

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

**IA-291/2022 IN**

**CP/IB/4469/(MB)/2019**

Under Section 7 of the IBC, 2016

In the matter of

**Edelweiss Investment Adviser  
Limited**

...Applicant

**IDBI Trusteeship Services Limited**

...Financial Creditor

V/s.

**Ornate Space Private Limited**

...Corporate Debtor

Order delivered on: **02.05.2023**

Coram:

Mr. Prabhat Kumar  
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli  
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant:

Mr. Shyam Kapadia a/w Mr.  
Rashid Boatwalla and Ms.  
Samiksha Rajput, i/b Manilal Kher  
Ambalal & Co., Adv.

For the Respondent(s):

Mr. Nausher Kohli a/w Mr. Devesh  
Juvekar, Mr. Ashish Parwani, Mr.

Dikshat Mehra, Mr. Chintan Gandhi  
and Ms. Anjali Dhoot i.b Rajani  
Associates for the RP.

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. This is an application filed by M/s **Edelweiss Investment Adviser Limited** filed on 19.01.2022 seeking rejection of Resolution Plan dated 28th August 2021 submitted by Ashdan Properties Private Limited and approved by Committee of Creditor of the corporate Debtor by e-voting concluded on 18.09.2021. The Applicant submitted that it was allotted 12 flats vide letter allotment dated 7th September 2015 executed in its favour.
2. Corporate Insolvency Resolution Process ("CIRP") came to be initiated against Ornate Spaces Pvt. Ltd. Applicant lodged its Form CA - claim before the Resolution Professional ("RP") appointed by the Hon'ble Tribunal on 14th July 2020. RP admitted the partial claim of the Appellant on 22nd December 2020. Thereafter, Resolution Plan dated 28th August 2021 came to be submitted by Ashdan Properties Pvt. Ltd ("Ashdan"). E- voting for the Impugned Plan was conducted and in the second round of voting, on 18th September 2021 plan of Ashdan was approved by Committee of Creditors. Application was filed by RP seeking an approval of the Impugned Plan before the Hon'ble Tribunal. Being aggrieved of the same, the present Application.
  - 2.1 The Applicant states that the Ashdan Resolution Plan ignores the interests and legitimate expectations of the homebuyers; the

home buyers are left in the lurch by the Corporate Debtor, who has miserably failed to fulfil its contractual obligation to allot flats on time and their miseries continues even under the Ashdan Resolution Plan; overrides the contractual understanding arrived between the Corporate Debtor and each of the homebuyers under their respective agreement for sale and/or the allotment letter, as the Corporate Debtor has agreed to sell flats to each of the homebuyers at the rate of Rs. 13,500/- (Rupees Thirteen Thousand Five Hundred Only) to Rs. 21,000/- (Rupees Twenty-One Thousand Only) per Square Feet, and under the Ashdan Resolution Plan, the homebuyers are required to pay to pay the 95% of launch price, which is more than the contractually agreed consideration; discriminates the home buyers by putting additional burden while no such additional burden is being placed on the actual Financial/Secured Creditors, strikes at the very root of the Impugned Ashdan Resolution Proposal.

3. The Resolution Professional on behalf of the Corporate Debtor has filed an affidavit dated 16.04.2022 stating that the applicant has no locus to file this application independently as the applicant is part of class of home buyers and can be heard through the authorized representative of such class; the plan has been approved by COC by 80.86% vote in its commercial wisdom; the home buyers having voted against the Resolution plan are entitled to only liquidation value; the Resolution Plan complies with the provision of the Code as interest of all stakeholders has been taken care; Applicant cannot be allowed to substitute the wisdom of the CoC; the Resolution Applicant is not

bound by contractual terms of the Corporate Debtor and cannot be made liable under the provision of RERA for the claims of home buyers. It is further stated that FSI available to the Corporate Debtor is of four and beyond that it is merely a contingency; for provision of 152 flats of 650 sq.ft each, the respondent would have to utilise approximately 11000 sq.mts out of total available area of 32,012 sq.mts; the developable carpet area is 3 lakh sq.ft including fungible FSI and not 5,01,179.53 sq.ft.

4. During the course of hearing, Ld. Counsel for the Applicant submitted that clause 5(A) of the plan provides for adjustment of sale value and the admitted claim amount includes interest component as well. The effect of clause 5(A) shall be that only principal component stand adjusted and not the interest part. In case the RA or RP agrees with the adjustment of the total admitted claim for future consideration, it can consider withdrawal of this I.A. The Ld. Counsel further submitted that Resolution Professional is charging success fees which is against the provisions of code, as Regulation 34B of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 came into effect from 01.10.2022. He also drawn our attention to page 372 of IA-2374/2021 to explain the differential treatment; the applicant has paid 50% payment towards the total costs of the flats since 2015; it was not supplied the copy of the plan though it was entitled to the same.
5. Counsel for the RP apprised this Bench that admitted claim of Edelweiss Asset Reconstruction Company Limited (“Home Buyers category”) and other home buyers includes interest component till date of admission of all respective claims which is same as in case of secured

creditors. He further relies upon Hon'ble Supreme Court decision in the matter of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors vs. NBCC (India) Ltd. & Ors.* {*CIVIL APPEAL NO. 3395 OF 2020*}, wherein it was held that the provisions of the Code would override those in the RERA. Consequently, contentions relating to the claims under RERA that do not conform with the resolution plan would be rejected, and the CoC would have full powers to decide the treatment of the agreement that the resolution plan would propose with financial creditors such as homebuyers, accordingly it was contended that waiver of RERA conditions is permissible if sought under the approved Resolution Plan in view of the decision of CoC.

6. Ld. Counsel for the RP drew our attention to the voting result of agenda Item No. 13 of first meeting of the CoC held on 31.03.2020 wherein the Edelweiss as well Authorized Representative of the homebuyers voted in favour of award of success fees. Ld. Counsel further drew our attention to Regulation 34B of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 wherein the fee to the Resolution Professional can be paid as decided by the CoC whereby the performance linked incentive was permitted from 01.10.2022. He further drew our attention to circular No. IBBI/IP/013/2018 dated 12.06.2018.

7. This bench heard both counsel and perused the material on record.

6.1 This bench finds merit in the contention of the resolution professional representing Corporate Debtor that the applicant has no locus to file the present application as the applicant is part

of class of home buyers and in terms of provisions of the code the applicant along with other home buyers is represented by an Authorized Representative to represent the class. It has been held by Hon'ble Supreme Court in the matter of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors* (Supra), "*That being the position, and the authorised representative having voted in accordance with the instructions given to him from the class of financial creditors i.e., homebuyers, every individual falling in this class remains bound by his vote and any association or homebuyer of JIL cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way of appeal*". Hence, this bench is of the considered view that this application is not maintainable. Having said so, this bench further considers it appropriate to clarify on the contentions raised by the applicant as similar contentions have been raised by other home buyers in IA-2953/2021.

- 6.2 The main argument of the applicant is against re-writing the contractual arrangement between the Corporate Debtor and Home-buyers by way of clause(s) contained in the Resolution Plan and putting them in disadvantageous condition vis a vis Secured Financial Creditors. This Bench further finds that the Hon'ble Supreme Court in the matter of **Ebix Singapore (P) Ltd. v. Educomp Solutions Ltd. (2022) 2 SCC 401**, held that '*IBC provides for completion of CIRP 'unswayed by abstract conceptions of equity and contractual freedom of the parties with unfettered discretion'*.

- 6.3 This bench finds that home-buyers have deposited principal amounts on different dates and different amounts have been deposited so far by each of the home-buyers. The proposed Resolution plan provides for deduction of principal amount paid by each one of them against the amount payable by each flat buyer determined as payable in terms of Resolution Plan. This Bench is of considered view that such treatment discriminates home-buyers within that class, as time value of money deposited by each of home-buyer to equalise them in class of home-buyer should be factored. Accordingly, this Bench feels that the amount eligible for deduction from total sum payable by each home-buyer against their entitlement of a flat under the Resolution plan should be the amount of claim admitted by the Resolution Professional in each case.
- 6.4 As regards the applicant's contention that secured financial creditors are entitled for share in 22% of the revenue share as well as 25% of additional revenue realised beyond the MSP is also discriminatory, this Bench feels that the Home-buyers are obligated to pay only 95% of MSP, which results into additional concession of Rs. 10,72,500/- (650 Sqft x 5% of Rs. 33,000) to each home-buyer. It is the case of the applicants that the home-buyers had booked flats in the price range of Rs. 13,500/- psf to Rs. 21,000/- psf and now are asked to pay a price of Rs. 33,000/- psf, while secured financial creditors are getting 33% of their dues in form of 22% share in the revenue realisation. This Bench finds that the Home-buyers are getting deduction of whole of principal

and interest admitted in claim by the Resolution Professional alongwith concession of Rs. 10,72,500/- for each flat booking. Under the scheme of the Code, the effort is to revive the Corporate Debtor by resolving its defaults, which is in the best interest of all stake-holders. For this purpose, the legislature has considered it appropriate to repose confidence in the commercial wisdom of CoC to approve a feasible and workable resolution of Corporate Debtor. This Bench does not find any discrimination in so far as treatment within class of home-buyers is concerned. Since, the Resolution plan stipulate share in the sale proceeds to the secured financial creditor which results into 33% realisation for them, while the home buyers are offered 100% of their claim amount. Accordingly, this Bench does not find any perversity in exercise of commercial wisdom by CoC in approval of plan. Hence, this Bench is not inclined to interfere on this ground.

- 6.5 As regards clause 11.1 seeking immunity from payment of any compensation for delay in delivery and bar on filing fresh claims before RERA authority, this Bench finds that the Hon'ble Supreme Court in the case of Jaypee Kensington Boulevard Apartments Welfare Association (Supra) held that the provisions of the Code would override those in the RERA. Consequently, contentions relating to the claims under RERA that do not conform with the resolution plan would be rejected and this Bench does not find that any prejudice is caused to the applicants in case their remedy under RERA in relation to past defaults of the Corporate Debtor stands forfeited. Further, it was

also held by the Hon'ble Supreme Court that the CoC would have full powers to decide the treatment of the agreement that the resolution plan would propose with financial creditors such as homebuyers, accordingly proposed delivery of the flats after 4.5 years and supersession of the existing flat buyers agreement by the clause(s) of the Resolution plan, to the extent such agreement is in contradiction with the proposed Resolution Plan, cannot be objected so long as the plan is found viable and feasible in the commercial wisdom of the CoC.

6.6 As regards objection to the withdrawal of 5% discount on launch price in case any of home buyers seeks to sell or transfer the booking, this Bench is of considered view that the legislature considers protection of home-buyers interest on the ground that a person books home for its own use and not as investor. Accordingly, this condition cannot vitiate the Resolution Plan, as such condition is purely commercial in nature and does not violate any law also.

8. In view of foregoing, this **IA-291/2022** is **partly allowed** and disposed of accordingly.

**Sd/-**

**Prabhat Kumar**

**Member (Technical)**

**Sd/-**

**Kishore Vemulapalli**

**Member (Judicial)**