

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT NO. IV)**

IA No.525/2019

IN

CP (IB) NO. 1059/ND/2018

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

IN THE MATTER OF

Gulshan Sethi

...Applicant

Versus

Mr. Anand Sonbhadra

Resolution Professional

M/S Subhkamana Buildtech Private Limited

...Respondent

AND IN THE MATTER OF

M/S Concord Infrastructure Private Limited

...Operational Creditor

Versus

M/S Subhkamna Buildtech Private Limited

...Corporate Debtor

Order delivered on: 23.07.2021



Coram:

**DR. DEEPTI MUKESH
HON'BLE MEMBER (Judicial)**

**MS. SUMITA PURKAYASTHA
HON'BLE MEMBER (Technical)**

IA No.525/2019

MEMO OF PARTIES

Gulshan Sethi

Office at G-116, Preet Vihar,

New Delhi-110092

...Applicant

Versus

Mr. Anand Sonbhadra

Flat-2183, Sector-B, Pocket-2,

Vasant Kunj, New delhi-110070

...Respondent

For the Applicant: Mr Gaurav Jain, Advocate

For the Resolution Professional: Mr Abhishek Pratap Singh, Advocate



ORDER

Per-Dr. Deepti Mukesh, Member (J)

1. The instant application has been filed by Mr. Gulshan Sethi (“The Applicant”) under section 60(5) of the Insolvency and Bankruptcy Code, 2016 for seeking directions against the Resolution Professional of M/s Subhkamana Buildtech Private Limited (“The Respondent”) of inter alia for following prayers:
 - i. Pass an order directing resolution professional Mr Anand Sonbhadra to admit the entire claim filed by the applicant/financial creditor of Rs 3,93,74,137/-
2. The Corporate Insolvency Resolution Process of M/s Subhkamana Buildtech Private Limited (“The Corporate Debtor”) was initiated vide Order dated 26.11.2018 by this Tribunal. The Interim Resolution Professional namely Mr. Gurkamal Hora Arora, made public announcement for invitation of claims in Form A.
3. The applicant submits that the Corporate Debtor launched two residential project by the name of ‘Tee Homes’, Project-1 and another by the name of ‘Shubhkamna City’, Project-2 and thereby invited bookings from the home buyers. That the Project-1 was to be completed in a time bound manner under which the Corporate Debtor promised the possession of the flats will be given within 1 year from the date of issuance of Allotment Letter. That Project-2 was also to be completed in a time bound manner under which the Corporate Debtor promised the possession of the flats will be given within 2 year from the date of issuance of Allotment Letter.
4. The applicant submits that upon the representations made by Corporate Debtor, the Applicant had purchased 2 flats and her husband has purchased 11 flats in Project-1 of the

Corporate Debtor and has also purchased 4 flats each in the Project-2 of the Corporate Debtor. The applicant further submits that the Corporate Debtor had failed to deliver the units in Project-I and Project-2 on time and it came to the knowledge of the Applicant from some relied sources that the Corporate Debtor had re-sold all those apartments in Project-1 to some other persons which were earlier sold to the Applicant and her husband and thus cheated the Applicant and her husband. Therefore, husband of the Applicant had lodged two FIR(s) dated 05.01.2017 under section 406/420/120B IPC against the Corporate Debtor and its directors. The copy of FIR has duly been annexed.

5. The applicant submits that on 14.11.2017, the Corporate Debtor, through its director and authorized representative Mr. Piyush Tiwari entered into a Settlement Agreement with the husband of the Applicant, and agreed to refund Rs. 15,50,00,000/- to the Applicant and her husband.
6. The applicant submits that on 05.01.2019, the IRP issued a Public Announcement in FORM A under Regulation 6 of IBC, asking all the Creditors of the Corporate Debtor to submit their claims with proof on or before 12.01.2019. The Applicant submitted his claim on 26.02.2019 for the Financial Debt of the principal amount of Rs. 13,06,89,850/- alongwith an interest of Rs. 4,65,85,307/-, totaling Rs. 17,72,75,157/-. The details of the financial debt due and payable by the corporate debtor to the applicant is as under:



Table A: Details of dishonored cheques

Cheque no	Date	Amount	Date of return
235545	15.12.2017	70,00,000/-	05.01.2018
2355462	30.01.2018	50,00,000/-	01.02.2018
235552	28.02.2018	50,00,000/-	04.04.2018
235548	30.03.2018	50,00,000/-	05.04.2018

Table B: Details of apartments in Shubhkamna city project allotted to the applicant but possession and title not transferred

Unit no	Purchase consideration (paid through cheque/RTGS/cash supported by duly signed receipts)
T-1/D-1401	36,23,875/-
T-1/D-602	26,66,625/-
T-2/A-1001	26,66,625/-
T-2/B-1402	26,66,625/-
T-3/C-001	50,59,750/-
T-3/A-201	41,43,525/-
T-3(A)/A-801	41,43,525/-
T-3(A)/A-1601	36,23,875/-
T-4/B-602	36,23,875/-
T-4/D-001	50,59,750/-
T-4/D-1502	26,66,625/-
T-4/A-601	50,59,750/-

T-4/D-1001	50,59,750/-
T-5/C-1301	18,75,000/-
T-5/C-1302	18,75,000/-
T-5/C-1201	18,75,000/-
T-5/C-1202	18,75,000/-

Table C: Other Property

Particulars	Amount
Plot no 18-19, LGF, Neelamber apartment, Ghaziabad	5,31,25,675/-

Net total (A+B+C)= 13,06,89,850/-

Interest = 4,65,85,307/-

Gross total= 17,72,75,157/-

7. The applicant submits that on 14.06.2019, the Applicant wrote E-mail to the RP asking for the status of the Claim. On 30.08.2019, the RP acknowledged the receipt of the Applicant's e-mail and further stated to revert back soon with updated status of the Applicant's claim but till date no e-mail has been received from the RP. The Applicant also had telephonic discussion with the staff of the RP and had also visited the office of the RP to enquire about the status of the Claim but the RP kept delaying it.
8. The applicant submits that under section 18(b) of the Code, the IRP/RP has the duty to collect all claims submitted by a Creditor. As clarified by the Hon'ble Supreme Court in '*Swiss Ribbons Pvt. Ltd. & Anr. Vs. Union of India & Ors.*', the RP while handling the claims of a Creditor does not have the power to adjudicate and has to collect and verify the

claims received from creditors. In the present case, the RP has failed to admit the claim of the Applicant despite claim being supported by the relevant proofs/documents. The applicant further submits that due to the non-admission of the claim, the Applicant is being denied the opportunity to become part of COC.

9. The RP has filed a reply and has asserted as follows:

- i. That the Applicant is a speculative investor who had invested in the residential colony project of the corporate debtor with the anticipation of good returns. That the RP has verified the claim of the Applicant and during the process it has been observed that the claims have been made against those fragments which are not part of the Company assets. Furthermore, the Applicant has not substantiated any adequate proof for the amount claimed.
- ii. That the RP, after the perusal of the Settlement Agreement between the parties, concluded that the said Agreement doesn't have any legal sanctity for the reason that the Director of the Corporate Debtor, Mr. Piyush Tiwari and Mr. Deep Tiwari were disqualified by Registrar of Companies. Further, on directions given by this bench ROC filed an affidavit clarifying the position of directorship of Mr. Piyush Tiwari as under:

That the director Mr. Piyush Tiwari was disqualified with effect from 01.11.2015 till 31.10.2020, by operations of law due to non-filing of financial statements & annual returns of the companies for 3 years. The information regarding the disqualifications of the directors is updated on the website of MCA by publishing list of disqualified directors and the same is ordinarily accessible to the general public from MCA website on 12.09.2017.

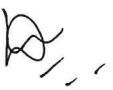
iii. That the Applicant has received the commissions against the units sold/booked by the Corporate Debtor and the same transactions are in the nature of an operational debt. That it is clear from these transactions that the Applicant had never been a financial creditor of the Corporate Debtor.

10. The applicant has filed a rejoinder controverting the averments made in the reply and has asserted as follows:

- i. The RP has a bounden duty towards the stakeholders of Corporate Debtor to timely verify their claims so that the Amount is equitably and fairly distributed. In spite of telephonic and written reminders sent by the Applicants, the RP slept over the claims and left it undecided. Resultantly, during the CIRP, the Applicants could not participate in COC meetings of the Corporate Debtor in spite of being a Financial Creditor as their claim was not admitted. Further, the Applicants had submitted Form for admission of their claims, well before the approval of Resolution Plan.
- ii. The Applicants state that they are genuine homebuyers who are interested in taking possession of flats for personal use and that is why they had paid the entire purchase consideration in advance. In the Settlement Agreement, the Applicants had agreed to take the allotment of alternative flats in lieu of the flats they had originally booked and did not insist on refund of money. This shows that Applicants are interested in taking actual possession of flats and they are not speculative investors who are only interested in return on investment. Further, the Applicant submits that they were always willing to furnish additional information and documents to RP to further substantiate the claim, however, the RP had never sought it from the

Applicants.

- iii. That Mr. Piyush Tiwari, along with another director of the Corporate Debtor, was disqualified by the MCA prior to the signing of the Settlement Agreement and therefore the Settlement Agreement is null and void and there is no obligation on the Corporate Debtor to hand over possession of flats. In this regard, the Applicants submit that they had no knowledge of disqualification of the directors of the Corporate Debtor.
- iv. That the ledger of Applicants in the book of Corporate Debtor is not similar to the ledger of allottees as maintained by the Corporate Debtor and the payments which Applicants have claimed as disbursed to the Corporate Debtor is not reflected in the ledger. The Applicants submits that sufficient proof of disbursement of money had been furnished and cannot be held responsible for consequences if the Corporate Debtor has not maintained the ledger properly.
- v. That the Applicants had received commission from the Corporate Debtor against the units sold, is denied by the applicant. It is submitted that the ledger entry of Rs.90,50,000/- paid by Corporate Debtor to the Applicants, was remitted towards part payment of liquidated damages for delay in delivery of possession of Flats booked by the Applicant.

 11. Heard submissions and perused the documents. We find force in the contentions of the Applicant. It is observed that on 27.10.2019 the resolution plan was approved by the CoC with 87.57% voting share and the applicant has filed Form of the claim on 26.02.2019, which is much prior to the approval of the plan by the CoC.

12. This bench in IA 3058/ND/2021, has recorded in their daily order:

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Mr. Abhishek Anand, Ld counsel for the RP states that resolution plan is approved by the CoC in the month of October, 2019 but the resolution plan vide its clause 8.6(3) has taken on record of claims of all home buyers who have not filed the claim or filed belatedly and not decided or specially considered in the plan. Such claimants (homebuyers) are covered/protected under this clause. Further, the order dated 27.10.2020 records that the submissions made by Mr. Sonbhadra, Ld counsel for the RP states that clause 8.6(3) specifically mentions about the claims of allottees or unit buyers which are not included in the plan will be entertained for the period of 60 days from effective date subject to verification of the claim. Clause 8.6 (3) of the resolution plan is reproduced herein under:

“Clause 8.6 Sub Clause 3: Claims, if any, of unit buyers / allottees, who have not yet submitted their claims with RP, shall be entertained for a period of 60 days from the Effective Date. Any claim by the unit holders / allottees beyond this period of 60 days shall stand irrevocably and unconditionally abated and extinguished in perpetuity on and with effect from the end of 60 days from the Effective Date and the Unit shall stand cancelled and vest with the corporate debtor/ Resolution applicant except for the claims lodged within the aforesaid period of 60 days. The corporate debtor/ Resolution applicant shall make all the possible efforts to accommodate the claims against cancelled units in case there is no inventory available. However even if after all reasonable efforts such claims could not be adjusted, all such claims shall be treated as Unsecured Financial Creditors and shall be paid accordingly.”

13. In view of the above order of this bench as mentioned above and the clause 8.6 (3) of resolution plan covering the issue raised by present applicant and also statements made by Ld RP Mr Sonbhadara alongwith Ld counsel for RP assuring allottees interest in terms of
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clause of resolution plan, the present application stands satisfied and is disposed of in aforesaid terms. A copy of the order shall be communicated to the Applicant and the Respondent by the Registry. A copy of the order shall be forwarded to IBBI for its records.



SDI-

(MS. SUMITA PURKAYASTHA)
MEMBER (T)



SDI-

(DR. DEEPTI MUKESH)
MEMBER (J)