voting agreement. It has only 16% shareholding in the Corporate Debtor, hence, cannot be held as related party as per Section 5(24)(j). The submission of the Appellant objecting participation of KASPL on the basis of its shareholding which in view of the definition clause 5(24)(j) does not fulfils it to be related party, hence, participation of KASPL in voting cannot be faulted. As noted above, transfer of shareholding in favour of the Vira Group could not materialise.

Issue No.3

13. The Adjudicating Authority by the impugned order has rejected the objection filed by the Appellant challenging the Resolution Plan on the ground that Appellant being a part of the class of creditors i.e. homebuyer who has voted for Resolution Plan cannot be allowed to challenge the Resolution Plan. The Adjudicating Authority in holding that Appellant as an individual cannot oppose the Resolution Plan has relied on judgment of Hon'ble Supreme Court in ***"Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Versus NBCC (India) Ltd. & Ors., (2022) 1 SCC 401"***. The Hon'ble Supreme Court in the above case has categorically held that where homebuyers as a class has assented to the plan any individual homebuyer and Association cannot raise challenge to the Resolution Plan. In Paras 218 and 226 of the judgment following has been laid down:

> *"218. 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."

"226. For what has been discussed above, we hold that the homebuyers as a class having assented to the resolution plan of NBCC, any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person; the question of violation of the provisions of the Real Estate (Regulation and Development) Act, 2016 does not arise; the resolution plan in question is not violative of the mandatory requirements of the CIRP Regulations; and when the resolution plan comprehensively deals with all the assets and liabilities of the corporate debtor, no housing project could be segregated merely for the reason that the same has been completed or is nearing completion."

14. From the facts which have been brought on the record, it is clear that homebuyer as a class have approved the Resolution Plan. Voting results on the plan have been brought on the record which clearly shows that the homebuyers as a class had approved the Resolution Plan. Appellant, who is a dissatisfied minority, a single homebuyer has to sail alongwith the view of the majority in terms of the scheme of IBC. We, thus, concur with the view of the Adjudicating Authority that Appellant as a class of homebuyers cannot be allowed to challenge the Resolution Plan which has received approval of class of homebuyers on the basis of majority of votes of homebuyers.

Issue No.4

15. The Resolution Plan is sought to be attacked by the Appellant on the ground that the homebuyers in class have been given different treatment under the heading 'Affected Homebuyers' and 'Unaffected Homebuyers'. We may for this purpose first notice certain clauses of the Resolution Plan. Clause 7.1.10 deals with proposal for 'Affected Homebuyers' and Clause 7.1.11 deals with proposal for 'Unaffected Homebuyers'. It is useful to extract clause 7.1.10 of the Resolution Plan:

> *"**7.1.10 Proposal for affected home buyers.***
>
> *7.1.10.1 The affected allottees have been allotted a total area of approx. 83,000 sq. ft. for a total consideration of Rs. 132 crores. Out of this, they have paid against their units a total sum of approx. Rs. 93 crores and amount of Rs. 39 crore is payable by them. LIC HFL has raised objection to allotment / sale of such units since NOC of LIC HFL was not obtained towards their allotment / sale. It is also noticed that some of the affected parties are shareholders of the Company and they have been classified as a related party by the RP and the RA has proposed the same treatment for them as other affected parties.*
>
> *7.1.10.2 In order to resolve the Corporate Debtor, it is proposed that allotment of such units where NOC was not obtained, their allotments / sale shall stand cancelled vide this resolution plan. The affected homebuyers will have to execute*

cancellation agreements within 30 days of the trigger date. In case they fail to do so, then the Resolution Applicant shall be entitled to do a one side cancellation agreement for the same under the Resolution Plan.

7.1.10.3 Against the aforesaid cancelation the RA proposes to allot fully paid-up units as per Annexure I & J as full and final settlement against their allotment or the amounts paid to the corporate debtor by such unit holders or the amounts credited to their account as paid by the corporate debtor against the aforesaid units. Accordingly, such units shall no longer be liable to pay the balance consideration of Rs. 39 crores as mentioned above and LIC HFL will be deemed to have given its NOC in respect of such allotment to these affected allottees and these units shall be released from the mortgage on approval of the resolution plan by the Adjudicating Authority. The details of such allotment is given in Annexure I & J hereto. Such unit holders who have executed the cancellation agreement will be given fresh allotment letters showing the revised area allotted to them and the consideration adjusted against the same.

7.1.10.4 The number of units coming to the share of each affected homebuyer is given in Annexure I hereto and if the same is not possible to be allotted due to the RERA carpet area of the units being higher or lower, then for the

difference in area the concerned homebuyer shall either make payment or be entitled to a refund calculated at the rate of Rs.24,500 per sq. ft . The payment of the said additional consideration for the additional area shall be made as per the schedule given in the agreement for the respective unit to be entered into with the affected allotee after approval of the plan. It is pertinent note that plans for phase 2 have not yet been approved by MCGM and fresh plans have to be submitted for approval by RA and hence allotment of units in phase 2 to affected units shall happen only after the plans are approved by MCGM. It shall be the endeavor of the RA to allot units to the affected allottees as per the areas mentioned in list attached hereto as Annexure I.

7.1.10.5 The units to be allotted to the affected home buyers shall be fully paid up as regards the sale consideration is concerned, but they will have to pay the stamp duty, registration charges, GST, and other applicable taxes and charges including electricity meter deposit, development charges, society formation charges, membership fees of the society, etc. as are applicable to all other unit buyers.

7.1.10.6 The affected allottees of phase 1 shall also be liable to pay an escalation charge of Rs. 2850 per sq.ft. of Rera carpet area in the manner provided here in below:

a) 30% within 60 days of the trigger date.

b) 30% within 6 months of the trigger date.

c) 20% within 9 months of the trigger date.

d) 20% within 12 months of the trigger date.

Such escalation charges are at par with the escalation charges provided for unaffected allottees.

The affected allottees of phase 2 shall also be liable to pay an escalation charge of Rs. 8500 per sq.ft. of Rera carpet area in the manner provided hereinbelow.

a. 30% within 60 days of the CC of phase 2.

b. 15% within 6 months of the CC of phase 2.

c. 15% within 12 months of the CC of phase 2.

d. 15% within 18 months of the CC of phase 2.

e. 15% within 24 months of the CC of phase 2.

f. 10% within 30 months of the CC of phase 2."

16. We have noticed above that Project-II was mortgaged to LIC Housing Finance Ltd. by Mortgage Deed dated 15.09.2017. The Mortgage Deed provided that the Corporate Debtor was required to take prior consent of LIC before creating of any third party rights over the mortgaged property. It is undisputed fact that allotment in favour of the Appellant on 05.04.2018, which is subsequent to the Mortgage Deed, was made without taking NOC

from the LIC Housing Finance Ltd. The allotment in favour of the Appellant was made by the Corporate Debtor and Allotment Letter indicate that consideration for the allotment was substantial part of the amount of the loan which was taken from the Appellant and rest of the amount was to be paid at the time of handing over of possession. The Resolution Plan states that such allotment for which no NOC was obtained shall be considered cancelled and Affected party has to execute cancellation agreement and by the same plan the Resolution Plan proposes to allot fully paid-up units as full and final settlement against allotment and the amount paid to the Corporate Debtor by such unit holders or the amounts credited. There is a clear demarcation line between Affected and Unaffected homebuyers. The distinction has been made between allottees with NOC from the Mortgagee and allottees without NOC of the Mortgagee. When the Mortgage Deed especially provide for NOC by the Mortgagee, any allotment made in breach of such mortgage condition could not have been ignored by the Resolution Professional and the Committee of Creditors in its commercial wisdom has decided to deal with homebuyers who had allotment with NOC of LIC Housing Finance Ltd. and those who does not have NOC, the said treatment by the Committee of Creditors cannot be said to be in violation of provisions of Section 30(2)(e) of the I&B Code.

17. From the relevant clauses of the Resolution Plan, as extracted above, it is clear that those homebuyers who were given allotment without NOC and from whom amount were received or credited have been offered allotment, ofcourse of the reduced area. The submission of the Appellant that both categories of homebuyers who were given allotment with NOC of LIC and

those who were given allotment without NOC of LIC has to be treated as member of one class and were entitled to similar treatment in the Resolution Plan. In a real estate project when the class of creditors consist of homebuyers and when the project spread into several units and several projects which are at different stages of construction the CoC in its commercial wisdom can take appropriate decision to satisfy the claim of class of creditors in a reasonable and fair manner.

18. Learned counsel for the Appellant has placed reliance on judgment of this Tribunal in ***"Company Appeal (AT) (Ins.) No. 700 of 2021, Amit Goel vs. Piyush Shelters India Pvt. Ltd."*** to support his submission that there cannot be differentiation in treatment of homebuyers. In the case of ***Amit Goel*** Resolution Plan was approved which provided for allotment of unit to those homebuyers whose claim was filed within time and admitted and with regard to those homebuyers who did not file their claim within time were proposed to get 10% of their booked amount after verification. The Resolution Plan was challenged on various grounds. The ground to challenge the Resolution Plan has been noticed in Para 6 of the judgment, which is to the following effect:

> *"6. The Appellants in the three appeals have assailed the Impugned Order on the following grounds: –*
>
> *(i) The Learned Adjudicating Authority has passed the Impugned Order in CA No. 371/2019 while an earlier CA No. 282/2019 filed by the Resolution Applicant for consideration of his resolution plan was*

pending before the Adjudicating Authority. Since no orders have been passed in CA No. 282/2019, the Committee of Creditors (CoC) could not have considered the resolution plan submitted by the consortium.

(ii) In the ninth meeting of CoC held on 1.11.2019, the CoC failed to consider the circumstances under which the earlier resolution plan of the Maya Group was withdrawn and revised resolution plan was being considered

(iii) Section 25–A of the IBC clearly stipulates that the authorized representative of the financial creditors in class (in this case homebuyers) shall attend the meeting of CoC on their behalf and vote in accordance with prior instructions of the financial creditors in class. In the present case the e–voting of the financial creditors in class took place along with e-voting on the resolution plan by the CoC which is evident from the results of e-voting. Thus, no prior voting by the financial creditors in class was organized by the authorized representative, thereby contravening provisions of Section 25A of the IBC.

(iv) The Resolution Professional should have considered maximization of value of the assets of the Corporate Debtor which was not done and the liquidation value is not sufficient to cover the amounts owed to financial creditors and other creditors.

> *(v) Only 222 homebuyers/allottees, out of a total of 473 homebuyers/allottees, have filed claims before the RP and claims of remaining 251 allottees have been almost extinguished with the approval of the resolution plan. The 251 homebuyers/allotees could not file their claims because wide publicity was not given to the CIRP as the newspapers in which the public notices appeared are published from New Delhi, whereas the project is situated in District Faridabad(Haryana) and registered office of Corporate Debtor is in Meerut (UP)."*

18. This Tribunal after hearing the submission of the parties by the order set aside the order of the Adjudicating Authority and directed the process to be started afresh by giving realistic time limit for submission of claims for the homebuyers. It is true that this Tribunal in the judgment observed that provision of 10% of the claim amounts to homebuyers/allottees who could not file their claims is an unfair and inadequate treatment of the financial creditors. In Para 28 of the judgment following observations have been made:

> *"28. Thus we see that the homebuyers/allottees could not have had access to either the registered office of the corporate debtor or the principal place of business at Faridabad since both were closed. Moreover, without the meeting/getting together by the homebuyers/allottees, it was not easy for them to discuss and convey their views to the Authorized Representative who would then represent their views*

> *in the CoC. When we see that out of a total of 473 home buyers/allottees only 222 allottees could file claims in time before the Resolution Professional and 251 allottees could either not do so or did so belatedly, we feel that exclusion of more than 251 i.e. about 53% of total homebuyers/allottees cannot lead to a fair and just resolution of the Corporate Debtor. We also feel that the providing 10% of the claimed amounts to homebuyers/allottees who could not file their claims in the circumstances of this case is an unfair and inadequate treatment of the financial creditors."*

19. However, when we look into the entire judgment of this Tribunal, the reason which found favour with this Tribunal was that voting as required under Section 25A was not correctly done. In Para 34 of the judgment this Tribunal itself has noted the distinguishing feature of the case i.e. question raised in the Appeal is about Section 25A and how it was put in operation. This Tribunal held that action of the Resolution Professional and Authorised Representative of financial creditors in class fell foul of Section 25A. In Para 37 of the judgment following has been observed:

> *"37. The **Maharashtra Seamless judgment** (supra) is distinguished on the basis that there were flaws in operationalizing the provision of Section 25Awhich is for the benefit of financial creditors in class when the Authorized Representative did not do "prior consultation" with the homebuyers/allottees who he sought to represent. Thereafter, the RP allowed e-voting on the final resolution plan wherein all the homebuyers participated, not as a class represented*

by the Authorized Representative alongwith the other members of CoC. All this means that section 30(2)(e) of the IBC was infringed and the resolution plan is therefore liable to be rejected on such a ground."

20. Ultimately in Para 39 following directions were issued:

"39. In light of the aforementioned discussion, we set aside the impugned order dated 14.7.2021 and direct that the process be started afresh with claims of homebuyers/allottees accepted by the Resolution Professional by giving them realistic time limit for submission of claims, in keeping with the order of the Adjudicating Authority in CA 12/2020, leading to a revised information memorandum, which should then be used for inviting Expressions of Interest. In the CIRP, the views of the financial creditors in class should be elicited by the Authorized Representative prior to CoC meetings in letter and spirit of section 25A of IBC. Thereafter, the CoC shall consider the resolution plans so received in accordance with the provisions laid down in law. For this entire exercise, we allow a period of 90 days to the CoC from the date of this order to complete the entire exercise."

21. The above judgment thus is not founded on the ground that Resolution Plan provides for 10% of claim to the homebuyers who could not file the claim, rather is founded on the ground that Section 25A has not been followed. The above judgment, thus, does not lend support to the submission of the Appellant that even though there are features for distinguishing a class of creditors in terms of the Resolution Plan, the same is impermissible.

22. Another judgment relied by learned counsel for the Appellant is judgment of this Appellate Tribunal in ***"Company Appeal (AT) (Ins.) No. 708 of 2019, Jaypee Greens Krescent Home Buyers Welfare Association & Ors. vs. Jaypee Infratech Ltd. Through Anuj Jain, Interim Resolution Professinal"***. In the above judgment of this Tribunal delivered on 30.07.2019 we do not find any preposition of law which may support the Appellant in the present case.

23. We, thus, are of the view that different treatment of two sets of homebuyers in view of the allotment to the homebuyer with/without NOC of the Mortgagee has rational for separate treatment and the submission of the Appellant cannot be accepted that all homebuyers should be treated in the same manner in the Resolution Plan. We may further notice that present is not a case where there is distribution of any amount as per the Resolution Plan to a class of creditors. Learned counsel for the Appellant has also relied on judgment of this Tribunal in ***"Company Appeal (AT) (Ins.) No. 1148 of 2022, Akashganga Processors Pvt. Ltd. vs. Shri Ravindra Goyal, decided on 13.07.2023"***. In the above case this Tribunal took the view that distribution to the Operational Creditor has to be in the same proportion and there can be no discrimination in payment of Operational Creditors. This Tribunal noticing that there was discrimination in payment to the Operational Creditors inter se, has directed that Operational Creditors be paid the same amount. In the above case, the Adjudicating Authority has rejected the Resolution Plan on the ground that there is differentiation in payment of Operational Creditors inter se. The Appeal was allowed by this Tribunal and

Resolution Plan was upheld subject to direction that Operational Creditors be made payment to the equal effect. In Para 8, 9 and 10 following has been held:

> *"8. As far as the submission that payment was made to Gujarat Industrial Development Corporation and Surat Municipal Corporation to keep the Corporate Debtor as a going concern, the said payment can very well be made by the Corporate Debtor but not in the manner as adopted in the Resolution Plan. In the present case, the Resolution Plan was approved by the CoC on 06.08.2021 with 99.84% vote share, however, the Adjudicating Authority rejected the plan by the impugned order. It is also to be noticed that none of the Operational Creditors i.e. State Tax, Government of Gujrat and Central Excise, Government of India have come up in appeal.*
>
> *9. The Punjab National Bank (Financial Creditor) has also filed an Additional Affidavit in pursuance of order dated 31.03.2023 indicating reason to accept the amount as allocated in the plan. We are satisfied that the said reason makes reasonable decision taken by the Bank to accept the plan. Under the Plan the Financial Creditor has conceded amount of Rs.32,78,102/- to Gujarat Industrial Development Corporation and Surat Municipal Corporation.*
>
> *10. In the facts of the present case, we are of the view that ends of justice be served in disposing of this appeal in directing that the amount of Rs.32,78,102/- be distributed to all the four Operational Creditors so*

as to save the plan from being invalidated. We, thus, are of the view that the Adjudicating Authority having found that there is discrimination in payment of Operational Creditors could have directed for compliance of provision of the Code by distribution of Rs.32,78,102/- without affecting the other terms and conditions of the plan. By this modification the plan shall be able to sail and implemented, which is approved by CoC with 99.84% vote share. The plan need to be implemented with modification as directed above."

24. The above judgment does not help the Appellant in the present case since in the above case the question was distribution of amount under the Resolution Plan to the Operational Creditors inter se and this Tribunal directed payment of amount to the Operational Creditors in the same proportion to uphold the Resolution Plan. The present is not a case of distribution of any amount rather Resolution Plan provides for ways and manner to complete the project and handover units to the allottees. Allottees have been classified in two groups – 'Affected' and 'Unaffected', as noted above, and we have found the classification justified in the treatment of claims. Learned counsel for the Appellant has failed to point out any violation of any provision of law by aforesaid classification of 'Affected' and 'Unaffected' homebuyers. We, thus, are of the view that the Resolution Plan does not violate any provision of law.

25. We are conscious that the Hon'ble Supreme Court in ***"Committee of Creditors of Essar Steel India Limited Through Authorised Signatory***

vs. Satish Kumar Gupta & Ors., (2020) 8 SCC 531" has laid down that there can be difference in payment of the different category of creditors. In Para 88 of the judgment following has been held:

> *"88. By reading paragraph 77 (of Swiss Ribbons) dehors the earlier paragraphs, the Appellate Tribunal has fallen into grave error. Paragraph 76 clearly refers to the UNCITRAL Legislative Guide which makes it clear beyond any doubt that equitable treatment is only of similarly situated creditors. This being so, the observation in paragraph 77 cannot be read to mean that financial and operational creditors must be paid the same amounts in any resolution plan before it can pass muster. On the contrary, paragraph 77 itself makes it clear that there is a difference in payment of the debts of financial and operational creditors, operational creditors having to receive a minimum payment, being not less than liquidation value, which does not apply to financial creditors. The amended Regulation 38 set out in paragraph 77 again does not lead to the conclusion that financial and operational creditors, or secured and unsecured creditors, must be paid the same amounts, percentage wise, under the resolution plan before it can pass muster. Fair and equitable dealing of operational creditors' rights under the said Regulation involves the resolution plan stating as to how it has dealt with the interests of operational creditors, which is not the same thing as saying that they must be paid the same amount of their debt proportionately. Also, the fact that the operational creditors are given priority in payment over all financial*

> *creditors does not lead to the conclusion that such payment must necessarily be the same recovery percentage as financial creditors. So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors."*

26. What was emphasised in the judgment is that there shall be fair and equitable treatment in dealing dues of Operational Creditors and further there can be difference in payment to the Financial Creditor and the Operational Creditors. Hon'ble Supreme Court in the said judgment has held that commercial wisdom of the Committee of Creditors cannot be substituted. In Para 144 and 147 following has been held:

> *"144. What is important to note is that when one reads the abovementioned judgment, it is a majority of 66% of the Committee of Creditors who has exercised the discretion vested in it under the Code in this particular manner, which has then correctly not been disturbed by the NCLT and NCLAT. Far from helping Shri Sibal's client, the principle that is applied in such a case is that ultimately it is the commercial wisdom of the requisite majority of the Committee of Creditors that must prevail on the facts of any given case, which would include distribution in the manner suggested in Orissa*

Manganese (supra). It is, therefore, not possible to accept the argument that the Adjudicatory Authority and consequently the Appellate Authority would be vested with the discretion to apply what was applied by the Committee of Creditors in the Orissa Manganese case (supra). This submission is also devoid of merit and is, therefore, rejected."

"147. The NCLAT judgment which substitutes its wisdom for the commercial wisdom of the Committee of Creditors and which also directs the admission of a number of claims which was done by the resolution applicant, without prejudice to its right to appeal against the aforesaid judgment, must therefore be set aside."

27. We, thus, are of the view that commercial wisdom of the Committee of Creditors, which has approved the Resolution Plan under which different treatment has been given to 'Affected Homebuyers' and 'Unaffected Homebuyers', cannot be faulted. We, thus, are of the view that there are no grounds made out to challenge the approval of the Resolution Plan. Further, the Adjudicating Authority has also rightly rejected the objections filed by the Appellant by I.A. No. 933 of 2022.

28. Coming to the order passed by the Adjudicating Authority in I.A. No. 533 of 2022 by which Appellant prayed for rectification of Register of Corporate Debtor. In support of I.A. No. 533 of 2022, the Appellant has relied on settlement dated 30.10.2018 as referred in its order dated 03.12.2021 by the Hon'ble Supreme Court. The Adjudicating Authority has observed that no

steps are shown to have been taken by the Applicant Company in terms of the Memorandum of Settlement and Share Purchase Agreement. In Para 34 of the order following has been observed by the Adjudicating Authority:

> *"34. Strangely enough, the applicant Company has not impleaded in this Application any other party with whom the terms of settlement or the share purchase agreement was executed. The applicant Company has simply sought a direction to the Respondent/ Resolution Professional to carry out the change in the register of members of Company on the basis of aforesaid settlement document/share purchase agreement on its own. Since admittedly there has been dispute between the parties with regard to the settlement terms and even the sale consideration in respect of the transfer of shares has not been exchanged, the Resolution Professional cannot be expected to effect any change in the register of members on the basis of the documents with regard to which a dispute continues to exist between the relevant parties. It has been rightly pointed out by the RP in the reply that the appropriate remedy available with the Applicant under the circumstances was to seek rectification of the register of members of the Corporate Debtor under Section 59 of the Companies Act, 2013. However, the said remedy was not availed by the Applicant prior to the initiation of the CIRP on 11.08.2020. Therefore, under the circumstances, the prayer with regard to the register of members by the Resolution Professional is not as per law and the same cannot be granted."*

29. We, thus, are of the view that no error has been committed by the Adjudicating Authority in rejecting I.A. No. 533 of 2022. The Register of the Corporate Debtor cannot be rectified on application filed by the Appellant and Appellant in fact by the application prayed for specific performance of Memorandum of Settlement which admittedly could not be implemented due to various reasons which are not necessary to be noted for the purposes of this case.

30. In view of the foregoing discussion and conclusions, we do not find any error in orders dated 19.07.2023 approving the Resolution Plan and rejecting I.A. No. 533 of 2022 and I.A. No. 933 of 2022. In result, all the Appeals are dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

2nd November, 2023

Archana