

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

**Comp. App. (AT) (Ins.) No. 1194 of 2023
& I.A. No. 4200 of 2023**

[Arising out of Order dated 13.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Court-III in IA- 779/2023 in IB-717(ND)/2019]

In the matter of:

Vijay Saini

....Appellant

Vs.

Shri Devender Singh & Ors.

...Respondents

For Appellants: Mr. Sandeep Bajaj, Mr. Devansh Jain, Ms. Vasudha Chadha, Mr. Shashwat Duggal, Advocates.

For Respondents:

WITH

Comp. App. (AT) (Ins.) No. 791 of 2023

[Arising out of Order dated 24.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No.III) in IA- 753/2023 in IB-717(ND)/2019]

In the matter of:

Devendra Singh

....Appellant

Vs.

Homebuyers of Sidhartha Buildhome Pvt. Ltd. & Ors.

...Respondent

For Appellants: Mr. Alok Dhir, Ms. Varsha Banerjee, Mr. Kanishk Khetan, Advocates.

For Respondent: Mr. Sumant Batra, Ms. Nidhi Yadav, Mr. Sarthak Bhandari, Mr. Shiv Mangal Sharma, Mr. Saurabh Rajpal, Mr. Abhishek Sharma, Mr. Aman Kalra, Mr. Abhinav Mathur, Advocates for R-4. Mr. Abhijeet Sinha, Sr. Advocate, Mr. Lalit Mohan, Mr. Videh Vaish, Advocates for R-1,2.

WITH**Comp. App. (AT) (Ins.) No. 982 of 2023
& I.A. No. 3346 of 2023**

[Arising out of Order dated 24.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Court No.III) in IA- 753/2023 in IB- 717(ND)/2019]

In the matter of:**Vijay Saini****....Appellant****Vs.****Homebuyers of Sidhartha Buildhome Pvt. Ltd. & Ors.****...Respondents****For Appellant:**

Dr. Menaka Guruswamy, Sr. Advocate, Mr. Sandeep Bajaj, Mr. Devansh Jain, Ms. Vasudha Chadha, Mr. Shashwat Duggal, Mr. Utkarsh Pratap, Mr. Harshwardhan Thakur, Mr. Lavkesh Bhambhani, Advocates.

For Respondents:

**Mr. Abhijeet Sinha, Mr. Lalit Mohan, Mr. Videh Vaish, Ms. Aakansha, Advocates.
Mr. Abhinav Mathur, Advocate for R-1,2.
Mr. Sumant Batra, Mr. Shiv Mangal Sharma, Mr. Saurabh Rajpal, Mr. Abhishek Sharma, Advocates for R-4.**

JUDGMENT**(16th February, 2024)****Ashok Bhushan, J.**

These three Appeals arising out of Corporate Insolvency Resolution Process of 'Sidhartha Buildhome Pvt. Ltd.' have been heard together and are being decided by this common judgment.

2. Company Appeal (AT) (Insolvency) No. 791 of 2023 has been filed by Mr. Devendra Singh who was Resolution Professional of the Corporate

Debtor challenging the order dated 24.05.2023 by which IA No.753 of 2023 filed by the Respondent No.1- Homebuyers of Sidhartha Buildhome Pvt. Ltd. has been allowed by the Adjudicating Authority (National Company Law Tribunal), accepting the proposal under Section 12A of the Code permitting withdrawal of the CIRP.

3. Company Appeal (AT) (Insolvency) No. 982 of 2023 filed by a Homebuyer challenging the same order dated 24.05.2023 passed in IA No.753 of 2023.

4. Company Appeal (AT) (Insolvency) No. 1194 of 2023 has been filed by a homebuyer challenging the order dated 13.07.2023 by which IA No.779 of 2023 filed by Vijay Saini and other homebuyers have been dismissed as infructuous in view of the order dated 24.05.2023 passed in IA No.753 of 2023.

5. We need to notice the brief facts of the case giving rise to these Appeals:-

5.1. On an application filed under Section 7 by Oriental Bank of Commerce (now merge with Punjab National Bank), the CIRP against Sidhartha Buildhome Pvt. Ltd. commenced by order dated 04.03.2021. The Resolution Professional twice issued Form-G. In response to Form-G issued, two Resolution Plans were received as well as one proposal under Section 12A for withdrawal submitted by Mr. Sidharth Chauhan, Promoter/Director. In the 18th meeting dated 15.02.2022, both the Resolution Plans as well as proposal submitted by promoter/director was rejected and decision was

taken to issue fresh Form G. In response to Form G published on 23.02.2022, two Resolution Plans were received one from the promoter/director i.e. Mr. Sidharth Chauhan and another from Alpha Corp Development Pvt. Ltd. The Adjudicating Authority passed an order on 22.08.2022 that the Resolution Plan of the promoter shall not be placed. Mr. Sidharth Chauhan thereafter submitted a proposal under Section 12A on 06.12.2022. In the 27th meeting of the CoC held on 10.01.2023, the Resolution Plan of Alpha Corp Development Pvt. Ltd. as well as withdrawal proposal of Mr. Sidharth Chauhan, Promoter/Director was put for discussion and voting. E-voting was conducted from 14.01.2023 to 18.01.2023. The Resolution Plan of Alpha Corp Development Pvt. Ltd. was not approved. After analysing voting result, the Resolution Professional found that with regard to Item No.B2 i.e. revised proposal under Section 12A submitted by Mr. Sidharth Chauhan, 40.15% votes by Financial Creditors in a class voted 'Yes' whereas 29.20% voted 'No' and 11.08% was abstained. Punjab National Bank having 12.42% voted for the plan and Punjab & Sind Bank having 7.15% voted against the plan. The Resolution Professional opined that the total votes in favour of plan is 52.57% which is less than the requisite 90% of the voting share of the CoC. The resolution was not approved.

5.2. The Authorised Representative of the homebuyers filed an IA No. 753 of 2023 questioning the minutes recorded by the Resolution Professional where proposal Item No. B2 was held not approved. In the application, following prayers were made:-

“a) Allow the present Application and "Approve the Withdrawal Proposal under Section 12A of the Code having 92.85% votes in its favour thereby, setting aside/quashing the finding/decision of Respondent No.1 qua the Item No. B-2 of the 27th CoC meeting and/or;

b) Pass appropriate orders for the revival of the corporate debtor and quash and set-aside the subsequent action/decision taken by the Respondent No.1 after the 27th CoC meeting dated 22.01.2023 and/or;

c) Pass any other order as this Hon'ble Tribunal may deem fit in the interest of justice.”

5.3. In IA No.753 of 2023, reply was filed by the Resolution Professional opposing the application. It was pleaded that for application under Section 12A, 90% vote share of CoC was required and withdrawal plan under Section 12A having received only 52.57%, the proposal was not approved. Adjudicating Authority after hearing the parties on IA No.753 of 2023 allowed the application. Adjudicating Authority held that the Resolution Professional ought to have followed the method prescribed under sub-section 3A of Section 25A and come to a conclusion that since more than 50% of the voting has been done in favour of 12A proposal, he should have taken it as 100% since the Financial Creditor have to be treated as a class. On the aforesaid conclusion, the Adjudicating Authority allowed the application and approved the withdrawal proposal under Section 12A. Company Appeal (AT) (Insolvency) No.791 of 2023 has been filed by the

Resolution Professional- Devendra Singh challenging the order whereas Company Appeal (AT) (Insolvency) No. 982 of 2023 has been filed by Vijay Saini, homebuyer challenging the order dated 24.05.2023. After filing of IA No.753 of 2023, an IA No.779 of 2023 was filed by Vijay Saini and 127 other homebuyers in which application following prayers have been made:-

“(i) Extend time period for completion of CIRP by 90 days from the date of order passed by this Ld. Tribunal, as the CIRP ended on 27,01,2023,

(ii) Replace the Respondent No. 1 as Resolution Professional with another Resolution Professional as deem fit by the Ld. Adjudicating Authority in present CIRP,

(iii) Replace Respondent No. 2 as Authorized Representative with another Authorized Representative as deemed fit by the Ld. Adjudicating Authority in present CIRP and

(iv) to direct newly appointed Resolution professional to place only viable resolution plan of Respondent No. 3 before the Committee of Creditors (CoC) for re-consideration and re-voting and under relevant provisions of the Code along with Regulations, 2016.

(v) Any other relief/direction/order which this Learned Adjudicating Authority may deem fit in the facts and circumstances of the present case.”

5.4. Applicant in IA No. 779 of 2023 opposed the withdrawal plan submitted under Section 12A. Application IA No.779 of 2023 came to be rejected by order dated 13.07.2023. Paragraph 2 of the order is as follows:-

“2. In view of the order dated 24.05.2023 passed in IA-753/2023 whereby this Adjudicating Authority allowed Section 12A application and permitted the Applicant to

*withdraw the main matter. Hence, the present IA-779/2023 **dismissed as infructuous.***”

5.5. Mr. Vijay Saini, aggrieved by the order, has filed Company Appeal (AT) (Insolvency) No.1194 of 2023.

6. We have heard Shri Alok Dhir, Learned Counsel appearing for Appellant in Company Appeal (AT) (Insolvency) No.791 of 2023, Dr. Menaka Guruswamy, Learned Senior Counsel appearing for Appellant in Company Appeal (AT) (Insolvency) No.982 of 2023 and Shri Sandeep Bajaj, Learned Counsel appears for the Appellant in Company Appeal (AT) (Insolvency) No.1194 of 2023. Shri Sumant Batra, Learned Counsel has appeared for Siddharth Chauhan, Director/Promoter- Respondent No.4 in Company Appeal (AT) (Insolvency) No.1194 of 2023. Shri Abhijeet Sinha, Learned Senior Counsel for the homebuyers of Sidharth Buildhome Pvt. Ltd. as well as Shri Dharmendra Kumar, Authorised Representative of homebuyers.

7. Shri Alok Dhir, Learned Counsel for the Appellant in Company Appeal (AT) (Insolvency) No.791 of 2023 submits that the Adjudicating Authority committed error in approving withdrawal proposal under Section 12A whereas said proposal had not received 90% votes of the CoC. It is submitted that the Adjudicating Authority has misconstrued the provision of Section 25A and Section 12A for withdrawal approval. Section 12A mandates approval of proposal by CoC with 90% voting share of the CoC. The Adjudicating Authority erred in taking the view that the vote of the homebuyers who are the Financial Creditor in class has to be computed as

per majority of their votes as per Section 25A (3A) whereas present is not a case where decision of the homebuyers by majority was sufficient to approve an application under Section 12A. Resolution Professional has rightly taken the view that the proposal under Section 12A submitted by the Respondent No.4 was not approved. On the e-voting held in pursuance of the meeting of the CoC held on 10.01.2023, Resolution Professional has rightly computed the result of the e-voting and had taken the view that in favour of the proposal under Section 12A only 52.57% votes were cast which was insufficient to approve the proposal under Section 12A. The Adjudicating Authority by misinterpreting the provision of Section 25A r/w Section 12A has allowed the application. Respondent No.4 has earlier also made attempts to withdraw the CIRP in which he failed. CoC on 15.02.2022 has earlier rejected the proposal under Section 12A. It is submitted that the Adjudicating Authority has incorrectly allowed Section 12A application and directed the Resolution Professional to handover assets and records to Respondent No.4- promoter/director which was contrary to the scheme of the IBC.

8. Dr. Menaka Guruswamy, Learned Senior Counsel appearing for Appellant in Company Appeal (AT) (Insolvency) No.982 of 2023 submits that the homebuyers have been cheated by the promoter/director. A huge amount was collected from the homebuyers and they have not been provided their units in spite of lapse of several years. It is submitted that both the projects of the Corporate Debtor namely— NCR One Project and Estella Project are incomplete. It is also contended that the Adjudicating

Authority committed error in holding that the proposal under Section 12A stood withdrawn on the basis of e-voting consequent to 27th CoC meeting held on 10.01.2023. It was submitted that 90% threshold for withdrawal of Resolution Plan by the CoC has been kept for purpose and object. The voting on the application under Section 12A is not voting on a Resolution Plan or voting where majority of votes of homebuyers have to be looked into. It is true that the homebuyers are creditor in class and majority votes of the creditor in class has to be treated as the views of the homebuyers on a particular subject but majority decision of homebuyers as a creditor in class is not sufficient for Section 12A proposal. The Resolution Professional has rightly opined that the proposal under Section 12A was not passed.

9. In Company Appeal (AT) (Insolvency) No.1194 of 2023, Learned Counsel for the Appellant submits that the IA No.779 of 2023 which was filed by 128 homebuyers with Vijay Saini, Authorised Representative of homebuyers was although heard together with IA No.753 of 2023 but judgment was not delivered in IA No.779 of 2023 and it was IA No.753 of 2023 which was decided on 24.05.2023. IA No.779 of 2023 has been subsequently rejected on 13.07.2023 holding that the IA has become infructuous in view of the order dated 24.05.2023. Both applications have been heard together and were required to be decided together. The order dated 13.07.2023 does not advert to the merits of the application and has simply dismissed the application, which order is unsustainable.

10. Shri Abhijeet Sinha, Learned Senior Counsel appearing for the homebuyers of Sidhartha Buildhome Pvt. Ltd. as well as Authorised

Representative has supported the impugned order. It is submitted that the decision of the homebuyers as a class is binding on each homebuyer and majority of homebuyers have decided to approve Section 12A proposal. Other homebuyers are bound by the same. It is submitted that the proposal under Section 12A contains detailed plan as to how the Corporate Debtor shall be revived and the promoter/director has given details in the plan for completing the construction of both the projects i.e. NCR Greens Project and Estella Project. It is submitted that the promoter has also in the plan provided for infusing funds and funds have been infused by proposal of Section 12A application due to which projects have progressed. Putting the Corporate Debtor in insolvency shall not be in the interest of the homebuyers. Promoter/director having undertaken to complete the construction without charging any extra amount from the homebuyers, homebuyers are getting the units long awaited. Subsequent events after the order dated 24.05.2023 have to be taken into notice while taking any decision in the appeal. In both the projects construction is going on and homebuyers will get their flats timely as per the approved withdrawal proposal. As of now, 145 flats are at completion stage in NCR Greens Project. Monitoring Committee has been constituted for overseeing the construction of NCR Greens and Estella. It is submitted that in event the order dated 24.05.2023 is reversed, company is likely to go into liquidation. Construction of both the projects has already been resumed.

11. Shri Sumant Batra, Learned Counsel for the Respondent No.4 promoter/director supported the impugned order and submits that the

interpretation put by the Adjudicating Authority on Section 25A is in accord with the statutory scheme. It is submitted that as per proposal under Section 12A, NCR Greens Project and Estella Project were to be completed within six months and one year respectively. A Monitoring Committee has been constituted comprising of a Retd. Chief Justice of High Court and there are other members. Several meetings have been held by Monitoring Committee and substantial progress has been made. The project NCR Greens is almost complete. The possession shall also be handed over till the end of February of 135 semi furnished units which shall be completed by then. Out of 653 units in project NCR Green, 415 units have already been handed over. It is submitted that Company Appeal (AT) (Insolvency) No.791 of 2023 filed by the Resolution Professional is not maintainable since Resolution Professional cannot be said to be an aggrieved person. On 23.11.2023, possession has issued of 103 units. As far as the Estella Project is concerned, upon direction of Monitoring Committee, the structural audit to ensure the future safety of the families who will reside is going on. It is submitted that the homebuyers of NCR Greens are satisfied with the progress and that is why application IA No.753 of 2023 was filed by homebuyers of Sidhartha Buildhome Pvt. Ltd. praying that the proposal under Section 12A should be approved. Shri Batra further submits that the Resolution Professional has counted the votes of each homebuyer individually, instead of considering the decision by the majority of class of creditors as a single vote in proportion to their voting share percentage. Calculation of votes individually is unsustainable. Plain reading of proviso of Section 25A(3), it is clear that by referring to the term 'several Financial

Creditors' the legislature has simply referred to 'several classes of Financial Creditors' or else, the purpose for the appointment of the Authorised Representative would be defeated if he had to cast his vote in respect of each homebuyer individually, because in that case, homebuyers could have directly casted their votes without appointing the Authorised Representative. It is submitted that the purpose of formation of 'class' would be defeated if the votes are to be counted individually. It is submitted that in view of the substantial progress towards construction in both the projects and the fact that Project NCR Greens is almost complete, in event it is necessary to revive the CIRP, reverse CIRP be directed for NCR Greens Project and Project Estella be taken under CIRP.

12. Counsel for the parties in support of their submissions have relied on several judgments of the Hon'ble Supreme Court and this Tribunal which shall be referred to while considering the submissions in detail.

13. We have considered the submissions of the Counsel for the parties and perused the record.

14. The principal issue which has come for consideration before us in these appeals is regarding manner of computation of voting with regard to application under Section 12A. Section 12A application submitted by promoter/director- Respondent No.4 was considered in 27th CoC meeting held on 10.01.2023. E-voting which was conducted between 14.01.2023 to 18.01.2023 and result of voting Resolution Professional has recorded in the minutes that two proposals have not been approved. In IA No.753 of 2023,

voting result as recorded by Resolution Professional on 12A application was challenged and it was pleaded in the application IA No.753 of 2023 that the proposal under Section 12A stood approved.

15. Before we proceed further, we may notice necessary statutory provisions governing withdrawal of insolvency application. Insolvency and Bankruptcy Code 2016 as initially enacted did not contain any provision for withdrawal of application. Section 12A was inserted in the Code by Act 26 of 2018 w.e.f. 06.06.2018. Section 12A as inserted w.e.f. 06.06.2018 is as follows:-

“12A. Withdrawal of application admitted under section 7, 9 or 10. – *The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent. voting share of the committee of creditors, in such manner as may be specified.*”

16. By the same amendment i.e. Act 26 of 2018, Section 25A was also inserted in IBC Code. Section 25A which is as follows:-

“25A. Rights and duties of authorised representative of financial creditors. – *(1) The authorised representative under sub-section (6) or sub-section (6A) of section 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.

(2) It shall be the duty of the authorised representative to circulate the agenda and minutes of the meeting of the committee of creditors to the financial creditor he represents.

(3) The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.”

17. Section 21 of the Code provides for CoC. As per Section 21, CoC comprised of all Financial Creditors of the Corporate Debtor. The scheme of IBC indicate that the various provisions/ statute provides for decision by the CoC. For example, under Section 28(3), action under sub-section (1) of Section 28 requires approval by the CoC by 66% of the voting shares. Section 28(3) is as follows:-

“28. Approval of committee of creditors for certain actions. – *(3) No action under sub-section (1) shall be approved by the committee of creditors*

unless approved by a vote of [sixty-six] per cent. of the voting shares.”

18. Section 30 provides for ‘submission of Resolution Plan’ and Section 30(4) provides for approval of the Resolution Plan by vote of not less than 66% of the voting share. Section 30(4) provides as follows:-

“30. Submission of resolution plan. - (4) *The committee of creditors may approve a resolution plan by a vote of not less than [sixty-six] per cent. of voting share of the financial creditors, after considering its feasibility and viability, [the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of a secured creditor] and such other requirements as may be specified by the Board:*

Provided that the committee of creditors shall not approve a resolution plan, submitted before the commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2017 (Ord. 7 of 2017), where the resolution applicant is ineligible under section 29A and may require the resolution professional to invite a fresh resolution plan where no other resolution plan is available with it:

Provided further that where the resolution applicant referred to in the first proviso is ineligible under clause (c) of section 29A, the resolution applicant shall be allowed by the committee of creditors such period, not exceeding thirty days, to make payment of overdue amounts in accordance with the proviso to clause (c) of section 29A:

Provided also that nothing in the second proviso shall be construed as extension of period for the purposes of the proviso to sub-section (3) of section 12, and the corporate insolvency resolution process shall be completed within the period specified in that subsection]:

[Provided also that the eligibility criteria in section 29A as amended by the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 shall apply to the resolution applicant who has not submitted resolution plan as on the date of commencement of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.]”

19. It is to be noted that earlier under Section 30(4) prior to amendment by Act 26 of 2018 vote share for approval of the plan was 75% which was reduced to 66% by Act 26 of 2018 w.e.f. 06.06.2018. It is also relevant to note that Section 12A which also came on statutory scheme by same amendment Act 26 of 2018 w.e.f. 06.06.2018 voting share of the CoC was provided 90%. The statutory scheme as delineated by aforesaid provision makes it clear that the voting share for proposal under Section 12A has been kept as a very high threshold. The Hon’ble Supreme Court in **“Swiss Ribbons Private Limited and Anr. vs. Union of India and Ors.- (2019) 4 SCC 17”** had occasion to consider challenge to Section 12A and threshold of 90% as provided. The Hon’ble Supreme Court repelled the challenge and held that Section 12A is constitutionally valid. In Paragraph 83 of the judgment, following has been held:-

“83. The main thrust against the provision of Section 12-A is the fact that ninety per cent of the Committee of Creditors has to allow withdrawal. This high threshold has been explained in the ILC Report as all financial creditors have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why ninety per cent, which is substantially all the financial creditors, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of ninety per cent, in the absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear, that under Section 60 of the Code, the Committee of Creditors do not have the last word on the subject. If the Committee of Creditors arbitrarily rejects a just settlement and/or withdrawal claim, NCLT, and thereafter, NCLAT can always set aside such decision under Section 60 of the Code. For all these reasons, we are of the view that Section 12-A also passes constitutional muster.”

20. We may also notice the relevant voting result of 27th CoC meeting held on 10.01.2023 which had come for consideration before the Adjudicating Authority in IA No.753 of 2023. Item No. B2 which came for consideration before the 27th CoC meeting was with regard to Section 12A proposal submitted by Mr. Sidharth Chauhan, Suspended Director of the Corporate Debtor. After receiving the voting result, summary record of the decision

taken on the relevant agenda item regarding the 27th CoC meeting has been minuted. We, in the present case, are concerned with Item No.B2. On Item No.B2, Resolution Professional has recorded following:-

"ITEM NO. B2

TO CONSIDER, DELIBERATE, DECIDE AND APPROVE THE REVISED PROPOSAL UNDER SECTION 12A OF THE IBC, 2016 SUBMITTED BY MR. SIDHARTH CHAUHAN, DIRECTOR (POWER SUSPENDED) OF CORPORATE DEBTOR

The Following Resolution was proposed for e-voting.

"RESOLVED THAT *the revised proposal submitted under Section 12A of IBC, 2016 by Mr. Sidharth Chauhan, Director (Power Suspended) be and is hereby approved."*

RESOLVED FURTHER THAT *the Committee of Creditors authorized the Resolution Professional to submit the Proposal as approved herein to the Hon'ble Adjudicating Authority for approval in terms of Section 12A of the Insolvency and Bankruptcy Code, 2016 read with Regulation 30A(5) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 and other applicable, provisions, if any, of the Insolvency and Bankruptcy Code, 2016 and in accordance with rules and regulations made there under."*

Analysis & Result

The Resolution Professional is providing the analysis on voting result on Agenda Item No. 82 in compliance with Section 25A (3) of IBC, 2016 as mandated under the Proviso of Section 25A (3A) of IBC 2016.

Agenda Item No.	Resolution Voted Upon	Yes(%)	No (%)	Abstain/Not Voted (%)	Total(%)
	• Voting by Financial Creditors in a Class(Homebuyers) as per Section 25A(3) of IBC, 2016	40.15%	29.20%	11.08%	80.43
	• Voting by Punjab National Bank	12.42%	-	-	12.42
	• Voting by Punjab & Sind Bank	-	7.15%	-	7.15
	Total	52.57%	36.35%	11.08%	100%

However, as per the analysis and computation on votes casted in compliance with the provisions of Section 25A(3A) of IBC, 2016, the members of CoC representing 92.85% voting share voted in favour of the Agenda Item No. B2 and 7.15% voting share voted against the Agenda Item No. 82. But the same is not in compliance with the proviso of Section 25A(3A) of IBC, 2016.

Whereas, as per the analysis and computation on votes casted in compliance with the provisions of Section 25A(3) of IBC, 2016, the votes casted in favour of Agenda Item No. B2 is 52.57% which is less than the requisite 90% of the voting share of CoC. The same is deemed to be in compliance with the proviso of Section 25A(3A) of IBC, 2016.

Hence, in compliance with the provisions of Section 25A(3) of IBC, 2016 on the instant resolution, the agenda item B2 is taken as "NOT APPROVED" by the CoC."

21. As observed above, the Resolution Professional after noticing the aforesaid voting result has recorded that the Agenda Item No.B2 is not approved by the CoC.

22. We may also notice analysis and conclusion of the Adjudicating Authority as recorded in the impugned order. Adjudicating Authority has relied on judgment of the Hon'ble Supreme Court in **“Jaypee Kensington Boulevard Apartments Welfare Association & Ors. vs. NBCC (India) Ltd. & Ors.- (2022) 1 SCC 401”** and after referring to the said judgment has concluded that the Resolution Professional ought to have followed the method prescribed under sub-section 3A of Section 25A and come to the conclusion that since more than 50% of the voting has been done in favour of Section 12A proposal, he should have taken it as 100% since the Financial Creditor have to be treated as a class. In paragraphs 22, 23 and 26, Adjudicating Authority has held:-

“22. At this stage, it is pertinent to refer to the judgment rendered by the Hon'ble Supreme Court, in the case of Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Versus NBCC (India) Ltd & Ors. (2022) 1 SCC 401 dated 24.03.2021, wherein it has been clearly laid down that sub-section 3A deals with Resolution Plan approval. Further the Hon'ble Supreme Court has clearly held that the home buyers shall be treated as a class.

23. Since, the Hon'ble Supreme Court has categorically held that the Home Buyers are treated as a class, we are of the considered view that the provisions contained in Section 25A including that of the proviso to sub-section 3A would have to be read together and in conjunction with each other and the Home Buyers would have to be treated as a class for all purposes in so far as Section 25A sub-section 1, 2, 3 (including proviso) and sub-section 3A (including proviso) are concerned. In our considered view the Home Buyers cannot be treated differently for different purposes i.e. in one particular way in the case of approval of Resolution Plan and in a different way in the case of dealing with Section 12A application. Therefore, we are of the view that the Resolution Professional ought to have followed the method prescribed under sub-section 3A of Section 25A and come to a conclusion that since more than 50% of the voting has been done in favour of 12A proposal, he should have taken it as 100% since the Financial Creditor have to be treated as a class.

26. Since, we have come to a conclusion that Home Buyers have to be treated as a class for all purposes, be it for the approval of Resolution Plan or for passing a resolution under Section 12A, we are of the considered opinion that the RP has followed a wrong method in calculating the voting shares of Home Buyers.”

23. After the aforesaid discussions, Adjudicating Authority recorded his conclusion in following words:-

“Conclusion:

From an analysis of the relevant provision and the case laws cited by the Applicant, we are of the considered view that the Resolution Professional has committed an error and followed an incorrect method in counting the votes. Therefore, we approve the withdrawal proposal under Section 12A of the Code and permit the Applicant to withdraw the present Petition.

We further set aside all the subsequent actions taken by Respondent No. 1 pursuant to the after 27th CoC meeting held on 21.02.2023.

We direct that the Corporate Debtor Company be revived and restored to its original position. The RP shall handover all assets, documents, records pertaining to the Corporate Debtor Company forth with and file a compliance report within two weeks.”

24. The Adjudicating Authority, thus, has held that with regard to application under Section 12A the voting ought to have been computed by the Resolution Professional in accordance with Section 25A (3A) i.e. Authorised Representative shall cast his vote on behalf of all Financial Creditors since decision taken by more than 50% of the voting share of the Financial Creditors. In coming to the above conclusion, Adjudicating Authority has failed to notice the proviso to sub-section (3A) of Section 25A. Proviso to sub-section (3A) is as follows:-

“25A. Rights and duties of authorised representative of financial creditors. – (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: Provided that for a vote to be cast in respect of an application under section 12A, the authorised representative shall cast his vote in accordance with the provisions of subsection (3).”

25. We again notice sub-section (3) of Section 25A which is to the following effect:-

“25A. Rights and duties of authorised representative of financial creditors. – (3) *The authorised representative shall not act against the interest of the financial creditor he represents and shall always act in accordance with their prior instructions:*

Provided that if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share:

Provided further that if any financial creditor does not give prior instructions through physical or electronic means, the authorised representative shall abstain from voting on behalf of such creditor.”

26. Thus, the voting under sub-section (3A) which is to be cast by Authorised Representative is to be on the basis of vote of more than 50% of

the voting share of the Financial Creditor in a class but the said provision of sub-section (3A) was subject to the proviso which proviso created a different voting pattern for 12A. Thus, for computing voting with regard to 12A proposal, the voting has to be computed as per Section 25A (3A) proviso r/w Section 25A(3). As per Section 25A(3), if the authorised representative represents several financial creditors, then he shall cast his vote in respect of each financial creditor in accordance with instructions received from each financial creditor, to the extent of his voting share. When the statute i.e. Section 12A provides 90% voting for approval of Section 12A proposal, 90% of the voting share of the creditor in class have to be taken into consideration. Since voting by each homebuyers who represented creditor in class has to be computed as per his voting share and adding all vote shares of the creditor in class with any other Financial Creditor if it is at least up to 90% only then 12A proposal is held to be passed.

27. Submission of Shri Sumant Batra that when there are more than one Financial Creditors and one of them is a creditor in class i.e. homebuyer, the decision of the homebuyers should be taken as majority decision of homebuyers i.e. vote of more than 50% of the voting share, cannot be accepted in view of the proviso to sub-section (3A). Proviso to sub-section (3A) clearly indicate that the decision of creditor of class by vote of more than 50% of the voting share as contemplated by sub-section (3A) is not applicable with regard to voting on a 12A application. The Adjudicating Authority has committed error in coming to the conclusion that vote share of creditor in class i.e. homebuyers have to be accepted as the majority vote

i.e. 50% of the voting share, hence, it has to be held that 100% of homebuyers have voted for the 12A proposal. The Adjudicating Authority has followed this logic and held that 100% of homebuyers i.e. 80.43% should be treated to have voted in favour of the proposal, hence, the 12A proposal has to be treated to be approved since 12.42% was also voted by Punjab National Bank in favour of the plan.

28. We are of the view that the interpretation put by the Adjudicating Authority on provision of 12A is not in accord with the statutory scheme. This can be demonstrated by taking a simple example; in a case where homebuyers i.e. creditor in class have 100% vote share in the CoC. Whether if majority of homebuyers i.e. 50% of the homebuyers take a decision to approve 12A proposal, can it be held that the proposal of 12A stand approved. Answer is a clear no. Since statute provides a rigorous threshold i.e. 90% of vote share, hence, when 90% vote share of the creditor of class approves the application under Section 12A only then CIRP can be withdrawn. The rigorous vote share has been provided with an object and purpose.

29. Learned Counsel for the Respondent has also relied on the judgment of the Hon'ble Supreme Court in **“Jaypee Kensington Boulevard Apartments Welfare Association & Ors.”** (supra). **“Jaypee Kensington Boulevard Apartments Welfare Association & Ors.”** was a case where a Resolution Plan was approved by the CoC in a class. In the above context, it was held that when homebuyers casts their votes of more than 50%, their votes shall be treated to be votes of a creditor in class since the Authorised

Representative is required to vote on the Resolution Plan in accordance with the decision taken by a vote of more than 50% of the voting share of the homebuyers as is required by Section 25A(3A). It is useful to extract paragraphs 164.5, 165.1 and 166 of the judgment, which is as follows:-

“164.5. To put it in more clear terms qua the homebuyers, the operation of Sub-section (3A) of Section 25A of the Code is that their authorised representative is required to vote on the resolution plan in accordance with the decision taken by a vote of more than 50% of the voting share of the homebuyers; and this 50% is counted with reference to the voting share of such homebuyers who choose to cast their vote for arriving at the particular decision. Once this process is carried out and the authorised representative has been handed down a particular decision by the requisite majority of voting share, he shall vote accordingly and his vote shall bind all the homebuyers, being of the single class he represents.

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165.1. A rather overambitious attempt has been made by the homebuyers who have filed separate appeal (T.C. No. 242 of 2020) to refer to the percentage of voting share of homebuyers and it has been suggested that out of the total voting share of homebuyers i.e., 57.66%, the assenting voting share was only 34.10%, whereas 22.51% abstained and 1.05% dissented. It is submitted that roughly, for every 3 homebuyers who voted for NBCC, 2 had dissented/abstained. Even assuming the percentage as stated by these Appellants to be

correct, we are at a loss to find any logic in the submissions so made. A re-look at Sub-section (3A) of Section 25A would make it clear that '50%' for the purpose of the said provision is of those homebuyers who cast their vote. On the percentage figures as given before us, out of the total voting share of homebuyers at 57.66%, the persons carrying 22.51% voting share simply abstained and of the persons casting their votes, ayes were having the voting share of 34.10% whereas nays were having the voting share of 1.05%. Obviously, 50% would be counted, only of the persons who chose to vote where, much higher than 50% of the homebuyers who cast their vote, stood for approval of the resolution plan of NBCC86. Such a voting cannot be set at naught for the purported dissatisfaction of a miniscule minority, which was about 3.69% in terms of the number of persons voting; and about 1.05% in terms of the voting share. They have to sail along with the overwhelming majority. That is the purport and effect of 'drag along' or 'sail along' provisions in the scheme of the Code.

166. For what has been discussed hereinabove, the suggestions that there was no cent percent approval of the resolution plan, or that there was no consensus amongst homebuyers, or that the plan of Suraksha Realty was considered better, are required to be rejected. It is not the case that the AR of homebuyers has not voted in accordance with the decision taken by a vote of more than 50% of the voting share of homebuyers who did cast their vote.

In the given set of facts, we have no hesitation in thoroughly disapproving the unnecessary imputations made by one set of homebuyers against the AR that he made any incorrect statement before the CoC. That being the position, and the authorised representative having voted in accordance with the instructions given to him from the class of financial creditors i.e., homebuyers, every individual falling in this class remains bound by his vote and any association or homebuyer of JIL cannot be acceded the locus to stand differently and to project its/his own viewpoint or grievance by way of objections or by way of appeal. All such objections and appeals are required to be rejected on this ground alone.”

30. The above judgment of the Hon'ble Supreme Court was considering a voting by Authorised Representative in accordance with decision taken of vote of more than 50% of the voting share as required by sub-section (3A) of Section 25A but the present is a case which is covered by proviso to sub-section (3A) of Section 25A. Proviso of sub-section (3A) makes a clear intention that voting as contemplated in Section 25A (3A) is not to be applied when an application under Section 12A is to be considered which requires 90% vote shares of the CoC. Thus, the judgment of the Hon'ble Supreme Court in **“Jaypee Kensington Boulevard Apartments Welfare Association & Ors.”** (supra) was not applicable with regard to voting on 12A application. The Adjudicating Authority fell in error in holding that the homebuyers in a creditor in class i.e. homebuyers who have voted 40.15% as 'yes' should be treated as 100% of vote shares of the homebuyers i.e. vote should be treated as 80.43% i.e. creditor in class. It was by adding vote of

creditors in class of 80.43% + 12.42% of Punjab National Bank. Adjudicating Authority has come to the conclusion that 12A proposal was approved by more than 90%, which is clearly fallacious and incorrect. We, thus, are of the considered opinion that the Adjudicating Authority committed error in holding that the proposal under Section 12A was approved by 90% whereas proposal had received only 52.57% of vote share as recorded by Resolution Professional on Item No. B2 as extracted above. Proposal submitted by Respondent No.4 not having been approved, Adjudicating Authority committed error in passing the impugned order by closing the CIRP and directing the Resolution Professional to handover the assets and documents to the promoter of the Corporate Debtor. Order dated 24.05.2023 is clearly unsustainable.

31. Shri Sumant Batra contended that Company Appeal (AT) (Ins.) No.719 of 2023 filed by the Resolution Professional is not maintainable since the Resolution Professional could not be held to be aggrieved person against order passed by the Adjudicating Authority dated 24.05.2023. Learned counsel for the Appellant has relied on judgment of Hon'ble Supreme Court in ***“Regen Powertech Private Limited vs. Giriraj Enterprises & Anr., Civil Appeal Nos.5985-6001 of 2023”***.

32. We have considered the submission of learned counsel for the Respondent No.4. The present is a case where the Resolution Professional has challenged the order of the Adjudicating Authority dated 24.05.2023 by which order the Adjudicating Authority has rejected the voting summary and opinion minuted by the Resolution Professional holding that 12A

proposal is not approved since it was not approved by 90% votes. The Appellant, Resolution Professional whose summary of voting holding that 12A application was not approved has been set aside by the Adjudicating Authority. The Resolution Professional is duty bound to ensure that the CIRP process is conducted in accordance with provisions of IBC and Regulations. In the facts of the present case where opinion of the Resolution Professional, who was Chairman of the CoC holding that 12A proposal is not approved has been overturned by the Adjudicating Authority, we are of the view that the Resolution Professional is an aggrieved person from the said decision since the decision of the Adjudicating Authority directly overturns the decision of the Resolution Professional. In so far as judgement of the Hon'ble Supreme Court in "**Regen Powertech Private Limited vs. Giriraj Enterprises & Anr.**" relied by the Respondent No.4, the judgment of the Hon'ble Supreme Court dated 25.09.2023 is as follows:

ORDER

We are of the opinion that in view of the facts and circumstances, the Resolution Professional should not have filed the present appeals. The Resolution Professional should have maintained a neutral stand. It is for the aggrieved parties, including the Committee of Creditors of Regen Powertech Private Limited (RPPL) and Regen Infrastructure and Services Private Limited (RISPL), to take appropriate proceedings or file an appeal before this Court.

Recording the aforesaid, the present appeals preferred by the Resolution Professional are dismissed as not entertained.

If required and necessary, the Court can take assistance and ascertain the facts from the Resolution Professional, in case an appeal(s) is preferred by the Committee of Creditors or a third party.

Pending application(s), if any, shall stand disposed of.”

33. When we look into the above judgment, it is clear that the said judgment was in the facts and circumstances of that case where the Supreme Court held that the Resolution Professional should have maintained a neutral stand and could not have filed an appeal. The present is a case where the Resolution Professional is required to conduct the proceeding of the CoC according to the IBC and take a decision on the result of voting. There can be no question of Resolution Professional taking, in the present case, any sides. In so far as computation of votes is concerned, the Resolution Professional is required to compute the votes as per the statute. Hence, the judgment of the Hon'ble Supreme Court in **“Regen Powertech Private Limited vs. Giriraj Enterprises & Anr.”** which was in the facts of the said case cannot be said to be applicable in the present set of facts. We, thus, are of the view that the appeal could not be held to be not maintainable, at the instance of the Resolution Professional. It is relevant to the notice that the said order has also been challenged by Homebuyer – Mr. Vijay Saini in Company Appeal (AT) (Ins.) No.982 of 2023 with regard to which there is no issue of maintainability.

34. Now we proceed to examine the submission advanced on behalf of the promoter/director as well as homebuyers of Sidhartha Buildhomes Pvt. Ltd. that the proposal submitted by Respondent No.4- promoter/director for withdrawal under Section 12A contain a detailed plan and mechanism for completion of both the projects and handing over the possession of units to the homebuyers. In Company Appeal (AT) (Insolvency) No.791 of 2023, we had permitted Respondent No.4 to file an Additional Affidavit which Affidavit dated 29.11.2023 has been filed by the Respondent No.4. In the Additional Affidavit, details of subsequent developments of the projects in question have been brought on record. Affidavit contains the detail of an amount infused by Respondent No.4 after the order dated 24.05.2023 it also mention about the payment of Rs.5.50 Crore to the Financial Creditors i.e. Punjab National Bank and Punjab & Sind Bank. Construction detail of NCR Greens Project and Estella Project has also been detailed. Affidavit indicated that the Monitoring Committee has been constituted headed by a Retd. Chief Justice of High Court.

35. Counsel for Respondent No.4 in his submission has submitted that in Project NCR Greens, all units shall be handed over till end of February 2024 and possession has been issued on 23.11.2023 to 103 units in Project NCR Greens. With regard to project Estella, it has been stated that several steps have been taken. Structural audit and other steps have been taken with regard to Estella Project. Affidavit further details that after order dated 24.05.2023 renewal of the licenses of the Project NCR Green have also been obtained on 09.11.2023 and with regard to Estella Project, an amount of

Rs.3,87,81,500/- has also been paid to the Department of Town & Country Planning as the fee for renewal of licenses for the Project Estella which license has not been issued till the date Affidavit was filed. Affidavit further states that company namely— 'Unique Consulting Engineers' for 'structural audit and health check' for the project Estella was engaged. Certain amounts have also spent by Respondent No.4 for an amount of Rs.8,30,000/- is also claim to be spent for Project Estella for structural audit and health check. Certain other steps with regard to Estella Project has been initiated.

36. From the facts which have been brought on the record, it is clear that after the order dated 24.05.2023 was passed by the Adjudicating Authority allowing 12A proposal, the Respondent No.4 proceeded as per the proposal under 12A and has carried out certain works as detailed in Additional Affidavit. It has further been submitted that all units pertaining to Project NCR Green shall be ready and shall be handed over by end of February. We are of the view that the Project NCR Green being almost complete, the said project need to be kept out of CIRP. However, Respondent No.4 shall be entirely responsible for handing over units to each and every unit holder of NCR Green Project.

37. We having already held that the order dated 24.05.2023 is unsustainable. The proposal under Section 12A having not been approved by 90% vote share of the CoC, the order dated 24.05.2023 has to be set aside reviving the CIRP of the Corporate Debtor.

38. Learned Counsel for the Respondent has relied on judgment of this Tribunal in Company Appeal (AT) (Insolvency) No. 926 of 2019- ***“Flat Buyers Association Winter Hills vs. Umang Realtech Private Limited through IRP & Ors.”*** where this Tribunal has directed for reverse CIRP in facts and circumstances of the said case. We are also of the view that in the present case, the CIRP of the Corporate Debtor be revived and be confined to the Estella Project. Let the Resolution Professional constitute the CoC for the Estella Project. Taking in the CoC the homebuyers of Estella Project, the Financial Creditors- Punjab National Bank and Punjab & Sind Bank shall also be part of the CoC. We permit the Resolution Professional to issue fresh Form-G with regard to Estella Project and complete the CIRP process within a period of 90 days from the date of issuance of Form G.

39. Coming to the Company Appeal (AT) (Insolvency) No.1194 of 2023, we having taken the view that the order dated 24.05.2023 is unsustainable, the order passed by the Adjudicating Authority in IA No.779 of 2023 deserves to be set aside reviving the IA No.779 of 2023 to be heard and decided afresh.

40. In view of the foregoing discussions and our conclusion, we decide all these appeals in following manner:-

(i) Company Appeal (AT) (Insolvency) Nos. 791 and 982 of 2023 are allowed. The order dated 24.05.2023 passed by the Adjudicating Authority in IA No. 753 of 2023 is set aside. I.A. No.753 of 2023 is dismissed.

(ii) CIRP of the Corporate Debtor- Sidhartha Buildhome Pvt. Ltd. is revived which proceeding shall confine to Project Estella.

(iii) The Project NCR Green be kept out of the CIRP which henceforth commences. The promoter/director is solely responsible to complete and handover all units of the Project NCR Green to the unit holders and in event there is any failure on the part of the Respondent No.4 to handover the units to all unit holders, it shall be open for the Financial Creditors in class to make an application before the Adjudicating Authority for appropriate relief including relief of revival of CIRP with regard to NCR Green Project also.

(iv) The Resolution Professional shall issue fresh Form G with regard to Estella Project and complete the CIRP within a period of 90 days from the date of issuance of Form G. Resolution Professional before issuing Form G with regard to Estella Project shall constitute the CoC for the Project Estella and proceed further as per decision of the CoC so constituted.

Parties shall bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

Anjali/nn