

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

INTERLOCUTORY APPLICATION. No. 14/2022

In

CP(IBC)No. 2517/MB/C-II/2018

*Application filed under Section 60(5) of the Insolvency
and Bankruptcy Code, 2016.*

In the matter of

Ms. Sharmila Sankar and Mr. Vinod Sankar

Having address at:

Building No.34, Flat No.101, Seawood Estates,
Nerul, Navi Mumbai-400706.

...Applicants

v/s

Arun Kapoor, Resolution Professional,

Monarch Brookefields LLP,

Having his address at: G-601, Army Co-operative
Housing Society, Sector-09, Nerul (East),
Navi Mumbai, Maharashtra-400706.

...Respondent

In the matter between:

Capri Global Capital Limited

.... Financial Creditor

v/s

Monarch Brookefields LLP

...Corporate Debtor

Order Pronounced on: - 12.04.2024.

Coram:

Shri. Anil Raj Chellan : Member (Technical)

Shri. Kuldip Kumar Kareer : Member (Judicial)

Appearances (in Physical Mode) :

For the Applicants : Mr. Nitish Bangera, PCS.

For the Respondent : Mr. Amir Arsiwala a/w Nupur Shah
and Vidit Divya Kumat.

ORDER

Per: Shri. Kuldip Kumar Kareer, Member Judicial.

1. This is an application filed by the Applicants under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('Code') seeking following reliefs:
 - a. Not to approve the resolution plan until flat buyers' issues are being resolved;
 - b. Name of the Applicants be included in the list of flat buyers;
 - c. The Applicants be allotted Flat No. 1003 in 'Arizona' or any other alternate flat along with covered car parking in their name;

Case of the Applicants in brief:

2. The Applicants had purchased the Flat No. 1003 in building named Monarch Brookefields and Wing-Arizona, built by the Corporate Debtor, vide Registered Agreement for Sale dated November 03, 2016 for purchase of the flat for a purchase consideration of INR 29,00,000/- (Rupees Forty-Three Lakhs only).
3. By an Order dated 27th September, 2019 passed by this Hon'ble Tribunal, the Corporate Insolvency Resolution Process ('CIRP') was initiated against the Corporate Debtor. The Applicants had filed their claim with the IRP/RP of the Corporate Debtor and the claim was admitted and the name of the Applicants was reflected at Serial No. 118 against Flat No. 1003 in the List of Buyer. However, as per the approved resolution plan in 13th CoC Meetings dated 15.11.2021 and 19.11.2021, the Applicants are only entitled to 60% of the claim amount and not entitled to any flat. Hence this application.
4. **Reply of the Respondent:** The Respondent has filed his Reply in the above-captioned matter on Affidavit dated 22nd March, 2022. The contentions placed by the Respondent are briefly stated as under:
 - I. It is not the case of the Applicants that the approved resolution plan is illegal, unlawful or in contravention of section 30(2) of the Code. The real grievance of the Applicants appears to be that they will only be entitled to 25% of their admitted claim under the terms of approved resolution plan. Therefore, this is essentially a challenge to

the commercial/business terms as set out in the approved resolution plan.

- II. It is submitted that the financial creditors belonging to the class of homebuyers have collectively voted in favour of the approved resolution plan and therefore, it is not open to the Applicants to individually challenge the same at this belated stage. It is now settled position of law, as per the decision rendered by the Hon'ble Supreme Court of India in Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v/s. NBCC (India) Ltd reported in (2022) 1 SCC 401, that an individual creditor belonging to a class of creditors does not have any locus standi to challenge a resolution plan when the class as a whole has already voted in favour of the same resolution plan.
- III. It is an admitted position that the Applicants had paid a sum of Rs. 35,84,000/- to the Corporate Debtor for acquiring a residential flat and for this reason, they have been recognised as a financial creditor belonging to the class of allottees. While the Applicants have a registered agreement for sale, it is an admitted position that the Corporate Debtor did not have the permission to construct 10th floor in building wing named, 'Arizona'. The permission to construct any floor beyond the 09th Floor was withdrawn by the concerned municipal authority and this fact is not in dispute. As per the approved resolution plan, the allottees are divided into three categories viz. Category A, Category B and Category C. The Applicants falls under Category 'C' whereby the flat purchasers

falling under this category are those who either do not have any registered agreements in the favour, or who have registered agreements which were executed after the flats allotted to them became illegal/unlawful under the revised sanctioned plans. These flat purchasers would be entitled to 25% of their admitted principal claim at the end of the term of the approved resolution plan. Alternatively, they may choose to purchase new flats from the resolution Applicants at prevailing market rates in which case they would be entitled to credit of 25% of their admitted principal amount.

- IV. It is reiterated that it was not the Respondent's decision that the Applicants be entitled to only for 25% of the claim amount, but rather it is the business decision of the Resolution Applicants which has been approved by the CoC. It is not open to the Applicants to seek to challenge the commercial wisdom of CoC at this stage, especially when they themselves were the members of CoC. While the Applicants had paid Rs. 35,84,000/- towards the purchase of flat, their claim has been admitted to the extent of Rs. 50,18,093/- which includes interest in accordance with the provisions of IBC.

ANALYSIS AND FINDINGS

5. We have heard the learned counsels for both the parties and perused the record.

6. Counsel for the Applicants submits that the Applicants are entitled to possession of an alternate flat for which permission has been received, though the claim had been filed by the Applicants. Counsel for the Applicants submit that 10th floor, on which the Applicants had booked the flat, turned out to be illegal since permission for the same was withdrawn, however, the Applicants cannot be punished for acts of illegalities on the part of builder/Corporate Debtor. Counsel for the Applicants submits that the acts of cancellation of allotment and refund of money that too only to the tune of 60% of the admitted claim, both by the RP, are patently illegal and the Applicants are still entitled to allotment though the flat in question turned out be illegal for no fault of the Applicants.
7. Counsel for the Respondent/RP submits that the Applicants seeks to acquire a flat in the project of the Corporate Debtor which did not exist as no permission was received or obtained for that entire floor. The Applicants cannot be equated with other allottees as it is a debatable question whether the allotment of an illegal unit could amount to “allotment” in law at all. Thus, according to the Id. Counsel, the Applicants cannot be treated at par with other homebuyers who have a genuine claim against sanctioned units in the project. Counsel for the Respondent submits that it is not the case of the Applicants that the approved resolution plan is illegal, unlawful, or in contravention of Section 30(2) of the Code in any manner. Therefore, the Id. Counsel submits that the proposed payment to be made to the Applicants, who have been classified into Category ‘C’ in the approved resolution plan, only to the tune of 25% of the Applicants’ admitted claim out of the proceeds of resolution plan, is a business decision based on

commercial considerations and therefore, the same is not amenable to judicial review by this Tribunal. Hence, the instant application should be dismissed.

8. We have meticulously examined the submissions canvassed across the bar on behalf of the Applicants as well as on behalf of the Respondent and having heard those submissions and after going through the records, we give our findings hereinbelow.
9. By way of this application, the Applicants herein are seeking to stay the resolution plan which has been approved by the CoC and not to approve the same until flat buyer's issues are resolved and also for the allotment of Flat No. 1003 in project 'Arizona' or any other alternate flat in the said project with covered car parking in the name of the Applicants.
10. We find that the Applicants' claim was admitted by the Respondent during the CIRP of the Corporate Debtor to the tune of Rs. 50,18,093/-, out of which the principal amount is Rs. 35,84,000/- and remainder is interest on principal in accordance with the provisions of Code. The resolution plan submitted by one M/s. Planet Builders and Developers was approved by the CoC in its 13th Meeting held on 15.11.2021 and 19.11.2021. It is not the case of the Applicants that the approved resolution plan is illegal, unlawful, or in contravention of Section 30(2) of the Code in any manner. The Applicants have not challenged their categorisation in the

resolution plan, but only *inter-alia* prayed for allotment of flat in the real estate project, 'Arizona', which was constructed by the Corporate Debtor.

11. Apparently, the Applicant and the Respondent seem to be at variance between the parties herein with respect to categorisation of the Applicants. According to the Applicants, they fall under Category 'B' of the Approved Resolution Plan, whereas the Respondent has classified the Applicants as Category 'C' of the approved resolution plan. However, since no relief has been sought with respect to categorisation of the Applicants, we are not determining whether the Applicants herein fall under Category 'B' or Category 'C'. As per the proposal, the flat buyers in Category 'B' are proposed to be paid 60% of their admitted principal at the end of the plan i.e. T+730 days. The flat buyers can also opt to purchase new flats after approvals for balance/additional or future FSI from the Resolution Applicant at prevailing or current market rates in case of which 100% of their admitted principal will be adjusted towards the new deal. Further, as per the proposal, the flat buyers in Category 'C' are proposed to be paid 25% of their admitted principal at the end of the plan i.e. T+730 days. The flat buyers can also opt to purchase new flats after approvals for balance/additional or future FSI from the Resolution Applicant at prevailing or current market rates in case of which 50% of their admitted principal will be adjusted towards the new deal. In our considered view, all of these decisions have been taken and approved by the CoC in its commercial wisdom and therefore, in the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the

commercial aspects of the decision of CoC; and there is no scope for substituting any commercial term of the resolution plan approved by CoC. Hence, on this ground alone, we are of the firm view that the present application deserves to be dismissed.

12. The Respondent has stated in his reply that financial creditors belonging to the class of homebuyers have collectively voted in favour of the approved resolution plan and therefore, it is not open to the Applicants to individually challenge the same at this belated stage. This fact has not been disputed, denied or rebutted by the Applicants as no rejoinder has been filed by the Applicants. The Hon'ble Supreme Court of India Jaypee Kensington Boulevard Apartments Welfare Association v/s. NBCC (India) Ltd reported in (2022) 1 SCC 401 has observed at Para 211 of the Judgment that there is no scope for any homebuyer arrogating himself to be a dissenting financial creditor merely because he was not with majority within class. His dissatisfaction does not partake the legal character of a dissenting financial creditor. The Hon'ble Apex Court has further observed at Para 214 of the aforesaid judgment that once the homebuyers as a class having voted in favour of approval of the resolution plan, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. Hence, in view of the judgment of the Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association (supra) and under the circumstances, we are of the considered view that the Applicants have no locus in raising objection to the resolution

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plan since the class of allottees to which the Applicants belong, have already voted in favour of the impugned resolution plan.

13. In view of the above findings, we are not inclined to allow this application and accordingly, **I.A. No. 14 of 2022** in CP(IB) No. 2517 of 2018 **is hereby dismissed** as being devoid of any merit.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)