

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

IA 1609/MB-V/2021

In

CP (IB) No. 2995/MB/2019

Under Section 60(5) of IBC, 2016
r/w Rule 11 of the NCLT Rules, 2016

**G. S. Constructions
(through its proprietor Mr. Sushil Uttarwar)**

.... Applicant

V/s

i. Mr. Gajesh Labhchand Jain

ii. Mr. Jitender Kothari

... Respondents

In the matter of:

Small Industries Development Bank of India

...Financial Creditor

V/s

E & G Global Estates Limited

...Corporate Debtor

Order Dated: 11.08.2023

Coram:

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

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

Appearances (via videoconferencing):

For the Applicant (s) : Adv. Kunal Kanungo.

For the Respondent (RP) : PCA Ayush Rajani a/w Khushboo
Shah i/b AKR Advisors.

ORDER

Per: Anuradha Sanjay Bhatia, Member (Technical)

1. This is an application, being IA No. 1609/MB-V/2021, filed by **G. S. Constructions** through its proprietor **Mr. Sushil Uttarwar**, the Applicant, under Section **60 (5)** of IBC, 2016 (hereinafter “**the Code**”) r/w Rule 11 of NCLT, 2016, seeking following reliefs:
 - a) *To quash and set aside the existing Committee of Creditors (hereinafter referred to as “CoC”) of the Corporate Debtor and declare all the acts and decisions taken by existing CoC as void and non-est;*
 - b) *In the alternative to prayer clause (a), declare and order all acts and votes cast by the Fraudulent Home Buyers i.e. (i) Bela Gujarati; (ii) Pallavi Girish Malani; (iii) Govind Malani; (iv) Madan Vallabhdas Devi; (v) Mina Gopal Gokhale; (vi) Gaurav Anil Mahajan; and (vii) Gokulsing Morkar, as void and non-est;*
 - c) *To direct the Respondent No. 1 to reconstitute the CoC in accordance with the provisions of the Code and call for fresh votes on each Resolution Plan i.e. the Applicant’s Resolution Plan, Asha Sanap’s Resolution Plan and Archana Sanap’s Resolution Plan;*
 - d) *Direct the Respondent No. 1 to conduct a through investigation and present a report to this Tribunal on the purported transaction entered into by the Fraudulent Home Buyers i.e. (i) Bela Gujarati; (ii) Pallavi Girish Malani; (iii) Govind Malani; (iv) Madan Vallabhdas Devi; (v) Mina Gopal Gokhale; (vi) Gaurav Anil Mahajan; and (vii) Gokulsing Morkar;*

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- e) *Recall the order dated August 18, 2020 passed by this Tribunal appointing Respondent No. 2 as the Authorised Representative of the Home Buyers of the Corporate Debtor on the ground that the same is vitiated by fraud perpetrated by the Fraudulent Home Buyers;*
- f) *That all acts of the Respondent No. 2 pursuant to the directions of the Fraudulent Home Buyers be declared as non-est and void, including the votes cast at the 8th CoC meeting held on April 20, 2021;*
- g) *In the alternative to prayer clause (d), Respondent No. 2 be ordered and directed to call for a meeting of the Home Buyers of the Corporate Debtor (not including the Fraudulent Home Buyers) for the purpose of determining the true and correct votes in favour of each Resolution Plan i.e. the Applicant's Resolution Plan, Asha Sanap's Resolution Plan and Archana Sanap's Resolution Plan; and*
- h) *That Asha Sanap's Resolution Plan be rejected inter alia as the same has not been validly approved by the CoC and is also in contravention to the provisions of the Code;*

BRIEF HISTORY OF THE CASE:

2. The brief history of the case is as under:

- 2.1 The M/s. G. S. Constro & Infra Pvt. Ltd. & Ors are the investors and shareholders of M/s. E & G Global Estates Limited, the Corporate Debtor, having approximately 48% of the shareholding of the Company. The Corporate Debtor was in need of funds to complete the construction of the Resort Project and therefore M/s. G. S.

Constro & Infra Pvt. Ltd. & Ors have infused funds into the Company, on the undertaking that 100% shares would be transferred to them. Accordingly, an MoU dated 10.12.2018 was entered into between the parties, whereby M/s. G. S. Constro & Infra Pvt. Ltd. & Ors paid Rs.75 lakh to SIDBI, towards the part payment of the loan amount, thereby saving the Company from becoming an NPA.

- 2.2 M/s. G. S. Constro & Infra Pvt. Ltd. & Ors vacated the post of 'Additional Directors' since an AGM was never conducted for including them as a Director, but the RoC portal was not updated, and they continued to remain as Additional Directors.
- 2.3 Thereafter, the Financial Creditor, SIDBI, had filed a Company Petition No. 2995 of 2019 under Section 7 of the Code, against the Corporate Debtor. In Part-IV of Form 1, under the head "Particulars of Financial Debt" the total amount claimed to be in default is Rs.3,85,15,033/-.
- 2.4 The Bench-V, Mumbai, after hearing the Company Petition No. 2995 of 2019, reserved for orders on 05.09.2019. Thereafter, Intervener Application, being MA No. 3182 of 2019, was filed on 19.09.2019 in the Company Petition No. 2995 of 2019, by M/s. G. S. Constro & Infra Pvt. Ltd. and its promoters against the Corporate Debtor. The Applicants in this MA claimed to be the part owners of the Corporate Debtor's Company, came forward to settle the dues of the Corporate Debtor. The draft Consent Terms were also filed before the Bench, by the Intervener Applicant for the Corporate Debtor but the Intervener Applicant as well as the Corporate Debtor never honoured the Consent Terms.

- 2.5 Accordingly, this Tribunal vide Order dated 24.06.2020 admitted the Company Petition No. 2995 of 2019 into CIRP and Dismissed the Intervener Application, MA No. 3182 of 2019 giving the Applicants ample time to settle the dues of Financial Creditor, SIDBI.
- 2.6 By virtue of the Order dated 24.06.2020, the Interim Resolution Professional commenced the Resolution Process and M/s. G. S. Constro & Infra Pvt. Ltd. & Ors. submitted their claim in Form C with the Interim Resolution Professional. The claim was submitted in the capacity of Financial Creditor. The same was rejected by the Interim Resolution Professional. Aggrieved by this, M/s. G. S. Constro & Infra Pvt. Ltd. & Ors. filed an IA No. 1148 of 2020 in CP 2995 of 2019 stating that the Interim Resolution Professional has erred in not making M/s. G. S. Constro & Infra Pvt. Ltd. & Ors., part of the CoC and erroneously considered them as “Related Party” and their amount invested with the Corporate Debtor was not considered as “Financial Debt.”
- 2.7 This Tribunal, in IA 1148 of 2020, vide its Order dated 03.12.2020 has dismissed the Application filed by M/s. G. S. Constro & Infra Pvt. Ltd. & Ors. in the following terms:

“47. This Bench, therefore, have no doubt in its mind that any money given to the Corporate Debtor by the Applicants was only and only for the purpose of acquisition of the Company by way of incremental purchase of shares and not a “financial debt”. This Bench is also clear, as has been demonstrated in the other paragraphs, that the set of the Applicants are “related party”, therefore, have no business to be the part of the CoC. The Resolution Professional has rightly taken them as suspended directors of the company.”

- 2.8 Aggrieved by the said order of this Tribunal, M/s. G. S. Constro & Infra Pvt. Ltd. & Ors. filed an Appeal being Company Appeal (AT) (Insolvency) No. 587 of 2021 before the Hon'ble NCLAT wherein Hon'ble NCLAT has upheld the Order of the NCLT, dated 03.12.2020, stating as follows:

“For the forgoing reasons, this Tribunal holds that the Appellants are ‘Related Parties’ and there are no substantial grounds to interfere with the well-reasoned Order of the Adjudicating Authority. Hence this Appeal fails and is accordingly dismissed. No Order as to costs.”

SUBMISSIONS OF THE APPLICANT:

3. The brief submissions on behalf of the Applicant is as under:
- 3.1 By an order dated 24.06.2020, this Tribunal admitted the main Company Petition No. 2995 of 2019 filed against the Corporate Debtor wherein Respondent No. 1 was appointed as the Interim Resolution Professional and was subsequently confirmed as the Resolution Professional (“RP”) in the 2nd CoC meeting dated 01.09.2020.
- 3.2 During the CIRP, a total of 52 claims filed by Home Buyers of the Corporate Debtor were admitted by the Resolution Professional on account of the fact that they have purportedly bought/been allotted homes in the Corporate Debtor’s project. Further, SIDBI filed a claim of Rs.4,07,13,665/- which was also admitted by the Resolution Professional. Accordingly, the CoC comprising of Home Buyers

constituting approx. 79.47% and 20.53% of Small Industries Development Bank of India (“SIDBI”) was constituted.

- 3.3 The Applicant has stated that out of the total home buyers, 14 home buyers (23.10%) have, in fact, entered into fraudulent and / or circuitous transactions with the Corporate Debtor and its erstwhile management. Additionally, by emails dated 09.06.2021 and 25.06.2021, the Applicants’ proprietor, Mr. Sushil Uttarwar brought to light various fraudulent, illegal and circular transactions executed between the Corporate Debtor, its erstwhile management and the 14 home buyers.
- 3.4 The Applicant has submitted further that, vide an order dated 18.08.2020, this Tribunal approved the appointment of Mr. Jitender Kothari as the authorised person to represent the Class of Creditors (home buyers), who has purportedly been elected with 63% voting share of home buyers. Since 16.40% of the home buyers who voted in favour of Mr. Jitender Kothari, are the fraudulent home buyers, therefore, the appointment of Mr. Jitender Kothari is illegal and contrary to law.
- 3.5 The Applicant further states that, certain bona fide and genuine home buyers of the Corporate Debtor had filed an Interlocutory Application bearing IA No. 1430 of 2020 in respect of various fraudulent transactions conducted by certain suspended directors, along with the aforesaid home buyers. By an order dated 16.09.2020, this Tribunal held that:

“2. This Bench observes that in a separate IA 1201 of 2020, a forensic audit has been sought by the CoC itself. The Bench is of the view that

the outcome of the forensic audit will provide a clear way for resolving various prayers as mentioned in the IA 1430/2020.”

- 3.6 Pursuant to the above order of this Tribunal, a forensic audit report has been prepared by Mazars Business Advisors Private Limited. The Applicant has submitted that the said forensic audit report brought out the fraudulent nature of transactions entered into between certain Home Buyers, the Corporate Debtor and its erstwhile management.
- 3.7 Thereafter, pursuant to submission of Expression of Interest, three Resolution Plans were submitted by prospective Resolution Applicants for consideration by the CoC:
- a. The Applicant’s Resolution Plan dated 27.01.2021;
 - b. Mrs. Asha Sanap’s Resolution Plan dated 26.01.2021; and
 - c. Mrs. Archana Sanap’s Resolution Plan dated 27.01.2021.
- 3.8 Subsequently, in the 8th CoC Meeting held on 20.04.2021, the three Resolution Plans were placed for voting before the CoC. The results of the voting are as under:

Plan submitted by	E-Voting results		
	Approved	Not Approved	Abstain
Mrs. Asha Sanap	79.60%	20.40%	-
Mr. Sushil Uttarwar	20.40%	79.60%	-
Mrs. Archana Sanap	0%	100%	-

- 3.9 The CoC in its 8th CoC meeting held on 20.04.2021 approved the Resolution Plan presented by Mrs. Asha Sanap by 79.60% voting.

The Applicant, M/s G. S. Constructions, is aggrieved by the rejection of the Resolution Plan presented by it. It has accordingly approached this Tribunal with a prayer to accept his Resolution Plan and reject the Resolution Plan of Mr. Asha Sanap approved by the CoC.

- 3.10 The Applicant has further submitted that, upon excluding the Fraudulent Home Buyers from the above, the votes by the CoC (being the Home Buyers of the Corporate Debtor) in favour of Mrs. Asha Sanap's Resolution Plan would be reduced to 35.56%.
- 3.11 Vide E-mail dated 09.06.2021 and 25.06.2021 addressed to the Resolution Professional, the Applicant's Proprietor, Mr. Sushil Uttarwar brought to light various fraudulent, illegal and circular transactions executed between the Corporate Debtor, its erstwhile management and purported Home Buyers. However, the Resolution Professional has failed and neglected to take any steps in pursuant of the above E-mail.
- 3.12 The Applicant further submits that, various Fraudulent Home Buyers, purportedly executed various agreements with the Corporate Debtor, after the date on which SIDBI filed the Company Petition under Section 7 of the Code. Hence, such transactions were not only fraudulent but were entered into by the Fraudulent Home Buyers in collusion with the erstwhile Directors of the Corporate Debtor to defeat the rights of the creditors of the Corporate Debtor. And hence, such transactions do not constitute a 'financial debt' under the provisions of the Code. Therefore, the Fraudulent Home Buyers involved in such transactions cannot and ought not to be considered

to be bone fide allottees or “Financial Creditors” under Section 5 (8) of the Code.

- 3.13 In view of the above submissions, the Applicant has filed the present Application.

REPLY OF THE RESOLUTION PROFESSIONAL:

4. The RP has filed its reply dated 17.06.2022 stating that the present Application is filed by the suspended Director and the Unsuccessful Resolution Applicant and the same is not maintainable by any stretch of imagination. The Learned Counsel for the Resolution Professional further submitted that:

- 4.1 During the course of pre-admission arguments, qua Section 7 proceedings before this Tribunal, the Applicant had intervened and claimed that he is a suspended Director and directly / indirectly controls approx. 48% of the voting share of the Corporate Debtor and would like to settle the matter with the Original Financial Creditor i.e. SIDBI, but eventually failed to do so.
- 4.2 The Applicant is referring to a “completion certificate” dated 26.01.2019 and an Architect’s letter dated 14.01.2019 both being much prior to the Insolvency Commencement Date and at no point in time did the Applicant ever place these documents on record before this Tribunal to contend that the project had been completed and they can dispose of the units to generate funds to settle outstanding dues of the Financial Creditor. The Applicant also challenged the Orders before Hon’ble NCLAT and did not succeed.

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- 4.3 It is undisputed fact that the present Applicant had participated in each CoC meeting and reference is made, more particularly to the 7th CoC meeting held on 06.03.2021, wherein the Architect Mr. Amol Chaudhari, whose letter dated 14.01.2019 is being referred to by the Applicant, was invited to the CoC meeting which was held physically, and all the home buyers were also invited and attended the said meeting. In fact, during the said meeting, the Architect informed that major repair work needs to be undertaken at the site to prevent substantial site damage and gave an estimate of the costs of approx. Rs.75 to Rs.80 lakh.
- 4.4 During the said 7th CoC meeting, the homebuyers also raised their concerns with regard to the resolution plan proposed by the Applicant and the homebuyers stated in the said meeting, that Mr. Uttarwar has not been able to deliver the present project, even though it was under his supervision. Yet, the Applicant could not place any completion certificate before the CoC members i.e. the Home Buyers, during the 7th CoC meeting held on 06.03.2021.
- 4.5 The Applicant has provided a detail comprising of voting rights, villa / studio number allotted to each to the 52 home buyers and the Applicant himself provided details as to whether or not the project is completed in so far as each villa / studio allotted to each of the 52-home buyer is concerned. The Applicant contended that the Respondent No. 1 ought to have called upon the home buyers to pay the balance consideration towards their respective property. The Applicant failed to appreciate, in spite of being part of the CoC meetings in his capacity as a Suspended Director, more specifically in the 7th CoC meeting when it was also discussed in detail that the

property needed repair work to be undertaken for preventing major damage to site, which was based on the estimates of Project Architect Mr. Amol Chaudhari, who was referred to by the Applicant himself. The CoC while approving the agenda but never paid towards the said expenses.

- 4.6 The Respondent No. 1 has stated that, the Applicant on one hand is seeking certain prayers from this Tribunal to direct the Respondent No. 1 on certain aspects, while in the immediately subsequent prayer also seeks “removal” of Respondent No. 1 and Respondent No. 2 from the present CIRP which nothing else but ultra-virus to the provisions of the Code which only permits the creditors to exercise such right with regard to replacement of Resolution Professional under Section 27 of the code and the Applicant being a Suspended Director and an Unsuccessful Resolution Applicant has no such authority or locus to seek any such relief.

Findings/ Observations:

5. Heard the learned counsel for the Applicant and the Respondents perused the records.
- 5.1 The Applicant, which is a proprietorship of Mr. Shushil Uttarwar, has filed this present Application challenging the authority of Mr. Jitender Kothari to act as the Authorised Representative of the Home Buyers of the Corporate Debtor; opposing the approval of the Resolution Plan dated 26.01.2021 submitted by Mrs. Asha Sanap; challenging the illegal rejection of the Applicant’s Resolution Plan

by the Committee of Creditors (“**CoC**”) being vitiated by the fraud perpetrated by some of the Fraudulent Home Buyers and certain erstwhile directors; and consequently, seeking reconstitution of the CoC of the Corporate Debtor.

- 5.2 The CoC in its 8th CoC meeting held on 20.04.2021 approved the Resolution Plan presented by Mrs. Asha Sanap by 79.60% voting while the Resolution Plan submitted by the Applicant was not approved as it failed to secure with the requisite voting by members of the CoC.
- 5.3 This Bench is of the opinion that, once the majority of CoC decide on one of the Resolution Plan, the decision of the CoC attains finality. It is observed by the Bench that, in the present case, since the CoC comprising of SIDBI and the home buyers approved the Resolution Plan presented by Mrs. Asha Sanap, the Unsuccessful Resolution Applicant has no locus to challenge the commercial decision of the CoC. Further, the prayer of the Applicant recalling the order dated August 18, 2020 passed by this Tribunal appointing Respondent No. 2 i.e. Mr. Jitender Kothari as the Authorised Representative of the Home Buyers of the Corporate Debtor on the ground that the same is vitiated by fraud perpetrated by the Fraudulent Home Buyers, has no merit in view of the above discussion by this Bench.
- 5.4 It is observed by the Bench that, the Applicant who himself was Prospective Resolution Applicant had submitted its Resolution Plan. At no stage, the Applicant challenged the constitution of the CoC. The Applicant is seeking relief to set aside and quash the CoC only after his plan not approved with the requisite voting of the CoC.

Moreover, no concrete evidence has been given by the Applicant that transactions of some Home Buyers (i.e. 14 Home Buyers) are fraudulent in nature. The question of some of the Home Buyers as fraudulent was also raised by the Applicant after the Plan of the Applicant was not approved with the requisite voting of CoC.

- 5.5 This Bench has further observed that, the Proprietor of the Applicant i.e. Mr. Sushil Uttarwar, was an ex Director of the Corporate Debtor and in an Application being IA No 1148 of 2020 in CP 2995 of 2019, filed by M/s G S Constor & Infra Pvt. Ltd. for making M/s G S Constor & Infra Pvt. Ltd. part of CoC was rejected by this Tribunal on the ground of being a Related Party and the said decision was also confirmed by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 587 of 2021. Hence, the Applicant has no locus to challenge the CoC at this when the CoC has already approved the Plan submitted by Mrs. Asha Sanap.
6. In view of the above discussion, we are of the considered view that the Interlocutory Application filed by the Applicant has no merit and the same liable to be dismissed. Hence, application being IA 1609/MB-V/2021, filed by **G. S. Constructions**, through its proprietor **Mr. Sushil Uttarwar**, is hereby **dismissed**.

Sd/-

ANURADHA SANJAY BHATIA
MEMBER (TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
MEMBER (JUDICIAL)