

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT-V

I.A. 654 OF 2022

IN

C.P.(IB) No. 3169/MB/2019

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

Bipin Dhayalal Savla,

03, Anandi Niwas, Shankar Mattham
Road, Matunga, Mumbai – 400 019

...Applicant

Vs

Manish Motilal Jaju,

Resolution Professional of Sivana Reality
Private Limited

...Respondent No. 1

M/s Kabra Estate and Investment,

Successful Resolution Applicant

...Respondent No. 2

Mr. Vithal M. Dhake

Authorised representative of Homebuyers

...Respondent No. 3

In the matter of

**Spartan Engineering Industries Private
Limited,**

...Original Petitioner

Vs

Sivana Reality Private Limited

**...Original Respondent/
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: Mr. Chetan Shah, Advocate i/b Rakesh Agrawal

For the Respondent: Mr. Amir Arsiwala, Advocate a/w Ms. Nidhi shah and
Ms. Nupur Shah (R1)

Per: Kuldip Kumar Kareer, Member (Judicial)

ORDER

1. The present Application is filed by the Applicant, namely, Bipin Dhayalal Savla, 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"**) objecting to the resolution plan submitted by M/s Kabra Estate and Investment Consultants (**"Successful Resolution Applicant"**) which has been approved by the Committee of Creditors of the Corporate Debtor.

FACTS OF THE CASE

2. The Applicant is the Financial Creditor falling under the class of **'Homebuyer/ Allottees'** in respect of 2 Flats ("Flats") in Phase-I of the Corporate Debtor's Project known as 'Sunshine Oakwood' ("Project"). The Corporate Debtor is a real estate company, constructing 2 (two) projects, namely, Samriddhi Garden (Phase 1) (hereinafter referred to as **"Project-I"**) and Oakwood Plaza (hereinafter referred to as **"Phase-2"**).

3. The Respondent No.1 is the Resolution Professional of the Corporate Debtor (**Sivana Reality Private Limited**) appointed vide order dated 03.11.2020 of this Tribunal. The Respondent No.2 is the Resolution Applicant who has submitted a resolution plan in respect of the Corporate Debtor which has purportedly been approved by a majority of the CoC. The Respondent no. 3 is the Authorised Representative of the Home buyers.
4. The Applicant had invested amount of Rs. 3,50,00,000/- in the Sunshine Group of Companies, namely M/s Sunshne Tracon Private Limited. The Sunshine Tracon Private Limited confirmed the payment of the investment and assured to allot two flats to the Applicant in the building under construction by its group of company namely Sunshine Housing Private Limited (now Sivana Reality Private Limited).
5. Vide letter dated 03.05.2017, the Corporate Debtor has confirmed the allotment of 2 flats (3BHK Flat. No. D-1301 and 1BHK Flat No. 1601) to the Applicant. It was also confirmed that the Occupancy Certificate would be obtained by 30.06.2018 in respect of the said flats.
6. Since the obligation to give Occupancy Certificate was not fulfilled by the Corporate Debtor, the Arbitration clause was invoked by the Applicant. Consequently, the Corporate Debtor had given an undertaking to handover the possession of flats by 31.03.2020 and agreed that the Corporate Debtor and Sunshine Tracon Private Limited would jointly pay the interest @1.25% per month compounded annually from 01.10.2016 till the actual possession of the flats.
7. In the meanwhile, this Tribunal vide order dated 11.08.2020 initiated the CIRP against the Corporate Debtor and admitted the Company Petition No. 3169 of 2019, and also appointed Mr. Nechal Pathan as the Interim Resolution Professional ("IRP") to carry out the CIRP of the Corporate Debtor.

8. The Applicant had filed his claim in Form CA dated 11.3.2021 for a sum of Rs. 6,02,92,476/- consisting of principal amount of Rs. 3,50,00,000/- and Rs. 2,52,92,476/- as Interest amount.
9. The Class of Home Buyers had 44.18% voting share in CoC. In the Class of Home Buyers, the voting share of the Applicant was 2.07%. LIC Housing Finance Ltd was also the part of the CoC having 27.21% voting share.
10. In the first meeting of CoC, the Respondent no. 1 was appointed as the Resolution Professional as approved by the order of this Tribunal dated 03.11.2020.
11. In the 18th CoC meeting held on 11.10.2021, the Resolution Plan submitted by the Respondent no. 2 was approved by the members of CoC by 99.96% voting share. The Respondent no.2 proposed differential treatment to the Home buyers with NOC as “unaffected” and without NOC as “affected”. The Applicant has voted against the resolution plan.
12. It has been submitted by the Applicant that the impugned resolution plan proposes to substantially reduce the area allotted to a class of creditors who do not have NOC from LIC Housing Finance Ltd (LICHFL). It is further submitted that the impugned resolution plan offers to the Applicant a substantially reduced carpet area of 834 sq. ft. as against 1253 sq. ft. The Applicant further raised his objection vide email dated 12.11.2021.
13. It has been submitted by the Applicant that the Applicant being a bona fide purchaser of said flats, cannot be affected by the fraudulent conduct of the Corporate Debtor. It has further submitted that the onus of obtaining the NOC from LIC was on the Corporate Debtor and the bona fide home buyer with payment of full consideration cannot be penalized for any default/failure on the part of the Corporate Debtor.
14. It has further been submitted by the Applicant that money advanced by the Applicant to the Corporate Debtor was much before LIC came into picture.

The statutory right created in favour of the Applicant being the bona fide purchaser cannot be defeated or diluted by the act of Corporate Debtor.

15. It has been submitted that the rights of the Applicant cannot be divested on the basis of not following the procedural formality of obtaining NOC from LICHL. It has further been submitted that the duty to obtain NOC from LIC should not survive since no judicial order is available against the rights of the creditors.
16. It has been submitted by the Applicant that the Resolution Applicant could not have differentiated between the same class/ set of creditors who are otherwise similarly placed as financial creditors (home buyers). The Applicant has further submitted that the Resolution Plan submitted by Respondent No.2 is ex-facie illegal, contrary to the provisions of the Code and the Regulations framed thereunder as it unfairly distinguishes between the same class of creditors and, therefore, liable to be rejected and set aside.
17. The Applicant has further submitted that such differential treatment amongst the same class / set of creditors has nowhere provided in the Code or the regulations framed thereunder and the same is completely contrary to the ratio laid down by the Hon'ble Supreme Court in the matter of Essar Steel India Ltd.
18. In the light of the abovementioned grounds, the Applicant has prayed for the rejection of the Resolution Plan.

REPLY FILED ON BEHALF OF RESPONDENT NO. 1 (RESOLUTION PROFESSIONAL)

19. It has been submitted by the Respondent No. 1 that there has been no discrimination between members of the class of creditors being allottees. However, in order to make the Resolution Plan viable and feasible, there is different treatment to the "affected allottees" and the unaffected allottees".

20. It has further submitted that A Resolution Plan is not meant to be "equitable" but is meant to be a workable and viable solution to rescue a failing company from liquidation. It is now settled law that a resolution applicant may seek to provide differential treatment to members of the same category of creditors, if it is necessary in order to make the Resolution Plan viable and feasible.
21. It is further submitted that it cannot be said that the Applicant is being deprived of any "property". It may be noted that in case the Corporate Debtor is ordered to be liquidated, the Applicant may not get any amount since the secured financial creditor having security interest over the immovable property of the Corporate Debtor will be entitled to sell the immovable property on the open market. In this event, it is unlikely that the Applicant would receive either the unit allotted to it (as the auction purchaser of the immovable property is not bound by the allotments made by the Corporate Debtor) or would receive any funds against its claim. It is only through the approved Resolution Plan that the Applicant is receiving something.
22. It has been submitted that the purpose of Section 31 of the IBC would be defeated if objections of this nature are sustained. The concept of a resolution plan is to restructure/ novate/ alter the rights and liabilities of the stakeholders of the Corporate Debtor.

REPLY FILED ON BEHALF OF RESPONDENT NO. 2 (SUCCESSFUL RESOLUTION APPLICANT)

23. It has been submitted that the present Application is not maintainable since the Applicant is filed by an individual Home buyer and it has no locus to file the same in the light of the settle law laid down by the Supreme Court.
24. It has further been submitted that the Tribunal is not empowered with the jurisdiction to override the decision of the COC which has approved the present Resolution Plan with majority.

25. It has been submitted that in the present case, the Applicant being a member of a class of homebuyers cannot claim to be a dissenting financial creditor and object to the plan once it is approved by the CoC members.
26. It has further submitted that 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 Code is impermissible.
27. It has further submitted that SRA has signed the Letter of Intent issued by the Resolution Professional and provided a performance guarantee of Rs. 3,00,00,000/- and, therefore, irreparable loss, harm and prejudice will be caused to the SRA if this Tribunal interferes with a resolution plan duly approved by majority of CoC.
28. With the above averments, the Respondent no. 3 has prayed for the dismissal of the present Application.

FINDINGS:-

29. We have heard the Counsel for the parties and have gone through the record.
30. The above IA 654 of 2022 has been filed by the Applicant i.e. Bipin Dayalal Salva who is a Financial Creditor in the class of Home Buyers/Allottees in respect of two flats situated in Phase-1 of the Corporate Project namely Sunshine Oakwood. The Applicant is stated to have invested an amount of Rs. 3.5 Crores in the Sunshine Group of Industries namely M/s Sunshine Tracon Private Limited. The Corporate Debtor confirmed the allotment of two flats number D-1301 and 1601 to the Applicant vide letter dated 03.05.2017. However, subsequently, the occupancy certificate was not issued. After the initiation of the CIRP Process against the Corporate Debtor vide order dated 11.08.2020, the Applicant lodged his claim of Rs. 6,02,92,476/- consisting of principle amount of Rs. 3.5 Crores and interest of Rs. About 2.52 Crores. It

has also claimed that in the Resolution Plan submitted by Respondent No. 2, the Applicant has been kept in the category of affected Home Buyers. Even though the money was advanced by the Applicant to the Corporate Debtor much before the LICHL came into picture and the Applicant was not duty bound to obtain any NOC from it. The Applicant has opposed the Plan on the ground that it illegally classifies the Home Buyers as affected and unaffected which is ex-facie illegal and contrary to the provisions of the Code and the Regulations framed thereunder.

31. Now the question arises as to whether the Applicant in the capacity of Home Buyers which, as a class, has voted in favour of the Plan is entitled to oppose or object to the Plan or not.
32. The answer to the aforesaid question can be found in **Jaypee Kensington Boulevard Apartments Vs. NBCC (India) Limited and others (2022) 1 SCC 401**, wherein 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.”*

33. 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, they 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 (supra), 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.

34. As a result of the above discussions, the above IA No. 654 of 2022 is hereby summarily **dismissed**.

Sd/-
ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-
KULDIP KUMAR KAREER
MEMBER (JUDICIAL)