IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT - II

IA No. 769 of 2022
IN
CP (IB) No. 1765/9/(MB) 2018

Under Section 60(5) read with Other relevant provisions and Regulations of the Insolvency and Bankruptcy Code, 2016.

Mrs. Renu Kapoor & Ors.
…..Applicants
Vs
Shailesh Verma & Ors.
….. Respondents

In the matter of

Raj Infrastructure Development (India) Private Ltd.
… Petitioner
Vs
Lavasa Corporation Ltd.
… Corporate Debtor

Order delivered on: 23.09.2022

Coram:

Hon'ble Member (Judicial) : Justice P.N. Deshmukh (Retd.)

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Applicants : Mr. Chaitanya Nikte, Advocate.

For the Resolution Professional : Mr. Ashish Kamat, Advocate.

ORDER

Per: Coram

1. This is an Application filed by the Applicants on behalf of 368 Homebuyers who had purchased properties from the Corporate Debtor against the Resolution Plan of the Corporate Debtor alleging misconduct in the Corporate Insolvency Resolution Process (CIRP) of the Corporate Debtor and mistreatment of the Homebuyers as a class of creditors and praying for the following reliefs:

    a. *To hold and declare that the Resolution Plan alongwith the addendums thereto submitted by the Respondent No. 4 Successful Resolution Applicant and the entire Consolidated CIRP of the Corporate Debtors is in violation of the provisions of the IB Code 2016 and the rules and regulations framed therein and accordingly be pleased to not approve the same and the Plan alongwith its addendums should be sent back to the committee of creditors for its re-consideration;*
    b. *That this Hon'ble Tribunal be pleased not to approve the Resolution Plan submitted by Respondent No. 4 Resolution Applicant under Section 31 of the IB Code 2016 and the rules and regulations framed thereunder and should be sent back to the committee of creditors;*
    c. *Pending the hearing and final disposal of the present Application the effect, implementation and operation of the Resolution Plan alongwith its addendums kindly be stayed;*

2. The Corporate Debtor was admitted into **CIRP on 30th August 2018** under an Application filed by Raj Infrastructure Development (India) Private Ltd. filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called "the Code") and the Respondent No. 1 was appointed as the Resolution Professional (RP). Thereafter, the CIRP of the present Corporate Debtor was consolidated with four of their wholly-owned subsidiaries and a Consolidated Committee of Creditors (CoC), Respondent No. 2 herein, was constituted for all the companies vide **Order dated 13th May 2021**. Subsequently, during the course of the CIRP, the CoC approved the **Resolution Plan dated 20th November 2021** proposed by Darwin Platform Infrastructure Limited, Respondent No. 4 (the Successful Resolution Applicant, hereinafter known as "RA") with **96.41% majority voting share** in the Consolidated Meeting of the CoC held on 23rd November 2021. The said Plan is pending for approval before this Bench.

3. The Applicants base their argument on seven grounds of challenge. Their submissions are summarised as hereunder:

   a. **Firstly**, the Applicants submit that the Homebuyers were promised to be paid the Liquidation value in case they vote against the Plan but the Liquidation value attributable to the Homebuyers was never calculated and/or disclosed. It is submitted that a dissenting financial creditor is entitled to receive the liquidation value under Section 30 of the Code and that the RP is duty bound to check all compliances before putting a Plan to vote, including applying for renewal of Environmental Clearances (EC). The RP is also mandated to calculate the liquidation value in order to enable the

Financial Creditors to make an informed decision prior to voting on any proposed Plan. These are duties which the present RP failed to abide by and hence the liquidation value derived and presented to the CoC is notional and does not represent the fair value and that the RP completely neglected his duty to calculate the liquidation value for each Home Buyer before putting the Plan to vote.

b. **Secondly**, the Applicants submit that the Resolution Plan is silent on the issue of non-procurement of EC by the RP since the past 2 years. The Applicants state that the RA proposes to deliver fully constructed properties to homebuyers over a period of 5 years from the receipt of EC on actual cost basis and gives two options to the homebuyers i.e. self-construction or exit option. The Applicants apprehend that in case the RP is unable to procure the EC, the Applicants will not be able to exercise their choice as the revival of the Corporate Debtor will be rendered impossible.

c. **Thirdly**, the Applicants state that future payments to be made by the Homebuyers is indeterminate and indefinite as most of these Flats or villas are partially built structures, the completion of which would require a substantial amount of expense to be made in due course. This cost is undefined and the Homebuyers are unaware of the actual contribution to such miscellaneous costs, if any.

d. **Fourthly**, the Applicants impute that the Plan does not provide for an event of default on the part of the RA to implement the Plan and does not make any provision to safeguard the rights of the Homebuyers in case the RA fails to construct and deliver possession as promised under the Plan. The Applicants submit that they rely on Section 18 of the RERA Act to maintain a claim for delayed

possession but the Plan overreaches this right and provides for extinguishment of future contingent liabilities.

e. **Fifthly**, the Applicants argue that the RA has not laid down the projected cash flow, balance sheet and profit and loss account of the Corporate Debtor despite which the CoC voted on the Plan without evaluating its feasibility and viability. This gives rise to considerable apprehension in the minds of the Applicants as the Plan envisages contribution from the Homebuyers towards actual cost of construction without informing individual Homebuyers of the exact amount/ liability of such contribution expected from them.

f. **Sixthly**, the Applicants raise allegations on the entire voting process by which the Plan was approved by the CoC. It is submitted that the Resolution Plan was put to vote in the 17th CoC Meeting and the voting for CoC was to open from 25th November 2021 and for Homebuyers from 26th November 2021. In the meantime, several issues cropped up during the 18th CoC Meeting which was held when the voting lines were still open and these were to be resolved by submitting addendums to the Resolution Plan by the RA. Three such addendums were submitted by the RA and accepted by the RP but the Homebuyers were not given due notice of this fact and therefore, voted on the original Plan that was put to vote before the deliberations of the 18th CoC Meeting.

g. **Seventhly**, the Applicants state that the Authorised Representative (AR) i.e. Respondent No. 3 herein representing the interests of the Homebuyers neglected his duties and failed to protect the interests of the Homebuyers. It is submitted that it was the duty of the AR to circulate the copy of the three addendums of the Resolution Plan to the Homebuyers and then take instructions from them on how to

vote. Further, the AR voted on the agenda before the voting for the Homebuyers expired and therefore, has not voted based on all the votes which makes the entire process illegal and opaque.

4. The Respondent No.1 i.e. the RP filed a **Reply dated 9th April 2022** to this Application wherein all allegations levelled against the RP and the conduct of the CIRP were denied *in toto* as being false and misrepresentative. The RP makes the following submissions:

   a. The RP states that since the AR of the Homebuyers has voted in favour of the Resolution Plan, it is indicative of the fact that the decision represents the vote of more than 50% of the Homebuyers who elected to vote. The AR proceeded with the voting after receiving votes of 70.89% Homebuyers in favour of the Plan. The RP relies on ***Jaypee Kensington Boulevard Apartments Welfare Association & Ors. vs. NBCC (India) (2021) 5 SCC 624*** to argue that once the AR has voted according to the majority decision, it is not open for any individual Home buyer to challenge the Plan.
   b. The RP states that there is no requirement under the Code to disclose the Liquidation value with respect to individual Homebuyers before voting on the Resolution Plan. The RP relies on ***Committee of Creditors of Essar Steel Limited vs. Satish Kumar Gupta (2020) 8 SCC 531*** to contend that this will not only negate the objective of the Code but also incentivise Creditors to dissent while approving the Plan and eventually may push the Corporate Debtor into Liquidation. If every creditor uses the liquidation value as the basis for voting, it might result into a situation where each creditor seeks to secure the highest value for themselves and opting for

Liquidation even if the collective value obtained by the Corporate Debtor is better in case of Resolution.

c. The RP submits that the Liquidation value of the Corporate Debtor was duly calculated by Registered Valuers who provided an estimate of the fair value and liquidation value in terms of **Regulation 35 of the CIRP Regulations.** Hence the liquidation value is not notional and in fact, the Plan was approved by the CoC after considering this liquidation value along with the viability of the Plan.

d. The RP submits that Homebuyers constitute a separate class of creditors and they may be afforded a treatment that is different from other Financial Creditors in the CIRP. The RP argues that it is open for the RA to strike different bargains between creditors belonging to different classes and the same was held in the case of ***Essar***. It is denied that only the payout made to the Homebuyers is linked to the grant of EC while there is no such linkage for the payments to the secured Financial Creditors.

e. The RP states that the Plan cannot be termed as "conditional" merely because it stipulates procuring EC as key to successful resolution and revival of the Corporate Debtor as any development or construction in the area earmarked for building the Hill Station is intrinsically linked to procurement of EC and no meaningful revival is possible in its absence. The RA simply acknowledges this fact and reiterates it in the Plan. The RP relies on **Section 31(4) of the Code and Regulations 37 and 38 of the CIRP Regulations** to state that the Code recognises that a Resolution Plan is itself supposed to provide for necessary approvals for its effective implementation.

f. The RP states that the first EC dated 9th November 2011 expired on 15th May 2018 and the CIRP of the Corporate Debtor commenced

on 30th August 2018. Subsequent to the appointment of the Respondent No. 1 as the RP of the Corporate Debtor on 15th October 2018, the RP sent numerous Applications to relevant authorities including the NCLT and conducted meetings with appropriate officers for securing expeditious grant of EC.

g. The RP states that the Applicants have wrongly challenged the commercial wisdom of the CoC in approving the Plan. Citing ***K. Sashidhar vs. Indian Overseas Bank (2019) 12 SCC 150***, *inter alia*, the RP points out that there is an intrinsic assumption that Financial Creditors are fully informed of the viability of the Corporate Debtor and the feasibility of the Resolution Plan. The RP states that due process and fairness was ensured in the voting process and enough time was given to the CoC to cast their votes. The voting lines were extended twice and due notice was provided to all CoC members including the AR to enable them to vote after considering the addendums to the Plan. The RP submits that the CoC had a period of about six months to discuss and negotiate the Plan and to raise objections, if any. The RA also held a separate meeting with the Homebuyers to address their concerns regarding the Plan. However, no such opposition was shown or brought to the notice of the RP by these Homebuyers.

With the above submissions, the Respondent No. 1 prays for rejection of the present Application.

FINDINGS

5. We have heard the submissions of the Counsel appearing for the Applicants and the Counsel appearing for the RP at great length. On

examining the present Application, three primary issues come to the fore. **Firstly,** whether liquidation value is required to be provided to every individual Home buyer under Section 30(2)(b)(ii) in the capacity of a dissenting Financial Creditor. In order to deal with the question that fell for consideration, it is pertinent to note that Homebuyers, essentially, constitute a different class of creditors distinct from the other Financial creditors. Individual Homebuyers may have divergent views but ultimately, they vote as a class and individuals therein cannot claim to be 'dissenting financial creditors' if they vote against the Resolution Plan. This is elaborated in ***Jaypee Kensington*** (supra) as follows:

> *"163….we are clearly of the view that the propositions of some of the associations and individual homebuyers to claim themselves as 'dissenting homebuyers' and thereby, 'dissenting financial creditors' do not stand in conformity with the scheme of the Code and the manner of voting on a plan of resolution by the Committee of Creditors.*
>
> *165…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."*

Thus, since Individual Homebuyers cannot be called as dissenting Financial Creditors, the question of providing separate liquidation values to each Homebuyer under Section 30 of the Code does not arise.

6. **Secondly**, whether the e-voting conducted by the RP for approval of the Resolution Plan was carried out following due procedure. The Applicants state that they could not vote on the Final Resolution Plan

along with the three addenda since they had no notice of the modifications and renegotiations made after opening the voting lines on 26th November 2021 for Homebuyers. However, it is seen from the minutes of the 18th CoC Meeting held on 10th December 2021 and reconvened on 13th December 2021 that the AR was an active participant in the meetings and even raised certain grievances related to grant of EC and Liquidation before the RP in the said meetings. Moreover, the RP has communicated the additional addenda to the Resolution Plan and extension of voting lines to the AR by e-mail dated 15th December 2021. The said e-mail clearly states that "*In view of the change made to the resolution plans, financial creditors who may have already cast their respective votes will accordingly have an opportunity to either change or retain their vote as it is.*" The voting lines were extended to **20th December 2021** and by further e-mail dated 18th December 2021 these were further extended to **22nd December 2021** for all classes of creditors including the Homebuyers.

7. Once communication has been made to the AR, it is deemed to have been communicated to all the creditors of the class he represents. As the AR is appointed by the majority vote of the financial creditors of a particular class, he is authorised to act for and on behalf of the class as a whole. In case the Homebuyers are not satisfied with the conduct of the AR, they have the option of replacing him. Since no such steps were taken in the present case, the AR proceeded to vote in favour of the Plan according to the majority votes of the Homebuyers and since he did not change his vote after receiving the communication regarding extension of the voting lines, it is deemed that the AR voted according to the instructions he received from the Homebuyers he represents.

Therefore, in our view, this is a belated stage for the Homebuyers to raise allegations against the AR especially after the CoC has voted in favour of the Resolution Plan with an overwhelming majority of 96.14% voting share. Moreover, the AR has already voted in favour of the Plan and a change in this decision would not influence the results in a substantial manner given that the Homebuyers hold 7.45% voting share in the CoC.

8. Additionally, it was contended by the Applicants that when the Plan was put to vote before the Homebuyers, only 230 out of 1086 Homebuyers voted and out of which only 144 Homebuyers voted for the Plan which constitutes hardly 10% of the total number of Homebuyers, hence the requisite 50% majority mark was not achieved as claimed by the RP. To put rest to this argument, a bare reading of **sub-section (3A) of Section 25A** would suffice:

> *"(3A) Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 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****:"*

The Code is thus abundantly clear on the fact that the 50% majority mark has to be achieved amongst those creditors of a particular class who actually cast their vote. In the instant case, voting results of the Homebuyers show that **65.69% majority** (Out of 230 Homebuyers present and voting, 144 voted in favour) was achieved which is more than the required percentage as a consequence of which, the RP voted in favour of the Resolution Plan in the 17th Consolidated CoC Meeting.

After this vote, all creditors in the particular class are necessarily bound by the decision of the majority and cannot maintain any claim against such decision. This principle is well established in ***Jaypee Kensington*** (supra) in the following words:

> *"164.4…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."*

9. **Thirdly,** on the issue of Environment Clearances it is noted that the Applicants' apprehensions related to extension of the EC are legitimate and the EC is a mandatory compliance for the revival of the Corporate Debtor. The RP is cognizant of this fact and has taken several steps to procure the EC as expeditiously as possible. He has approached relevant authorities such as the State Environment Impact Assessment Authority (SEIAA), State Level Expert Appraisal Committee (SEAC), Principal Secretary of the Environment Department (Government of Maharashtra) and has also filed appropriate applications before authorities such as the National Green Tribunal. It is evident from these steps that the RP comprehends the importance of the EC and the gravity of the consequences of its non-procurement. These applications are pending adjudication before the respective authorities and it is clear

that the RP has not acted adversely to the interests of the members of the CoC including the Homebuyers.

10. In view of the foregoing reasons, we find no merit in the present Application. With the above observations, IA No. 769 of 2022 is **dismissed** without costs.

Sd/-	**Sd/-**
SHYAM BABU GAUTAM	**JUSTICE P. N. DESHMUKH**
(MEMBER TECHNICAL)	**(MEMBER JUDICIAL)**

AN
23.09.2022