

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1214 & 1215 of 2023

[Arising out of orders dated 11.08.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench in I.A. No. 1777 of 2021 and I.A. No. 1150 of 2021 in CP(IB) No. 2995/MB/2019]

IN THE MATTER OF:

Ms. Amita Saurabh Bihani
Block No: 16/16, Trimurti Residency,
JB Nagar, Andheri (East),
Mumbai, Maharashtra - 400 059

Mrs. Madhu Pradeep Bihani
Block No: 16/16, Trimurti Residency,
JB Nagar, Andheri (East),
Mumbai, Maharashtra - 400 059

Mrs. Roma Moti Thakur
Flat No. 05, Helicon Castle,
Plot No.75, Mahatma Nagar,
Nashik, Maharashtra - 422 007

Mr. Ashok Mulchand Khatpal
Plot No.26, Sneh Bungalow, Dsouza Colony,
College Road, Nashik,
Maharashtra - 422 005

.....Appellants

Versus

E&G Global Estates Limited
Through the Resolution Professional,
Having address at:
502, Brookfield Society,
Old Lokhandwala Complex Road, Opposite
Ashok Academy, Andheri (W),
Mumbai, Maharashtra - 400 053

...Respondent No.1

Mr. Gajesh Labhchand Jain
Resolution Professional of
E&G Global Estates Limited
Having address at:
502, Brookfield Society,
Old Lokhandwala Complex Road, Opposite
Ashok Academy, Andheri (W),
Mumbai, Maharashtra - 400 053

...Respondent No.2

**Mrs. Asha Sanap,
Successful Resolution Applicant,
Having address at:
Aikya Bunglow, Plot No.27,
Ashvin Co-Operative Housing Society,
Jay Bhavani Road, Nashik Road,
Nashik, Maharashtra - 422 101**

...Respondent No.3

**Dnyaneshwar Chaudhari
Suspended Director of the Corporate Debtor,
Ideal Apartment, Near Khanderao Mandir,
Sharmik Nagar, Satpur, Nashik,
Maharashtra - 422 012**

...Respondent No.4

**Mr. Ganesh K Ahire,
Suspended Director of the Corporate Debtor,
Flat No.1, Nikita Pride, Date Nagar,
Ayodhya Colony, Next to Akashwari Tower,
Gangapur Road, Nashik,
Maharashtra - 422 013**

...Respondent No.5

**Mr. Hiran Patil,
Suspended Director of the Corporate Debtor,
PL 3 & 4, I/F Godavari Heights,
Savarkar Nagar, Opposite Shri
Swamisamarth Temple,
Nashik, Maharashtra - 422 007**

...Respondent No.6

**Small Industrial Development Bank of India
Specialized Asset Recovery Branch (SARB),
Smarudhi Venture Park, Upper Ground Floor,
MIDC Road, MIDC Marol, Andheri (East),
Mumbai, Maharashtra - 400 093**

...Respondent No.7

Present:

**Appellants: Mr. Krishnendu Datta, Sr. Advocate with Mr.
Pranjit Bhattacharya, Ms. Raj Sarit Khare,
Advocates.**

**For Respondents: Mr. Sumesh Dhawan, Mr. Saurya Shyam, Mr.
Sagar Thakkar and Mr. Raghav Dembia,
Advocates for SRA.**

**Mr. Gaurav Mitra, Mr. Aman Varma, Ms. Riya S.
Wasade, Advocates for R-4, 5 & 6.**

With

Company Appeal (AT)(Insolvency) No. 1217 & 1218 of 2023

**[Arising out of orders dated 11.08.2023 passed by the Adjudicating
Authority, National Company Law Tribunal, Mumbai Bench in I.A. No.
1609 of 2021 and I.A. No. 1150 of 2021 in CP(IB) No. 2995/MB/2019]**

IN THE MATTER OF:

**G.S. Constructions
(Through its sole proprietor,
Shri Sushil Uttarwar)
Office No.301, 3rd Floor, Divine Tej,
Opposite Kilbil School,
Thatte Marg, College Road,
Nashik, Maharashtra – 422 005**

...Appellant

Versus

**E & G Global Estates Ltd.
Through the Resolution Professional
502, Brookfield Society,
Old Lokhandwala Complex Road,
Opposite Ashok Academy,
Andheri (W), Mumbai – 400 053**

...Respondent No.1

**Gajesh Labhchand Jain
Resolution Professional of E&G Global
Estates Limited
502, Brookfield Society,
Old Lokhandwala Complex Road,
Opposite Ashok Academy
Andheri (W), Mumbai-400 053**

...Respondent No.2

**Jitender Kothari,
Authorized Representative of Class Of
Creditors Homebuyers of E&G Global
Estates Limited
702, Orchid A Wing, Evershine Park
Off Veera Desai Road, Andheri (W)
Mumbai- 400 053**

...Respondent No.3

Asha Sanap
Successful Resolution Applicant of E&G
Global Estates Limited
Aikya Bunglow, Plot No. 27, Ashvin
Co-operative Housing Society,
Jay Bhavani Road,
Nasik Road, Nashik – 422101 ...Respondent No.4

Small Industries Development Bank of India
Specialized Asset Recovery Branch (SARB),
Samrudhi Venture Park,
Upper Ground Floor,
IDC Road, MIDC Industrial Area,
Marol, Andheri (East), Mumbai – 400093 ...Respondent No.5

Bela Gujarati
3, Datta Bhavan, N.D. Patel Road,
Opp. S.T. Workshop, Nashik – 422001 ...Respondent No.6

Pallavi Girish Malani
Shankar Kunj Bunglow, Jagtap Malani,
Nisarg Datta Mandir, Near Taran Talav,
Nashik – 422 101 ...Respondent No.7

Govind Malani
04 Shankar Kunj Jagtap,
Nisarga Datt Nagar Jagtap,
Maala Nashik Road – 422101 ...Respondent No.8

Madan Vallabhdas Devi
Plot No. 11, Raghav, Ramdas Colony,
Behind Seva Hospital, Canada Cover,
Nashik – 422005 ...Respondent No.9

Mina Gopal Gokhale
8 Archana CHS, Sector 17, Plot No. 18,
Vashi, Navi Mumbai – 400705 ...Respondent No.10

Gaurav Anil Mahajan
702, Orchid A Wing, Evershine Park
Off Veera Desai Road, Andheri (W)
Mumbai- 400 053 ...Respondent No.11

Gokulsingh Morkar
Flat No. 12, The Imperial Heights,
Off Gangapur Road, Riverfront Cruiseway,
Chandshi, Nashik – 422003

...Respondent No.12

Present:

Appellant: **Mr. Abhijeet Sinha, Mr. Abhirup Dasgupta, Ms. Jayashree Shukla, Mr. Ishaan Duggal and Ms. Mukta Halbe, Advocates.**

For Respondents: **Mr. Sumesh Dhawan, Mr. Saurya Shyam, Mr. Sagar Thakkar and Mr. Raghav Dembia, Advocates for SRA.**

Mr. Gaurav Mitra, Mr. Aman Varma, Ms. Riya S. Wasade, Advocates

Mr. Parvindra Nutiyal, Advocate

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

These two sets of appeals have been filed challenging the impugned orders dated 11.08.2023 passed in I.A. Nos. IA No.1777, 1150 and 1609 of 2021 by the Adjudicating Authority in CP (IB) No.2995/MB/2019. The first set of appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 (“**IBC**” in short) by the Appellants/Homebuyers (hereinafter referred to as ‘**Appellants-1**’) arises out of the Order dated 11.08.2023 (hereinafter referred to as “**First Impugned Order**”) passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-V) in IA No.1777 of 2021 in CP (IB) No.2995/MB/2019. By the first impugned order, the Adjudicating Authority dismissed the challenge raised by the Appellants-1 to the constitution of the

Committee of Creditors (“**CoC**” in short) for the purposes of initiating Corporate Insolvency Resolution Process (“**CIRP**” in short) against the Corporate Debtor. These Appellants have also challenged another Order dated 11.08.2023 (hereinafter referred to as “**Second Impugned Order**”) passed by the said Adjudicating Authority in IA No.1150 of 2021 in the same company petition at supra by which the resolution plan of the Successful Resolution Applicant has been approved. The second set of appeal filed by M/s. G.S. Constructions (hereinafter referred to as ‘**Appellant-2**’) also arises out of the Order dated 11.08.2023 (hereinafter referred to as “**Third Impugned Order**”) in I.A. 1609 of 2021 wherein the same Adjudicating Authority dismissed the challenge raised by this Appellant to the constitution of the CoC. This Appellant has also challenged the second impugned order passed by the same Adjudicating Authority in IA No.1150 of 2021 approving the resolution plan of the Successful Resolution Applicant.

2. The factual matrix in both the appeals shares commonality and facts which are of relevance in deciding the two appeals are as outlined below: -

- SIDBI–Financial Creditor filed a Section 7 application under IBC to initiate CIRP against the Corporate Debtor, namely, E & G Global Estates Ltd. in CP(IB) No. 2995 of 2019 which was admitted on 24.06.2020.
- The interim Resolution Professional was confirmed as Resolution Professional (“**RP**” in short) in the 2nd CoC meeting held on 01.09.2020. The same meeting also appointed a Forensic Auditor to undertake forensic audit of the books of account of the Corporate Debtor.
- The RP constituted the CoC with SIDBI having 20.40% vote share and Home Buyers as class of creditors with 79.60% vote share. The Home

Buyers appointed an Authorized Representative to represent their interests in the CoC.

- The Appellants -1 filed an IA No. 1430 of 2020 in respect of fraudulent transactions entered between certain set of suspect/fraudulent home buyers and suspended Director of the Corporate Debtor seeking the quashing of the CoC and reconstitution thereof. The Adjudicating Authority disposed of the said IA on 16.09.2020 stating that the outcome of the forensic audit which had been sought by the CoC would provide the way forward.
- The Forensic Auditor, appointed on 01.09.2020, submitted its report (“**FAR**” in short) on 14.01.2021 basis which the RP filed IA 107 of 2021 under Section 66 of the IBC on the fraudulent and circuitous transactions by certain home buyers with the suspended directors of the Corporate Debtor. The RP had sought cancellation of their voting rights as they were not Financial Creditors and for having filed fraudulent claims. Relief was also sought against the suspended directors for returning money back to the Corporate Debtor which had been siphoned off through circular transactions.
- The Adjudicating Authority in the matter of IA 107 of 2021 directed the removal of these home owners from the CoC and reconstitution of the CoC by the RP on 17.11.2021. This order of the Adjudicating Authority was however challenged before this Tribunal in CA(AT)(Ins)No 26 of 2022 by the homebuyers who had been removed from the CoC. This matter was remanded back to the Adjudicating Authority for reconsideration without entering into the merits of the

matter by this Tribunal on 08.03.2022. The IA 107 of 2021 continues to remain pending.

- The RP also filed IA No. 149 of 2021 under Sections 43 to 45 of the IBC for preferential transactions to bring back the amount siphoned through fraudulent/circuitous transactions in which adjudication remains pending.
- In the interim, in pursuance to duly published Form G, the CoC received resolution plans from 3 prospective resolution applicants namely, G.S. Constructions (sole proprietorship of Sushil Uttarwar); Mrs. Archana Sanap and Mrs. Asha Sanap.
- The 8th CoC meeting held on 20.04.2021 approved the resolution plan submitted by Asha Sanap with 79.60% vote share.
- Thereafter the RP filed IA No. 1150 of 2021 seeking approval of the resolution plan of Asha Sanap which was approved by the Adjudicating Authority vide second impugned order on 11.08.2023. Both Appellants-1 and Appellant-2 have come up in appeal against this impugned order approving Asha Sanap as the Successful Resolution Applicant (“**SRA**” in short).
- While the IA 107/2021 was still pending before the Adjudicating Authority, the Appellants-1 filed IA No. 1777 of 2021 praying for removal of alleged illegitimate home owners from the CoC and to disregard the votes cast by them during 8th CoC meeting; reconstitute the CoC with genuine home buyers; conduct forensic audit of the accounts of related parties of the Corporate Debtor and to approve the resolution plan submitted by M/s. G.S. Constructions (‘**GSC**’ in short)

on grounds of being a superior and commercially viable plan than that of the SRA.

- The IA No. 1777 of 2021 was dismissed by the Adjudicating Authority vide first impugned order on 11.08.2023 which order has been assailed by the Appellants-1 in the present appeal.
- Appellant-2 filed IA No. 1609 of 2021 praying for removal of alleged illegitimate home owners from the CoC; reconstitute the CoC and call for fresh voting besides rejection of resolution plan by SRA. This IA 1609 of 2021 was rejected by the Adjudicating Authority vide third impugned order on 11.08.2023 which order has been assailed by Appellant-2.
- Aggrieved by the first, second and the third impugned orders, both the Appellants have come up in appeal.

3. More or less identical submissions were made by Learned Senior Counsel for Appellants-1 and Learned Counsel for Appellant-2 and hence for reasons of convenience both their pleadings/arguments are being summed up together. Making their submissions, it was submitted that the Appellants-1 had filed IA 1430 of 2020 before the Adjudicating Authority seeking the quashing of the irregularly constituted CoC since illegitimate home buyers who had entered into fraudulent and circuitous transactions with the suspended directors of the Corporate Debtor were included in the CoC by the RP. The Adjudicating Authority in its orders dated 16.09.2020 disposed of IA 1430 by observing that conduct of forensic audit would address these concerns. It was submitted that their apprehensions of fraudulent and circuitous transactions were validated by the FAR dated 14.01.2021. It was submitted that the Appellant-2 had also made similar prayers in IA1609 inter

alia to set aside the existing CoC of the Corporate Debtor and declare the decisions taken by them in the CIRP proceedings as void and non-est; to reconstitute the CoC and call for fresh votes on each Resolution Plan and to direct the RP to conduct a thorough investigation on the purported transactions entered into by the fraudulent home buyers and that Resolution Plan of SRA be rejected.

4. It was further submitted that the RP admitted the claims of these illegitimate home owners who had committed irregularities by way of fraudulent transactions and gave them access to the CoC at a time when in IA 107 of 2021, the RP had himself prayed for reconstitution of the CoC. Further the RP not only allowed their entry into the CoC but also allowed these illegitimate home buyers to discuss and approve the resolution plan. Had the votes of the illegitimate home owners been excluded, the results of the voting on the resolution plan of SRA would have been different. It has, therefore, been contended that when the composition of the CoC itself is under cloud and the question of reconstitution of CoC was still pending in IA 107 of 2021, the approval of the resolution plan of the SRA by the Adjudicating Authority was against the fundamental tenets of IBC. The Appellants have relied on the judgment of this Tribunal in **Jayanta Banerjee v. Shashi Agarwal and Anr. in CA (AT) (Ins.) No. 348 of 2020** ('Jayanta' in short) which has held that if the constitution of CoC is a nullity in the eye of law, the entire CIRP process is vitiated. In support of their contention, they have also relied upon the judgment of this Tribunal on similar lines in **Hindalco Industries Ltd. v. Hiralak Industrial Works Ltd. & Ors. in CA (AT) (Ins.) No. 42 of 2022** ('Hindalco' in short) in that if related parties are allowed on the CoC, it is sufficient to render the constitution of CoC illegal and their

decisions null and void. Submitting that a resolution plan approved by a wrongly constituted CoC is invalid and non-est in the eyes of law, it was also articulated that the resolution plan of the SRA was commercially less viable than the plan submitted by another resolution applicant, namely, GSC.

5. The Learned Counsels appearing for the SRA and suspended directors of the Corporate Debtor have opposed the submissions made by both set of Appellants. Since their submissions largely overlap, the same have been clubbed together. It has been contended that IA 1777 of 2021 was filed by the Appellants-1 challenging the constitution of CoC only after the rejection of the resolution plan of GSC as an after-thought. Prior to the approval of the resolution plan of the SRA, the Appellants never raised any objections to the constitution of the CoC and had in fact participated in the voting process without any protest or demur. That the Appellants-1 in IA 1777 of 2021 had also prayed for approval of the resolution plan of GSC manifests their motive which was to revive the rejected resolution plan of GSC though it had failed to secure the requisite majority votes in favour. This shows that their motives are not bona fide in that they aimed only to derail the CIRP process and to somehow manage approval of the resolution plan of GSC.

6. It was also contended that the grounds of non-joinder of necessary parties cited by the Adjudicating Authority in rejecting IA 1777 of 2021 was also right as the alleged suspect/fraudulent homebuyers whose removal from the CoC was sought had not been impleaded by the Appellants-1. Even the RP had been kept away from the list of parties. Even the Appellant-2 in IA1609/2021 had sought the removal of certain alleged fraudulent home buyers from the CoC but failed to implead them as parties to its application.

It had only arrayed the RP and the Authorized Representative as parties before the Adjudicating Authority. It was also argued that the alleged suspect home buyers have been impleaded only at the appeal stage without seeking leave of this Tribunal to implead additional parties who were not parties in the application before the Adjudicating Authority.

7. In support of their contention, the Learned Counsel for the SRA has relied upon the judgment of the Hon'ble Supreme Court in the case of ***Moreshar Yadaorao Mahajan v. Vyankatesh Sitaram Bhedy LR & Ors. (2022) SCC OnLine SC 1307*** wherein it has been held that in the absence of a necessary party, in whose absence no effective decree could be passed by the Court, the suit itself is liable to be dismissed.

8. It was also contended that in terms of Section 25(2)(j) of the IBC, it is the duty of the RP to file applications for avoidance of transactions. The Appellants-1 being homebuyers of the Corporate Debtor and Appellant-2 being an unsuccessful resolution applicant are not entitled to file such avoidance applications. Hence on this count itself the IA 1777 was not maintainable. Further even if the issue of avoidance application merits consideration, in terms of Section 26 of IBC, there was no requirement to put the process of approval of the resolution plan into abeyance.

9. It has also been contended that the Appellants being individual home buyers who by themselves constitute only a minority of the entire financial creditor in class cannot object to the resolution plan of SRA once it has been approved by the requisite majority of the homebuyers. It is also submitted that the Hon'ble Supreme Court in the case of ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. Vs. NBCC (India)***

Ltd. and Ors. (2022)1 SCC 401 ('Jaypee' in short) has categorically held that individual home buyers constituting the financial creditors cannot object to the resolution plan once such resolution plan has been approved by the requisite majority of the homebuyers.

10. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

11. We propose to start with the tenability of the first impugned order of the Adjudicating Authority in IA 1777/2021. It is the contention of the Appellants-1 that they are legitimate owners of Holiday Homes developed by the Corporate Debtor and that they are part of CoC with 16.53% vote share. The Appellants-1 claim that they have reasonable grounds to feel aggrieved as the RP had admitted the claims of certain illegitimate home owners who had committed irregularities which amounted to fraudulent transactions and made them part of the CoC. It was asserted that in IA No. 1430 of 2020, the Adjudicating Authority was convinced of dubious transactions undertaken by the suspended directors of the Corporate Debtor with the illegitimate home owners which had led to ordering of forensic audit of the books of account of the Corporate Debtor. The FAR had clearly set out the fact that fraudulent and circuitous transactions were actually carried out by some home owners and suspended directors.

12. It is also the case of the Appellants that in view of the clear findings of the FAR, the RP had filed IA No. 107/2021 for fraudulent transactions under Section 66 of the IBC and IA No. 149 of 2021 for preferential transactions under Section 43-45 of IBC and prayed that the illegitimate home owners be removed from the CoC and their voting rights cancelled. Submitting that the

IA 107/2021 was still pending, the Adjudicating Authority without deciding on the said IA should not have dismissed IA No. 1777 of 2021 filed by them praying for removal of alleged illegitimate home owners from the CoC and to disregard the votes cast by them during CoC meetings as well as to reconstitute the CoC with genuine home buyers. Under such circumstances, where 17 out of 53 home buyers had irregularly and illegally gained access to the CoC, it has been the contention of the Appellants-1 that the constitution of CoC was clearly rendered illegal and decisions taken by the said CoC is invalid.

13. Before we delve into the sustainability of the first impugned order of the Adjudicating Authority in IA 1777/2021, it would be constructive to note the status of IA 107/2021 as filed by the RP seeking reconstitution of the CoC. It is the claim of the Appellants-1 that the Adjudicating Authority in its order dated 17.11.2021 in IA 107/2021 had removed the alleged fraudulent home buyers from the CoC. On the other hand, it is the counter claim of the Respondents that the said order was challenged by the expelled home buyers before this Tribunal in CA(AT)(Ins)No 26 of 2022 and was set aside by this Tribunal on 08.03.2022 and the matter remanded back for reconsideration by the Adjudicating Authority. Perusal of the said order of this Tribunal clearly shows that in para 8 it has held that the Adjudicating Authority had passed the orders on 17.11.2021 under the wrong impression that the entire money invested by the suspect home buyers was routed back, which obviously not being the position, the same ought to have been cleared by the Resolution Professional before the Adjudicating Authority. This Tribunal had accordingly set aside the order of the Adjudicating Authority without expressing any opinion on merits and remitted the matter for reconsideration of the

Adjudicating Authority after hearing the parties afresh. Thus, we hold that the earlier order of the Adjudicating Authority on IA 107/2021 removing certain home buyers from the CoC having been set aside does not hold good.

14. Coming to the tenability of the first impugned order, it is the contention of the Appellants-1 that the impugned order in IA 1777/2021 reflects non-application of mind by the Adjudicating Authority. Though grave allegations were raised by them on the constitution of the CoC, and IA 107 was still pending, these facts were disregarded by the Adjudicating Authority without examining the merits of the same or providing reasons for negating the same. The CoC was illegally constituted with illegitimate home buyers who had entered into collusive arrangements with the suspended directors of the Corporate Debtor and voting undertaken for approval of the resolution plan with a CoC comprising of such illegitimate home buyers. If the votes of the illegitimate home owners were excluded, which should have been the right course of action on the part of the RP, the results of the voting on the resolution plan of SRA would have been different. Relying on the judgments of this Tribunal in **Jayanta** and **Hindalco** supra, it was contended that the RP by allowing related parties of the Corporate Debtor to become members of the CoC made the constitution of CoC illegal and rendered decisions undertaken by such an irregularly constituted CoC to be null and void.

15. It may be useful at this stage to notice the first impugned order and would like to extract hereinunder the relevant observations and conclusions arrived therein:

“14. It has further been observed by this Bench that the Resolution Professional, who has admitted the claims of the homebuyers under challenge has not been made a party in the present Interlocutory

Application. Further, the allottees, whose claims have been challenged in the present IA, are also not made a party in this IA. In the given situation no order can be passed at the back of such allottees without providing them an opportunity of being heard.

15. This bench has further observed that the present application is filed by the owners of holiday homes/villas in the Project collectively having 25.55% voting share in the COC out of which 2 applicants namely Applicant nos. 3 & 4 having 2.85% and 3.17% voting share have already sought removal of their names from the present application which had been allowed by this Bench vide daily order dated 04.05.2023. Furthermore, the individual homebuyers who have been sought to be removed from the list of home buyer/ Committee of Creditors constitute just about 12% voting share in the COC. Therefore, assuming if their names are excluded, even that would not alter the final outcome and the plan of Mrs. Asha Sanap would still fetch more than 66% of voting share. Even otherwise, the applicants as the Home Buyers do not have any locus to agitate as to which plan should be approved especially when the Home buyers as a class having 79.60% voting share have voted in favour of the Resolution Plan submitted by Mrs. Asha Sanap.

16. Even otherwise, the Applicants being the individual home buyers, as per the terms of Section 25-A(3-A) of IBC, can vote only through the Authorised Representative who is required to cast the vote on behalf of the Creditors in class after taking into account majority percentage of the Homebuyers against or in favour of a particular Resolution Plan. The relevant extract of Section 25-A(3-A) of IBC is as under:

25A. (1) The authorised representative under sub-section (6) or sub-section (6A) of sect 21 or sub-section (5) of section 24 shall have the right to participate and vote in meetings of the committee of creditors on behalf of the financial creditor he represents in accordance with

the prior voting instructions of such creditors obtained through physical or electronic means.

(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:

17. In the instant case, the class of creditors (i.e. Home Buyers) have voted in favour of Resolution Plan of Mrs. Asha Snap with 42.03% voting which represents more than 50% of the total voting strength of their class i.e.79.60%. Therefore, the entire vote (i.e. 79.60%) would be considered to have been cast in favour of the plan submitted by Mrs. Asha Sanap, as required in terms of provisions of the Code.

18. In view of the above, the objections raised by the Applicants in an individual capacity as a home buyer are inconsequential as they represent homebuyers in minority and are thus bound by the decision taken by the majority within the class of homebuyers. In this regard, reliance can be placed as the law laid down by the Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association and Ors. Vs. NBCC(India) Ltd. and Ors.(2022)1 SCC 401 wherein it was held that when Homebuyers as a class have voted in favour of the Resolution Plan, any particular constituent of that class cannot be heard in opposition to the Resolution Plan by way of objection as there is no concept of dissenting homebuyers within Creditors in class. The relevant extracts of this judgement are reproduced below:-

"164.4 Having regard to the scheme of IBC, and the law declared by this Court, it is more than clear that once a decision is taken, either

to reject or to approve a particular plan, by a vote of more than 50% of the voting share of the financial creditors within a class, the minority of those who vote, as also all others within that class, are bound by that decision. 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 authorize representative over the resolution plan in accordance with the majority decision of the class he is authorized to represent, a plan or resolution involving large decision of the class he is authorized to represent, a plan or 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. In the larger benefit and common good, the democratic principles of the determinative role of the opinion of majority have been duly incorporated in the scheme of the Code, particularly in the provisions relating to voting on the resolution plan and binding nature of the vote of authorized representative on the entire class of the financial creditor/s he represents.

170. To sum up this part. of discussion, in our view, after approval of the resolution plan of NBCC by CoC, where homebuyers as a class assented to the plan, any individual homebuyer or association cannot maintain any challenge to the resolution plan nor could be treated as carrying any legal grievance.

171. Once we have held that these dissatisfied homebuyers and associations are not entitled to put up any challenge to the resolution plan contrary to the decision of the requisite majority of their class, all their objections are required to be rejected outright...."

19. In the light of what has been held by the Hon'ble Supreme Court in the afore-cited judgment it becomes abundantly clear that Home Buyers can vote for or against the Plan only as a class and if there are some Home Buyers pitted against the Resolution Plan, who are otherwise in minority, they have absolutely no locus to oppose the Plan in the capacity of dissatisfied or dissenting Home Buyers. It is also abundantly clear that such dissenting minority segment within the class of Home Buyers cannot arrogate themselves to be dissenting Financial Creditors.”

16. It is an undisputed fact that the Appellants-1 had only impleaded the suspended directors of the Corporate Debtor as parties in IA 1777/2021 and not included the suspect home buyers or even the RP. We therefore find sound logic in the dismissal of IA 1777/2021 by the Adjudicating Authority on the ground that the alleged illegitimate home buyers had not been impleaded in the said IA at a time when their ouster from the CoC was being agitated. Any decision by the Adjudicating Authority to remove these home buyers from the CoC without hearing them would have caused deep prejudice to their interests and been unfair, unequitable, unjust besides running contra to the principles of natural justice. That apart we notice that no objections were ever raised earlier by the Appellants-1 to the constitution of the CoC or on the participation of the suspect home buyers in the voting process until the 7th CoC meeting. Even the Appellants never raised any objections to the appointment of the Authorised Representative or in the latter's participation in the voting process in CoC. It was only after the resolution plan of the SRA was approved that the Appellants approached the Adjudicating Authority by way of filing an IA 1777/2021 and challenging the constitution of the CoC. If the Appellants were genuinely aggrieved with the constitution of the CoC, we fail to comprehend as to what prevented them from objecting to the

constitution of the CoC and participation in the CoC meetings at any stage prior to the 8th CoC meeting. This clearly shows that the Appellants sprang into action only after the resolution plan of GSC was not approved.

17. During the course of making oral arguments, the Learned Senior Counsel of the Appellants-1 handed over a chart containing revised calculations of the shares of the home buyers post the removal of the suspect/fraudulent homebuyers. We also notice that the FAR observations with respect to related party transactions have been placed by Appellants-1 at pages 134-136 of Appeal Paper Book (**'APB'** in short), preferential transactions at page 137 of APB, undervalued transactions at pages 138-139 of APB, besides other suspicious transactions at pages 140-144 of APB. Be that as it may, it would be misplaced to place any reliance on the list of fraudulent home buyers as furnished by the Appellants in the absence of unequivocal findings of fraud against these parties.

18. It is also noticed that while the RP in IA 107 of 2021 had impleaded only 4 home buyers, the Appellants-1 have included other parties as suspect home buyers than those named in IA 107 of 2021. We now proceed to examine whether the Appellants-1 being a set of home buyers falling in a class of creditors can decide on other home buyers falling in the same class of creditors as suspect/fraudulent/illegitimate home buyers.

19. The statutory construct of IBC clearly puts the onerous responsibility of pursuing avoidance applications on the RP. In terms of Section 25(2)(j) of the IBC, it is the duty of the RP to file appropriate applications for avoidance of transactions which fall under the ambit of preferential, fraudulent, undervalued or extortionate transactions. When the statutory scheme clearly

states that it is the duty of Resolution Professional to determine the nature of such transactions and file an appropriate application before the Adjudicating Authority, neither the Appellants-1 being home buyers themselves nor the GSC as unsuccessful resolution applicant are entitled on their own to file applications seeking avoidance of transactions. The ratio of the **Jayanta** case also cannot come to the aid of the Appellant-1 since in that case the RP without verifying the claims submitted by the Financial Creditors had allotted voting share. Further, the RP had not prepared the Information Memorandum and the CIRP proceedings were conducted without any valuation of the Corporate Debtor. Neither was there any publication of Form G inviting Expression of Interest. Moreover, in that case the CoC had rushed into liquidation of the Corporate Debtor. We therefore cannot commend such unilateral addition of names in the list of suspect home buyers by the Appellants-1.

20. This brings us to the second impugned order passed by the Adjudicating Authority in IA No. 1150/2023 approving the resolution plan of the SRA. This order has been assailed by both Appellants-1 and Appellant-2 on more or less similar grounds that the Adjudicating Authority failed to take cognizance of the fact that the decision of the CoC to approve the resolution plan stood vitiated since the constitution of the CoC itself was a nullity. The question before us is whether the CoC in the facts of the present case could lawfully consider approval of the resolution plan when the constitution of the CoC is claimed by both the Appellants to be tainted.

21. It is the contention of the Appellants-1 and 2 that the CoC was illegally constituted with illegitimate home buyers who had entered into collusive

arrangements with the suspended directors of the Corporate Debtor. 16 out of 17 such suspect home buyers had voted in favour of the resolution plan of the SRA. Such a resolution plan approved by related parties is therefore liable to be set aside. It is therefore their case that the decision of CoC in the present set of facts cannot be validated on the pretext of exercise of commercial wisdom as the commercial wisdom of CoC cannot condone material irregularities in the conduct of CIRP.

22. We find that the Adjudicating Authority while considering at length the IA 1150 filed by the RP for approval of the resolution plan, held in the second impugned order, that the plan meets the requirements of Section 30(2) of the IBC and Regulations 37, 38, 38(1A) and 39(4) of the CIRP Regulations. It also held that the resolution plan was feasible and viable which balances the interests of the all the stake-holders and is in accordance with law and does not contravene any of the provisions of Section 29(A) of the IBC. Further when we see paras 15 to 18 of the first impugned order as extracted at Para 15 above, we find that the Adjudicating Authority has clearly held that the home buyers as class of creditors have cast their votes in favour of the resolution plan submitted by the SRA. The Adjudicating authority has also spelt out in para 15 of the impugned order the vote share of the Appellants-1 and that of the alleged suspect home buyers and that even if the names of the suspect home buyers are excluded, the plan of the SRA had fetched more than the requisite percent of votes. Thereafter the Adjudicating Authority has relied on law laid down by the Hon'ble Supreme Court in **Jaypee** supra and held that objections raised by a set of home buyers as a minority constituent of the same class of creditors does not hold ground.

23. The Hon'ble Supreme Court in the **Jaypee** matter has emphasized that the democratic principles of a determinative role of majority opinion have been enshrined in the statutory construct of the IBC and hence the minority homebuyers have to necessarily sail with the majority within the class. Once the CoC has approved the resolution plan by requisite majority and the same is in consonance with applicable provisions of law, the same cannot be a subject matter of judicial review and modification. We are therefore not convinced with the plea raised by the Appellants that the Adjudicating Authority had committed an error in approving the resolution plan.

24. This brings us to the third impugned order passed by the Adjudicating Authority dated 11.08.2023 in I.A. 1609 of 2021 and IA No. 1150/2021 in CP(IB) No. 2995/MB/2019 which has been challenged by Appellant-2/GSC who is an unsuccessful resolution applicant.

25. In IA 1609 of 2021, the Adjudicating Authority has dismissed the prayers of GSC to quash and set aside the CoC of the Corporate Debtor under CIRP. The prayers are similar to those raised by Appellants-1 in IA 1777/2021. In the present IA 1609/2021 too, the prayers of the Appellant-2 have been rejected and the grounds are amplified by the Adjudicating Authority at paras 5.3, 5.4 and 5.5 of the third impugned order which is as reproduced below:

“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 GS 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.”

Since we have already recorded our reasonings in the preceding paragraphs affirming the dismissal of IA 1777/2021, we have no reasons to take a different stand and therefore uphold the third impugned order of the Adjudicating Authority dismissing IA 1609/2021.

26. In IA No. 1150/2021, the Adjudicating Authority has approved the resolution plan of the Corporate Debtor. The issues challenged by the Appellant-2 in IA 1150/2021 being the same as those challenged in the first and second impugned orders by the Appellants-1 we do not propose to discuss them again as they have already been dealt in the foregoing paragraphs. We would only like to touch upon the argument proffered by Appellant-2 that the resolution plan could not have been approved by the Adjudicating Authority since applications under Sections 43, 44 and 66 of IBC as contained in IA 149 were still pending before the Adjudicating Authority.

27. We are not inclined to agree with this contention of the Appellant-2 in view of the statutory construct of IBC. The IBC stipulates the conclusion of CIRP in 330 days. Within this prescribed timeline, often the RP is unable to identify avoidable transactions and apply to the Adjudicating Authority to reverse them. We also notice that the avoidance applications are not statutorily bound by time as is the resolution process. Section 26 of IBC further provides that application for avoidance of transactions is not to affect CIRP proceedings and therefore such applications can continue even after completion of the CIRP. Section 26 of the IBC clearly stipulates that the pendency of any avoidance application shall not come in the way of the approval of the resolution plan. CIRP and avoidance applications are, thus by their very nature, a separate set of proceedings. The former is time bound whereas the latter requires a proper discovery of suspect transactions that are time consuming. The scheme of the IBC reinforces this difference and thus adjudication of an avoidance application is independent of the resolution of the corporate debtor and can survive CIRP. Recently, a division bench of the Delhi High Court in **Tata Steel BSL Limited v. Venus Recruiter Private**

Limited and Others [(2023) SCC OnLine Del 155] has held that avoidance applications which are initiated by the RP shall continue irrespective of the finalisation of the Resolution Plan and the conclusion of the CIRP. In view of the above reasons, we are of the considered opinion that simply because the Appellants have raised the issue of avoidance application, it does not stand to reason that the approval of the resolution plan needs to be put on hold or kept in abeyance. We also find that the present resolution plan also provides that recovery under Section 43, 45, 50 and 66 of the IBC would be the exclusive rights of the CoC of the Corporate Debtor. We therefore affirm the approval of the resolution plan by the Adjudicating Authority.

28. In view of the foregoing discussions, we are satisfied that no cogent grounds have been raised in either of the two appeals which would warrant any interference with the impugned orders passed by the Adjudicating Authority. In result, both the appeals are dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi

Date: 05.12.2023

PKM