IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-V

I.A. 344 OF 2023
IN
C.P.(IB) No. 3169/MB/2019

Under Section 60(5) of the Insolvency & Bankruptcy Code, 2016

Mr. Amit Kantilal Desai

…Applicant

Vs

Mr. Manoj Motilal Jaju

…Respondent No. 1

LIC Housing Finance Limited

…Respondent No. 2

Kalpatru Advisory Services Private Limited

…Respondent No. 3

Kabra Estate and Investment Consultant

…Respondent No. 4

Mr. Vithal Dahake

…Respondent No. 5

In the matter of

Spartan Engineering Industries Private Limited,

... Petitioner

Vs

Sivana Reality Private Limited

... Corporate Debtor

Order Pronounced on: 19.07.2023

Coram:

Hon'ble Shri. Kuldip Kumar Kareer, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearances (via Videoconferencing)

For the Applicant:	Senior Adv. Ashish Kamat, Adv. Harsh Murjani, Adv. Rajan Agarwal and Adv. Varun Agarwal i/b RDA Law Office
For the RP:	Mr. Amir Arsiwala, Advocate a/w Ms. Nidhi shah and Ms. Nupur Shah
For the Successful Resolution Applicant:	Mr. Prateek Seksaria, senior counsel a/w Adv. Atishay Jain, Adv. Nishant Chothani, Adv. Yash Chedda and Adv. Rohan

<u>Per: Kuldip Kumar Kareer, Member (Judicial)</u>

ORDER

The present Application is filed by the Applicant, namely, **Mr. Amit Kantilal Desai**, under section 60(5) of the Insolvency and Bankruptcy Code, 2016 **("Code")** read with rule 11 of the National Company Law Tribunal Rules, 2016 **("NCLT Rules").**

FACTS OF THE CASE:-

1. The Applicant is a financial creditor falling in the class of "Home Buyers/Allottee" at the Project "Samrudddhi Garden" of the Corporate Debtor. The instant Interlocutory Application has been preferred by the Applicant under the provisions of section 60(5) of the Insolvency and Bankruptcy Code, 2016 read with relevant provisions of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, further read with Rule 11 of the National Company Law Tribunal Rules, 2016.

2. The Resolution Professional has accepted claim of one "Kalpatru Advisory Services Private Limited" as a Financial Creditor in the category of homebuyer/allotee. Kalpatru Advisory Services Private Limited has allegedly provided services of project management and consultancy to the Corporate Debtor amounting to around Rs. 28.00 crores. The Corporate Debtor allegedly has issued a "letter(s) of allotment" to Kalpatru Advisory Services Private Limited, whereby allegedly certain flats/shops were allotted to Kalpatru Advisory Services Private Limited towards payment of alleged services rendered by Kalpatru Advisory Services Private Limited of the Corporate Debtor.

3. Consequent to admission of the alleged operational creditor as a financial creditor by the Resolution Professional, the Resolution Plan has allocated residential and office spaces to Kalpatru Advisory Services Private Limited.

4. Firstly, the Resolution Professional could not have accepted the claim of Kalpatru Advisory Services Private Limited as a financial creditor in the

category of homebuyer as the purported claim arises out of alleged provision of services by Kalpatru Advisory Services Private Limited to the Corporate Debtor. Secondly, in fact, the alleged services are not rendered by Respondent No 3 at all at any time to the Corporate Debtor as alleged and as the flats/offices have been allotted to Respondent No 3 pursuant to a settlement between the parties. The alleged claim of Kalpatru Advisdry Services Private Limited is a false claim as no services are offered or rendered to the Corporate Debtor by Kalpatru Advisory - Services Private Limited as claimed.

5. The present Interlocutory Application is to seek relief against the decision taken by the Resolution Professional to admit the claim of the alleged operational creditor, Kalpatru Advisory Services Private Limited as a financial creditor in the category of home buyer and against the allocation of residential and office spaces to Kalpatru Advisory Services Private Limited under the Resolution Plan.

6. As per Transaction Audit Report submitted by Transaction Audit to the Respondent No. 1, Transactions for Rs. 216,93,59,972/- are identified in the Transaction Audit Report as avoidance transactions as per the provisions of the Code.

7. Out of the avoidance transaction for Rs 216,93,59,972, the Respondent No 1 has filed application for avoidance transaction for Rs 37,97,46,222/-only. A question that arises is why the Respondent No 1 has not filed applications for avoidance transactions for Rs 178,96,13750/- and why did the Committee of Creditors allow such deliberate lapse on the part of Respondent No 1. If the Respondent No 1 is directed to file application for avoidance transactions against various parties aggregating to Rs 178,96,13750/- who have been identified by the Transaction auditor, then the recovery from such applications shall accrue to the Applicant and other creditors of the Corporate Debtor.

<u>Reply of Respondent No. 1</u>

8. The present application has been filed for re-classification of Respondent No. 3's debt as an operational debt instead of a financial debt and to re-consider the financial debt claims already admitted by Respondent No. 1. In addition, the Applicant is assailing the Resolution Plan approved by the Committee of Creditors (hereinafter referred to as the "COC" for the convenience of this Hon'ble Tribunal) in its 18th meeting.

9. It was observed by Respondent No. I that the IRP received Rs. 4.19.94.34.644/- claims from the financial creditors and claims of Rs. 4.16.25.13.903/- were admitted by the IRP. Accordingly, the COC of the Corporate Debtor consisted of five financial creditors having voting rights.

10. On perusing the documents provided by Respondent No. 3 of the claim form and from the records of the Corporate Debtor, it is observed that project management and consultancy services were rendered by the Corporate Debtor (earlier known as Sunshine Housing Private Limited) for a consideration of Rs. 27,52,86,000/- (Rupees Twenty Crores Fifty-Two Lakhs and Eighty-Six Thousand Only) from Vira Group Companies. Respondent No. 3 is part of the Vira Group. However, due to the oppression and mismanagement conducted by majority shareholders, disputes arose between Respondent No. 3 and the Corporate Debtor. Several legal proceedings were initiated by Vira Group Companies and the Corporate Debtor. However, on 31.10.2018, a settlement agreement along with the memorandum of settlement, letter of agreement, and letter of allotment was executed between the Corporate Debtor and Vira Group Companies.

11. Due to the massive debt, the Corporate Debtor was obligated to transfer certain shareholdings, and commercial and residential premises to Vira Group through the settlement agreements. In this regard, the Corporate Debtor transferred certain commercial and residential units to Respondent No. 3, a member of the Vira Group Companies through a Letter of Allotment dated 31" of October, 2018, for a total consideration of Rs. 27,52,86,000/- (Rupees Twenty Crores Fifty-Two Lakhs and Eighty-Six Thousand Only).

Therefore, the Applicant's contention that the allotment letter was provided in 2010 is misleading and inaccurate.

12. Thereafter, a letter was addressed by Respondent No. 3 to Respondent No. 2, informing them about the transfer of certain units in the name of Respondent No. 3 through a settlement agreement between the Corporate Debtor and Vira Group Companies. However, a no objection certificate was not obtained by Respondent No. 3 from Respondent No. 2. Hence, Respondent No. 3's claim was categorized as an affected allottees claim under the resolution plan submitted by Respondent No. 4.

13. Thus, the contention of the Applicant that the services were not provided by Respondent No. 3 or Vira Group Companies to the Corporate Debtor is inaccurate. In fact, the Applicant in paragraph 49 of the application admits that project management and consultancy services were provided to the Corporate Debtor. Therefore, the contention of the Applicant runs contrary to what is alleged in the application. Further, only after rendering services to the Corporate Debtor by Respondent No. 3, can a settlement agreement be initiated. Further, the services were provided to Sunshine Housing Private Limited, a part of the Sunshine Group Companies by Respondent No. 3 and its Group Companies. Later on, the Corporate Debtor altered its name to Sivana Realty Private Limited. However, the alteration in the name does not revoke the executed agreement for the services rendered.

14. The Applicant contends that Mr. Pratik Vira is a common director in Respondent No. 3 and the Corporate Debtor. However, Mr. Pratik Vira was appointed as a director of Corporate Debtor on the 13th of December, 2018, and resigned on the 19th of January, 2019. Therefore, the Corporate Debtor and Respondent No. 3 were related parties only for two months, as Respondent No. 3 falls under the Vira Group Companies, a family business operated by Mr. Pratik Vira and his family members. However, they were related parties only prior to the Corporate Insolvency Commencement date which is the 11th of August, 2020.

15. The Applicant alleges that the approved Resolution Plan has the effect of re-determining or re-classifying the claim of the Applicant. At the very outset, this allegation must be denied as being absurd and devoid of any supporting material. As has been set out above. Respondent No. 3 has always, at all relevant times, been a financial creditor belonging to the class of allottees and has always been entitled to all rights available under the law.

16. In addition. Respondent No. 3's claim cannot be re-classified as an operational debt. The services were provided prior to the execution of settlement agreements dated 31st of October. 2018. Through the settlement agreements. Respondent No. 3 was allotted commercial and residential premises in the projects being constructed by the Corporate Debtor in lieu of the consideration amount of Rs. 27,52,86.000/-.

Reply of Respondent No. 3

17. The Applicant in present Interlocutory Application claims to be the financial creditor' falling in the class of home buyers/ allottees' at the project "Samruddhi Garden" of the Corporate Debtor. However, the Applicant is an unsecured creditor and is classified as an 'affected allottee'.

18. It has been submitted by the Respondent that the Applicant is not authorised to file the present application in an individual capacity as Mr. Vithal Dahake, Respondent No.5 has been appointed as the authorised representative of the class of home buyers / allottees and the same is an admitted fact in Application by the Applicant himself. It has further submitted that till date no objection has been raised by Mr. Vithal Dahake who is the authorised representative of the class of home buyers/allottees. Therefore, the Applicant has now approached this Tribunal without any authority and at a belated stage raising the present objection only with an intent to derail the CIRP proceedings. The Respondent has placed reliance upon the case of Jaypee Kensington Boulevard Apartments Welfare Assn v. NBCC (India) Ltd. ((2022) 1 SCC 4011.

19. The Respondent has submitted that the present Application is filed at a delayed stage, without any authority, when the resolution plan filed by Respondent No 4 is before the Tribunal for its approval in order to derail the process of approval of resolution plan of Respondent No.4. it has further submitted that the Applicant has deliberately supressed the relevant and crucial information in respect of Applicant's own transaction. Section 3.2 of the Transaction Audit Report clearly mentions the name of the Applicant and identifies the transaction with the Applicant as PUFE transitions covered u/s 45 and 66 of IBC.

20. The Respondent has submitted that no differential treatment has been given to the Applicant under the present resolution plan submitted by the Respondent No.4. It has been stated that the Applicant under the previous resolution plan submitted by Vira Realspace LLP' was allotted an area of 605 sq ft carpet area against a claim of Rs. 1,05,00,000/- and under the present resolution plan submitted by Respondent No.4, the Applicant is getting an exit option with a refund of amount of Rs.58,55,500/-. The Respondent No 3 was originally entitled to an area of 18,651 sq ft. However as per the present Resolution Plan submitted by Respondent No 4 is only allotted an area of 6564 sq ft Moreover, Respondent No. 3 is also liable to pay an escalation amount of Rs. 7500/- per sq. ft on the revised area of 6564 sq.ft. to Respondent No. 4. Therefore, it is evident that no preferential treatment is given to the Respondent No.3 under the present resolution plan submitted by the Respondent No.4.

21. It has been submitted by the Respondent that as per the settlement, the shareholding of the Corporate Debtor was to be transferred to Vira Group' upon payment of consideration. The Respondent has further denied that as per the settlement arrived, "Sunshine Housing Pvt Ltd" was to be taken over by the Vira Group. As per the Memorandum of Settlement dated 31 October 2018, Vira Group was supposed to receive 51% shares from Sunshine Housing Infrastructure Private Limited (SHIPL) against which consideration was paid by Vira Group to SHIPL in the period November 2018 and January

2019. However, the Vira Group never retained the shares received from Sunshine Housing Infrastructure Private Limited (SHIPL) and sold approximately 35% of its shares to third parties. It has further submitted by the respondent that on the date of the commencement of CIRP, the shareholding of Vira Group was 16% and, therefore, Vira Group is not a related party to the corporate debtor.

22. With the above averments, the Respondent has prayed for the dismissal of the present Interlocutory Application.

FINDINGS: -

23. We have heard the Counsel for the parties and have gone through the record.

24. It has been contended on behalf of the Applicant that Respondent No. 3 (Kabda State and Investment Consultancy Services) have been wrongly treated as Financial Creditor whereas it was liable to be treated as Operational Creditor as the claim of Respondent No. 3 was based upon certain services provided to the Corporate Debtor. It has also pointed out that the claim of Respondent No. 3 has been accepted by the RP on the basis of Journal Entries.

25. It has also been argued by the Counsel for the Applicant that the RP has not filed avoidance application in respect of all the transactions identified by the Transaction Auditor which aggregated to Rs. 178,96,13,750. The Counsel for the Applicant has further contended that Respondent No.1-B is liable to be directed to file avoidance applications in respect of transaction aggregating 178.96 Crores and be further directed to scrutinize all the claims admitted by him and to rework the Resolution Plan.

26. On the other hand, the Counsel for the Respondent No. 1 has argued that the real intention behind filing the instant application is to challenge the Resolution Plan for which the Applicant is otherwise not qualified. The Counsel for the Respondent No. 1 has further argued that even otherwise one Creditor cannot challenge the claim of the other Creditor. Moreover, the

constitution of the Committee of Creditor was never challenged. Therefore, at this belated stage, the Applicant cannot raise any objection regarding the claim lodged by Respondent No. 3 which has already been admitted. It has also been pointed out by the Counsel for the Respondent that the transaction of the Corporate Debtor with Respondent No. 3 cannot be termed as fraudulent. Moreover, the same pertain to beyond the look back period of 2 years.

27. We have weighed the contention raised by the Counsel for the Parties and have gone through the record.

28. By way of this IA, the Applicant, inter alia, has sought the relief that Respondent No. 3 is liable to be treated as Operational Creditor instead of a Financial Creditor as Respondent No. 3 has been wrongly treated as Financial Creditor in the category of Home Buyer.

29. However, in this regard, it has been pointed out by the Counsel for the Respondents that since the inception of the project till March 2015, Vira Group had undertaken development and management services of Bhandup Project against which the Corporate Debtor had agreed to pay Rs. 27 Crores along with GST and other levies etc. Thereafter, vide Memorandum of Settlement dated 31.10.2018 against the amount of Rs. 27 Crores, letter of allotment dated 31.10.2018 was issued to Respondent No. 3 and units were allotted. Once the residential units were allotted to Respondent No. 3 against outstanding payment of about Rs. 27 Crores, it cannot be said that Respondent No. 3 continued to be an Operational Creditor. The allotments were made in favour of Respondent No. 3 against valid consideration. Moreover, Respondent No. 3 has not been treated differently in as much as against original entitlement of Respondent No. 3 to an area of 18651 sq. ft, in the Resolution Plan, only an area of 6564 sq. ft is proposed to be allotted to Respondent No. 3 and Respondent No. 3 is further liable to pay an escalation amount of Rs. 7500 per sq. ft. Therefore, it cannot be said that Respondent

No. 3 has been preferentially treated at the cost of the other Allottees or the Creditors.

30. Secondly, by virtue of the laid down in Jaypee Kensingtons case, the Applicant who is one of the Home Buyers, is not entitled to question the validity of the Resolution Plan considering the fact that the Home Buyers as a class has voted in favour of the Plan and has approved the same. That being so, the Applicant cannot be heard harping that the Plan is bad in the eyes of law on the ground including the one that it treats Respondent No. 3 preferentially or that the claim of Respondent No. 3 has wrongly admitted in the claim of the Financial Creditor instead of Operational Creditor. The following observation has been made by the Hon'ble Supreme Court in Jaypee Kensingtons case case clearly go on to prove that the Applicant has no locus to challenge the Resolution Plan on any ground once it has been approved by the Home Buyers as a Group/Class.

31. In **Jaypee Kensington Boulevard Apartments Vs. NBCC (India) Limited and others (2022) 1 SCC 401,** the Hon'ble Supreme Court has categorically held as follows:

(i) "Every individual allottee does not become an independent financial creditor of the corporate debtor if the number of allottees are 10 or more, in terms of the meaning assigned to the expression "class of creditors" in the CIRP Regulations 130. (The allottees, like the homebuyers of JIL, falling within clause (f) of sub-section (8) of Section 5, do carry the status of financial creditors but they would be falling in a class collectively; and the voting share of that class would be in terms of the financial debt owed to that class as a whole.

(ii) Specific provisions have been made for voting on behalf of a class of creditors in terms of clause (b) of sub-section (6-A) of Section 21 by the authorised representative. The rights and duties of the authorised representative of financial creditors are also delineated

in Section 25-A of the Code and any doubt, as to how he would vote and how his vote is counted, is put to rest by insertion of sub-section (3-A) to Section 25-A. which provides that notwithstanding anything to the contrary contained in sub-section (3), the AR shall cast his vote on behalf of all the financial creditors he represents "in accordance with the decision taken by a vote of more than fifty per cent of the voting share of the financial creditors he represents, who have cast their vote".

(iii) It is made explicit that the allottees, even if not a homogeneous group, they could vote only either to approve the resolution plan or to disapprove the same. Divergence of the views within their own class may exist but, when coming to the vote in the Committee of Creditors, their vote would be that of a class.

(iv) Having regard to the scheme of IBC and the law declared by this Court, it is more than clear that once a decision is taken, either to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. There is absolutely no scope for any particular person standing within that class to suggest any dissention as regards the vote over the resolution plan. It is obvious that if this finality and binding force is not provided to the vote cast by the authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code.

(v) There is no scope for any homebuyer suggesting himself to be a dissenting financial creditor merely because he was not with

majority within the class. His dissatisfaction does not partake the legal character of a dissenting financial creditor.

(vi) The suggestion about the so-called statutory right of appeal has only been noted to be rejected. The homebuyers as a class shall be deemed to have voted in favour of approval of the resolution plan of NBCC; and once having voted so, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. The statute, that is IBC, has itself provided for estoppel against any such attempted opposition to the plan by a constituent of the class that had voted in favour of approval.

(vii) *To sum up this part of discussion, in our view, after approval of the resolution plan of NBCC by CoC, where homebuyers as a class assented to the plan, any individual homebuyer or association cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance."*

32. In the light of what has been held by the Hon'ble Supreme Court in the afore-cited judgment it becomes abundantly clear that Home Buyers can vote for or against the Plan only as a class and if there are some Home Buyers pitted against the Resolution Plan, who are otherwise in minority, absolutely no locus to oppose the Plan in the capacity of dissatisfied Home Buyers. It is also abundantly clear that such dissenting minority segment within the class of Home Buyers cannot arrogate themselves to be dissenting Financial Creditors. That being the legal position, which is explained in unequivocal terms by the Hon'ble Supreme Court in Jaypee Kensingtons case, in our considered view, any objection raised by the so-called minority Home Buyers raising objection against the Plan, which have been approved by them as a class, cannot be entertained and are liable to be rejected at the very threshold without going through the merit of such objections. Therefore, the objections raised in the IA are liable to be dismissed as the Applicant has no locus to maintain any such objections against the Resolution Plan.

33. As a result of the above discussions, the above IA No. 344 of 2023 is hereby summarily **dismissed.**

Sd/-	**Sd/-**
ANURADHA SANJAY BHATIA	**KULDIP KUMAR KAREER**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**