

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH

COURT-IV

I.A.(IBC)/5348/2022, INT. PET/60/2023, INT. PET/70/2023
IN
C.P.(IB)No.198/ND/2022

IN THE MATTER OF:

M/s. Sawaria Seth Infratech Pvt. Ltd

... Operational Creditor

Versus

M/s. Nitya Realtech Private Limited

... Corporate Debtor

IN THE MATTER OF I.A.(IBC)/5348/2022 :

Committee of Creditors of M/s Nitya Realtech Pvt Ltd.
Through Sanyam Goel, Resolution Professional
M/s Nitya Realtech Pvt Ltd

... Applicant

Versus

M/s. Proview Infrastructure Private Limited ... Respondent

IN THE MATTER OF INT. PET/60/2023 IN I.A.(IBC)/5348/2022 :

Officer City-1 Nitya Homes Apartment Owners Association

... Intervener No. 1

IN THE MATTER OF INT. PET/70/2023 IN I.A.(IBC)/5348/2022 :

Phoenix ARC Private Limited

... Intervener No. 2

CORAM:

SH. MANNI SANKARIAH SHANMUGA SUNDARAM,
HON'BLE MEMBER (JUDICIAL)

DR. SANJEEV RANJAN,
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the RP : Mr. Nakul Sachdeva, Mr. Aakarshan Sahay, Mr. Sagar Arora, Mr. Abhinandan Sharma, Mr. Sanyam Goel (RP in person), Mr. Mohtashim Kibiriya, Advs.

For Intervenor : Mr. Shivam Kumar, Mr. Dhruv Joshi, Mr. Abhinav Singh, Ms. Sanjana Mehrotra, Advs.

Order Delivered on: 19.04.2024

COMMON ORDER

PER: SH. MANNI SANKARIAH SHANMUGA SUNDARAM, MEMBER (J)

I.A.(IBC)/5348/2022 :

The interlocutory application i.e. I.A.(IBC)/5348/2022 is preferred by the Committee of Creditors of M/s. Nitya Realtech Private Limited through Mr. Sanyam Goel, Resolution Professional ('applicant') of M/s. Nitya Realtech Private Limited ('Corporate Debtor No.1') under Section 60(5)(a) of Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 11 of the National Company Law Tribunal Rules, 2016 ('NCLT Rules') seeking the following prayer(s):-

- a) Order and direct substantive consolidation of the CIRPs of Corporate Debtors into a single proceeding solely for the purposes of CIRP in accordance with the provisions of the Code, including but not limited to the acceptance, confirmation and all other actions with respect to the resolution plan for the Corporate Debtors and any and all amendments or modifications thereto, in such consolidated proceedings;
- b) Order and direct that solely for the purpose of the consolidated CIRP proceedings, all assets and liabilities of the Corporate Debtors be merged and deemed to be the assets and liabilities of all the Corporate Debtors on a consolidated basis;

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- c) Order and direct that each and every claim filed in the individual proceedings of any of the Corporate Debtors is deemed to be filed against all the Corporate Debtors in the consolidated proceedings;
- d) Order and direct that a common CoC may be constituted for the Corporate Debtors so that the decision-making process in relation to the CIRP may be done in an efficient manner and to diminish the scope of any conflicting decision;
- e) Order and direct that both the Corporate Debtors based on relevant factors including but not limited to commonality of business may be formulated and approved by the CoC and I placed before this Hon'ble Tribunal for its approval in I accordance with the provisions of the Code; and £ Grant such other or further reliefs as this Hon'ble Adjudicating Authority deems fit in the facts and circumstances of the case.

AVERMENTS OF THE APPLICANT

2. Briefly stated the facts of the present case as averred by the applicant in the present application and necessary for the adjudication of the present application are as follows:-

- a) The Corporate Insolvency Resolution Process against M/s. Nitya Realtech Private Limited ('Corporate Debtor No.1') was initiated by this Hon'ble Adjudicating Authority vide order dated 05.08.2022 passed in C.P.(IB)/198/ND/2022, an application filed under Section 9 of the Code, 2016 by M/s. Sawaria Seth Infratech Private Limited ('Operational Creditor') and Mr. Sanyam Goel ('applicant') was appointed as the Interim Resolution Professional who was later confirmed as Resolution Professional of the Corporate Debtor.
- b) The Corporate Insolvency Resolution Process against M/s. Proview Infrastructure Private Limited ('Corporate Debtor No.2') was initiated by this Hon'ble Adjudicating Authority vide order dated 05.08.2022 passed in C.P.(IB)/199/ND/2022, an application filed under Section 9 of the Code, 2016 by M/s. Sawaria Seth Infratech Private Limited ('Operational Creditor') and Mr. Sanyam Goel ('applicant') was appointed as the Interim Resolution Professional who was later confirmed as Resolution Professional of the Corporate Debtor.
- c) The Corporate Debtor No.1 and Corporate Debtor No.2 are having their Registered Offices at the same address i.e., 220, Opposite Vetrernity Hospital Village Burari, Delhi -110084 India. The Corporate Debtor No.1 is engaged in

the business of real estate activities with owned or leased property which includes buying, selling, renting and operating of self-owned or leased real estate such as apartment building and dwellings, non-residential buildings, developing and subdividing real estate into lots etc. The Corporate Debtor No.2 is engaged in the business of construction of residential houses, commercial buildings, flats and factory's sheds and buildings and to act as builders, colonisers, and civil and construction contractors.

d) The shareholding pattern and the Boards of the Corporate Debtors shows the commonality of interest and ownership between the Corporate Debtors. Both the companies are being controlled by the same family with no outsider being a shareholder or a director of either of the companies. The constitution Board of Suspended Directors and the Shareholding of the Corporate Debtor No.1 and Corporate Debtor No.2 are as follows:-

Shareholder	Nitya	Proview
Rajpal Tyagi	340000	30400
Vikas Tyagi	5000	18050
Punit Tyagi	395000	30010
Shyama Devi	255000	10000

(Shareholding Pattern of Corporate Debtor No.1 & Corporate Debtor No.2)

Director	Nitya	Proview
Punit Tyagi	Director	Director
Khushal Tyagi	Director	Director

(Board of Suspended Directors of Corporate Debtor No.1 & Corporate Debtor No.2)

- e) The Corporate Debtor No.1 and Corporate Debtor No.2 have also jointly developed two residential projects in Rajnagar Extension, Ghaziabad. The names of the projects are Officers City (developed by Proview) and Nitya Homes (developed by Nitya). It is submitted that although both the projects are named and developed separately, however, both these projects are built on the same portion of the land and have a common perimeter wall and common security/maintenance services. Cumulatively, there are approximately 1904 flats of different sizes on the said portion of land. The project is almost ready except for some finishing work and the completion certificate has been obtained for part of the project.
- f) It is pertinent to note that the major number of flats in the common complex belong to Corporate Debtor No.2 and only some belong to Corporate Debtor No.1. Further, upon physical verification it is revealed that on the ground it is not possible to physically segregate the project, as all the amenities, including the entry-exit to the common complex are intertwined.
- g) The Applicant has obtained copy of title deeds of the Land parcel where both the projects i.e. Officer City (Corporate Debtor No.2 Project) and Nitya Homes (Corporate Debtor No.1 Project) are located. A perusal of the said documents revealed that entire Land Parcel is in the name of two entities i.e. M/s. R.K.S. Buildcon India Pvt. Ltd. and M/s. Lotus Enterprises ("Landowning entities"). Further, both these land-owning entities have executed registered Power of Attorneys in the name of Proview/Corporate Debtor No.2 for the development of entire parcel of land including power to sell the developed flats/ units on behalf of the Landowning entities.
- h) The Applicant submitted that apart from Real Estate Allottees being the Class of Creditors there is only one Financial Creditor i.e., M/s Phoenix ARC Limited for both Corporate Debtor No.1 and Corporate Debtor No.2. Further, the claim filed by M/s. Phoenix ARC Limited, will reveal that loan has been extended to both Corporate Debtor No.1 and Corporate Debtor No.2 as single entity.
- i) The Applicant submitted that since the Corporate Debtor No.1 and Corporate Debtor No.2 have been running their business and operations as if they were a single entity and a single economic unit and all the lending has been done on

such basis, therefore, the entire line of credit by financial institutions to the Corporate Debtors were extended relying upon their unity in business and operations. The loans were extended with the understanding that the Corporate Debtors will be 'jointly and severally' liable for the obligation owed to the lenders. Therefore, the assets and liabilities of the Corporate Debtors are inextricably intertwined and the CIRP of the Corporate Debtors deserves to be consolidated. Accordingly, prays for the consolidation of the CIRP of both the Corporate Debtors.

INT. PET/60/2023 IN I.A.(IBC)/5348/2022 :

3. The Intervention Petition i.e., Int. Pet./60/2023 in I.A.(IBC)/5348/2022 is preferred by the Apartment Owner Association in the Projects Nitya Homes and Officers City ('Intervener No.1) under Section 60(5)(a) of Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 11 of the National Company Law Tribunal Rules, 2016 ('NCLT Rules') seeking the following prayer(s):-
- a) Pass an order directing the Applicant to intervene in the I.A. NO. 5348 OF 2022 of C.P.(IB)-198/ND/2022.
 - b) Direct the Resolution Professional to reconstitute the CoC of the Corporate Debtor.
 - c) Pass any further orders or directions, as this Hon'ble Tribunal may deem fit in the facts and circumstances of the present case and in the interests of justice

AVERMENTS OF THE INTERVENER NO. 1

4. Briefly stated the facts of the present case as averred by the Intervener No.1 in the present application and necessary for the adjudication of the present application are as follows:-
- a) The Corporate Debtor No.2 i.e., Proview Infrastructure Private Limited has taken a loan from the L&T Finance Limited and for the same L&T Finance Limited had created charges and mortgages on the assets and property of the Corporate Debtor No.1 as well as the Corporate Debtor No.2. Further, the L&T Finance Limited, before the CIRP initiation against the Corporate Debtors, had

assigned the loan to the Phoenix Trust and the Phoenix ARC Private Limited acting in its capacity as Trustee of Phoenix Trust submitted the claim as a secured financial creditor vis-a-vis the Corporate Debtor No.1 as well as Corporate Debtor No.2.

- b) The Resolution Professional had on two separate occasions, accepted the identical claim submitted by Phoenix in context of the Corporate Debtor No.1 as well as the Corporate Debtor No.2. However, as per the Balance Sheet and the Public Records, the L&T Finance Limited had advanced the loan only to Proview Infrastructure Private Limited i.e., Corporate Debtor No.2 and the Resolution Professional ('applicant') has wrongly and erroneously admitted the claim of the Phoenix also in the Corporate Debtors and further has made Phoenix a member of the Committee of Creditors of both the Corporate Debtors.
- c) It is further submitted that during the first Committee of Creditors (CoC) meeting of the respective Corporate Debtor, Phoenix had given their approval for the consolidation of the CIRP of both the Corporate Debtors. However, it is noteworthy that Phoenix in the 8th CoC had disapproved the consolidation for the reasons best known to them and the Resolution Professional. The wrongful and unlawful admission of the claim of the Phoenix in the Corporate Debtor is jeopardizing the consolidation as well as the CIRP process of the Corporate Debtor. Accordingly, prays for the relief(s) sought.

INT. PET/70/2023 IN I.A.(IBC)/5348/2022 :

5. The Intervention Petition i.e., Int. Pet./70/2023 in I.A.(IBC)/5348/2022 is preferred by M/s. Phoenix ARC Private Limited ('Intervener No.2) under Section 60(5)(a) of Insolvency and Bankruptcy Code, 2016 ('Code') read with Rule 11 of the National Company Law Tribunal Rules, 2016 ('NCLT Rules') seeking the following prayer(s):-

- a) Allow the present application and implead the present applicant/intervener as a necessary party in IA no. 5348 of 2023 in C.P. (IB) 198 (ND)/2022
- b) Allow the applicant to place on record the minutes of the 8th CoC meeting held on 05.08.2023

- c) Adjudicate upon the applications submitted by the Operational Creditor individually rather than consolidating the same
- d) Pass any other order as this Hon 'ble Tribunal may deem fit and proper be granted in favour of the present applicant.

AVERMENTS OF THE INTERVENER NO. 2

6. Briefly stated the facts of the present case as averred by the Intervener No.2 in the present application and necessary for the adjudication of the present application are as follows:-
- a) The Resolution Profession of the Corporate Debtors (applicant herein') had filed the captioned IA No. 5348/2023 seeking consolidation of the Corporate Insolvency Resolution Process ("CIRP") of the Corporate Debtors i.e. Nitya Realtech Pvt. Ltd. ('Corporate Debtor No.1') and Proview Infrastructure Pvt. Ltd ('Corporate Debtor No.2') . However the resolution to this effect which was put to vote pursuant to directions of this court in the 8th CoC Meeting dated 05- 08-2023 and the same has been rejected by the CoC and as such there is no justification that the Resolution Professional has advanced to negate the commercial wisdom of the CoC.
 - b) It was further submitted that the two CIRPs have been initiated, pursued and conducted so far independently as they involve different assets and proceedings. Further, as per a Transaction Audit Report filed by the Resolution Professional before this Hon 'ble Adjudicating Authority, it is evident that the directors and personal guarantors of the Corporate Debtor have indulged in the fraudulent transactions in order to defraud the financial creditors and have along with the other Personal guarantors, which are his family members, have inter alia siphoned off funds via sale of flats from the project/assets without taking the 'NOC' from the Creditor, or have not routed the sales consideration through Escrow Account , or sold the flats/units at a lower price contrary to the stipulation in the agreements and MOU dated 06.08.2020 executed between the lender and the borrower.

- c) The applicant also submitted that most of the unsecured creditors i.e the homebuyers have purchased the apartments without the necessary NoC from the intervener No.1, thereby rendering their position in the CoC suspect. The Resolution Professional has also failed to take cognizance of this glaring anomaly and instead of secure the taking over of possession of the mortgaged apartments which have been occupied by the unsecured homebuyers without authorization
- d) That the consolidation of the two CIRPs or any further dilution of the stake of the intervener No.2 would be incongruous with the mandate of the IBC and shall also be a travesty of justice. Accordingly, prays for the dismissal of I.A.(IBC)/5348/2022.

ANALYSIS AND FINDING

7. We have heard the Learned Counsel for the parties and perused the averments made in the Interlocutory Application, Intervention Petitions and Written submission filed by the respective parties. Since, the issue in the Interlocutory Application i.e., I.A(IBC)/5348/2022, Intervention Petitions i.e., Int. Pet./60/2023 and Int. Pet./70/2023 are interconnected with each other therefore all the three matters are being taken together for adjudication.
8. Coming to the factual matrix of the present case, this Adjudicating Authority vide order dated 05.08.2022 passed in C.P.(IB)/198/ND/2022 and C.P.(IB)/199/ND/2022 had initiated Corporate Insolvency Resolution Process against M/s. Nitya Realtech Private Limited ('Corporate Debtor No.1') and M/s. Proview Infrastructure Private Limited ('Corporate Debtor No.2') respectively and the applicant was appointed as the Interim Resolution Professional for both the Corporate Debtors and later confirmed as the Resolution Professional of both the Corporate Debtors. Pursuant to which the Public Announcements were made and separate Committee of Creditors for both the Corporate Debtors were constituted wherein M/s Phoenix ARC Pvt. Ltd ('Intervener No.2') holds a voting share of 96.72% in Corporate Debtor No.1 and 97.33% voting share in Corporate Debtor

No.2. The Applicant conveyed the 1st CoC meeting for both the Corporate Debtors individually on 07.09.2022, wherein CoC of both the Corporate Debtors had unanimously passed a resolution to consolidate the CIRP of the Corporate Debtor No.1 and Corporate Debtor No.2 On the basis of both the CoC, the Applicant had filed the instant application seeking consolidation of the CIRP of the CDs.

9. On perusal of records, it is observed that this Adjudicating Authority considering the re-constitution of the Committee of Creditors of both the Corporate Debtors with the Real Estate Allottees had vide order dated 01.08.2023 had directed the Applicant to conduct a fresh voting for consolidation of the CIRP of the Corporate Debtor No.1 and Corporate Debtor No.2.

10. Further, it is observed that both the Corporate Debtors are building residential projects in Rajnagar Extension, Ghaziabad namely Nitya Homes developed by Corporate Debtor No.1 and Officers City developed by Corporate Debtor No.2 which are being separately registered. Also, it is an admitted fact that the assets of both the Corporate Debtors are distinguishable and were overall functioning independently. The allotment letter(s) of both the project(s) are issued separately to the Real State Allottees without the mention of the other Corporate Debtor. Merely, constructing of two different project(s) in a common complex may not necessary warrants the consolidation of the project.

11. In compliance with this Adjudicating Authority's order dated 01.08.2023, the Applicant /RP had conveyed the 8th CoC meeting of Corporate Debtor No.1 and Corporate Debtor No.2 individually to consider and vote upon the consolidation of Corporate Debtor No.1 and Corporate Debtor No.2. The Applicant had submitted the Compliance Affidavit dated 02.09.2023 for placing on record the Minutes of the 8th CoC Meeting of the Corporate Debtor No.1. On perusal of the Minutes of the 8th CoC Meeting dated 05.08.2023 of Corporate Debtor No.1, it is observed that the Committee of Creditors in the case of Corporate Debtor No.1 had voted against the resolution proposing the consolidation of CIRP of both the Corporate Debtors. The relevant extract of the 8th CoC Meeting of the Corporate Debtor No.1 is reproduced overleaf:-

VOTING SHEET/RESULT OF THE EIGHTH (8TH) MEETING OF THE COMMITTEE OF CREDITORS ("COC") OF M/S NITYA REALTECH PRIVATE LIMITED ("CORPORATE DEBTOR/CD"), HELD ON SATURDAY, 05.08.2023 THROUGH VIDEO CONFERENCING (VC) COMMENCED AT 12:15 PM AT GURUGRAM (BEING THE PLACE WHERE CHAIRPERSON OF THE MEETING WAS PRESENT) WHEREIN THE E VOTING WAS CONDUCTED FROM 06TH AUGUST, 2023 06:00 PM TO *16TH AUGUST, 2023 11:00 PM

AGENDA ITEM NO.4

TO RATIFY AND APPROVE THE CONSOLIDATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS ("CIRP") OF THE CORPORATE DEBTOR AND M/S PROVIEW INFRASTRUCTURE PRIVATE LIMITED

"RESOLVED THAT the approval of Committee of Creditors be and is hereby granted for consolidation of ongoing Corporate Insolvency Resolution Process of Corporate Debtor with M/s Proview Infrastructure Private Limited subject to approval of the CoC members of M/s Proview Infrastructure Private Limited

RESOLVED FURTHER THAT Resolution Professional be and is hereby authorised to do all such acts, deeds and things as may be required or considered necessary or incidental thereto including filling or continuing of any proceedings in this matter before the Hon'ble Adjudicating Authority."

Voting Pattern:

Sl. No.	Name of COC Member	Voted In Favour/ Against/ Abstained	Vote Share
1	Phoenix ARC Private Limited	Against	65.47%
2	Creditor In Class - Homebuyers	In Favour	34.53%

Out of the Creditors in Class who voted on the resolution, 99% of the Creditors in Class have voted in favour, 1% have voted against the resolution and 0% have abstained from the E-voting. That in accordance with the sub-section 3A of Section 25A of the Code, the Authorised Representative has voted in favour of the resolution.

However, the Financial Creditor (Phoenix ARC Private Limited) having 65.47% voting share has voted against the Resolution. Thus, the aforesaid resolution is rejected by the COC with 65.47% vote being against the resolution.

SANYAM
GOEL

Sanyam Goel
Resolution Professional
Nitya Realtech Private Limited
IBBI/IPA-002/IP-N00138/2017-18/10397
AFA: AA2/10397/02/011123/202247, Valid from 02/11/2022 to 01/11/2023
Unit No. 110, First Floor, JMD Pacific Square, Sector 15,
Part II, Gurugram, Haryana-122001
Email: goelsanyam@gmail.com

[Extract of the 8th CoC Meeting of the Corporate Debtor]

12. M/s. Phoenix ARC Private Limited, acting as Intervener No.2, holds a 65.47% voting percentage in Corporate Debtor No.1 and a 37.57% voting percentage in Corporate Debtor No.2. It is undisputed that during the 8th CoC Meeting of Corporate Debtor No.1 on August 5, 2023, the resolution for consolidating the CIRPs of both Corporate Debtors was rejected. However, the CoC of Corporate Debtor No.2 voted in favor of the consolidation. It is crucial to note that both CoCs must align on either supporting or opposing the consolidation of the CIRPs. The resolution passed by the CoC of Corporate Debtor No.2 in favor of consolidation is contingent upon a similar resolution from Corporate Debtor No.1, or vice versa. As the CoC of Corporate Debtor No.1 exercised its commercial wisdom to reject the consolidation resolution, the resolution passed by Corporate Debtor No.2 alone does not signify creditor consent for consolidation.
13. The Hon'ble Supreme Court in the case of **K. Sashidhar v. Indian Overseas Bank and Others [(2019) 12 SCC 150]** had held that the commercial wisdom of the COC was held to be supreme. The same has been reiterated by the Hon'ble Supreme Court in Committee of creditors of the **Essar Steels Ltd. v. Satish Kumar Gupta (2020) 8 SCC 531** and the same is reproduced below:-
- "Since it is the commercial wisdom of the Committee of Creditors that is to decide on whether or not to rehabilitate the corporate debtor by means of acceptance of a particular resolution plan, the provisions of the Code and the Regulations outline in detail the importance of setting up of such Committee and leaving decisions to be made by the requisite majority of the members of the aforesaid Committee in its discretion."
14. In general parlance, it is a settled position of law that for any restructuring or consolidation of a corporation, the special consent of its stakeholders is paramount, as they are the best judges for the company's future. The same logic applies in the present case as well. Since the CoC of Corporate Debtor No.1 is not in favor of consolidation, this adjudicating authority is not inclined to proceed with the consolidation of the corporate debtors

15. It is consistently held that the commercial wisdom of the CoC has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the IBC. Further, this Adjudicating Authority is of the view that the Applicant had failed to meet the basic requirements for `consolidation of CIRP' viz. that the `Assets' of a `Corporate Debtor', cannot be considered on a `standalone' basis.
16. The Applicant had placed reliance on **Hon'ble NCLAT's order in M.A 1306/2018 in CP (IB) -02/2018] State Bank of India v. Videocon Industries Limited & Ors.** to support the contention of consolidation of the CIRP of different companies. On perusal of the Judgement relied upon, we are of the considered view that the parameters laid down in the said Judgement are not fulfilled in the case before us. Accordingly, the Judgement relied upon by the Applicant is not helpful in the present case.
17. Further, the Intervener No.1 in Int. Pet 60/2023 is also seeking the removal of M/s. Phoenix ARC (Intervener No.2') from the CoC of the Corporate Debtor No.1. Since, the subject matter of the present Application is with regard to the consolidation of the CIRP of both the Corporate Debtors. Therefore, the issue of class of creditor of Intervener No.2 cannot be determined in the present Intervention Petition .
18. Resultantly, in view of the aforesaid discussions, this Adjudicating Authority is of the view that the present Interlocutory Application i.e., **I.A(IBC)/5348/2022 being devoid of merits, stands dismissed.** Consequently, in terms of the above order, the **Intervention Petitions i.e., Int. Pet./60/2023 and Int. Pet./70/2023 stands disposed of.**

Sd/-

**(DR. SANJEEV RANJAN)
MEMBER (T)**

Sd/-

**(MANNI SANKARIAH SHANMUGA SUNDARAM)
MEMBER (J)**