NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT)(Insolvency) No. 1240 of 2023

[Arising out of order dated 01.08.2023 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi (Court-III) in I.A. No. 4171/2021 in CP (IB) No.2130/ND/2019]

IN THE MATTER OF:

Mr. Ankur Narang & Ors. **...Appellants**

Versus

Mr. Nilesh Sharma
Resolution Professional of Today Homes and Infrastructure Pvt. Ltd. & Ors. **...Respondents**

Present:

For Appellants: **Mr. Pawan Shree Agrawal and Ms. Shubhangi Negi, Advocates.**

For Respondents: **Mr. Kanishk Khetan, Advocate for R-1.**

J U D G M E N T

[Per: Barun Mitra, Member (Technical)]

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code, 2016 ("**IBC**" in short) by the Appellants arises out of the Order dated 01.08.2023 (hereinafter referred to as "**Impugned Order**") passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Court-III) in IA No. 4171/2021 in CP (IB) No.2130(ND)2019.

2. For better appreciation of the matter at hand, we begin by setting out the factual matrix as brought out before us. The present Appellants constitute

a clutch of 25 applicants, each being allottees of residential flats in a project, namely, Canary Greens, Gurugram (hereinafter referred to as "**Project**"). The said project was being developed by Today Homes and Infrastructure Pvt. Ltd. – Corporate Debtor. Since the possession of the flats was not offered by the Corporate Debtor within the prescribed time, the Appellants raised complaint before the National Consumer Disputes Redressal Commission ("**NCDRC**" in short) following which the NCDRC ordered on 31.01.2017 that the Corporate Debtor shall refund the entire amount received from each of the complainants including Service Tax and VAT along with compensation in the form of simple interest @ 10% p.a. besides Rs.10,000/- as the litigation cost, which payments were to be made within three months from the date of the order. With these orders, NCDRC had disposed of all the complaints. The Appellants filed the execution petition in pursuance of the NCDRC order and received compensation until 31.10.2019 on which date the Corporate Debtor was admitted into Corporate Insolvency Resolution Process ("**CIRP**" in short). The principal amount however was not received by them from the Corporate Debtor.

3. Since the Corporate Debtor had been admitted into CIRP, the applicants filed their claim. The Resolution Professional ("**RP**" in short) had raised certain concerns regarding calculation of the claims filed by them and asked them to revise their claims aggrieved by which the Appellants filed IA No. 4059/2020 and 4914/2020 before the Adjudicating Authority. Since the RP later admitted their claims in full, both the IAs were rendered infructuous. The claim submitted to the RP pertained purportedly only to the principal amount which was yet to be recovered from the Corporate Debtor.

4. Taking the process of CIRP forward, the RP had invited resolution plans. The RP had presented the plans so received from the Resolution Applicants before the Committee of Creditors ("**CoC**" in short) and the resolution plan was approved by the CoC with 96.93% vote share. Notably, the resolution plan is pending approval of the Adjudicating Authority. In the interim, the Appellants aggrieved with the resolution plan filed IA No. 4171/2021 before the Adjudicating Authority challenging the resolution plan as approved by the CoC. The Adjudicating Authority dismissed the said IA vide impugned order dated 01.08.2023 against which the present appeal has been preferred.

5. The Learned Counsel for the Appellants submitted that the Adjudicating Authority wrongly dismissed their IA No.4171/2021 without considering the resolution plan which plan is not in consonance with Section 30(2) of the IBC and Regulation 38 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("**CIRP Regulations**" in short). Elaborating further it has been submitted that Clause 9.2.2B(iii) of the resolution plan (hereinafter referred to as "**Clause 9**") by treating the entire compensation amount received by the Appellants in terms of the NCDRC order as refund towards the principal sum was discriminatory and therefore contrary to Section 30(2)(e) of the IBC. The flats of the Appellants who have order of refund has been treated as cancelled without payment of refund amount as against home-buyers who continue to hold allotments. Thus though the Appellants fall in the same class as other home-buyers but have been treated differently. Further, the Adjudicating Authority committed an error in overlooking the fact that as dissenting financial creditors, the Appellants are required to be paid in priority over the financial creditors who voted in favour of the resolution plan as contemplated in Regulation 38 of the

CIRP Regulations. By providing partial payment and that too after sale of the respective flats of the Appellants, the resolution plan is contingent in nature and therefore contrary to the IBC. It has also been contended that the Appellants being secured Financial Creditors, will rank at the top in terms of the waterfall mechanism under Section 53 of the IBC along with dues of the workman after CIRP costs and are entitled for their full claims.

6. Refuting the above submissions, the Learned Counsel for the Respondent No.1 submitted that the Appellants being a minority group of Home Buyers have no locus to challenge the resolution plan especially when the Home Buyers as a class have voted in favour of the resolution plan. It was also submitted that the Appellants cannot claim that their objections were not given due cognizance since the RP had given them the liberty to raise their objections before the Authorized Representative of the Home Buyers and the Authorized Representative in turn had sent a communication to the Appellants to get in touch with the Resolution Applicants for redressal of their objections and make necessary negotiations. Having already availed this opportunity, it was contended that the Appellants have no legitimate reasons to feel aggrieved. It was further contended that in Clause 9 of the resolution plan, the concerns and interests of the Appellants have been duly taken care of but by making selective and deliberate omissions while referring to Clause 9, they have intentionally distorted the facts. It was emphatically asserted that the resolution plan having been approved by the CoC in their commercial wisdom, the scope of interference in the resolution plan in the exercise of jurisdiction of judicial review by the Adjudicating Authority is extremely limited. Hence, the Adjudicating Authority had rightly dismissed the IA 4171/2021.

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

8. It is the case of the Appellants that they had raised their objections before the Authorized Representative with respect to certain clauses contained in the resolution plan, particularly clause 9. Submission was pressed that the resolution plan invalidly deducts payment of compensation/interest from their principal amount which is unjust. Moreover, they have been treated differently from other homebuyers to whom possession is being given as they will have a benefit of 65% more than them. The resolution plan is also conditional as it provides that the payment shall be made to the Appellants only after the housing units are completed and sold thereafter. Thus the plan being contingent when it relates to payments to the Appellants, and thereby these clauses in the resolution plan being prejudicial and discriminatory to their interests, the CoC in approving such resolution plan acted contrary to Section 30(2)(e) of the IBC.

9. At this stage it would be helpful to also note the prayers of the present Appellants as made in IA 4171/2021. It has been prayed that the CoC and the RP be directed by the Adjudicating Authority to consider their objections in the said I.A. and to obtain revised/amended resolution plan from the Resolution Applicant including amendment of Clause 9 so as to secure the interests of the Appellants in compliance with the NCDRC orders.

10. The Learned Counsel for the Respondent No. 1 asserted that the Appellants were given adequate chance to raise their objections before the RP as well as the Authorized Representative of the Home Buyers. There is no

merit in the objections raised by the Appellants being a group of individual homebuyers in minority, particularly so, when the plan has been assented to by the Home Buyers as a class. In support of their contention reliance was placed on the judgement of the Hon'ble Apex Court in the ***Jaypee Kensington Boulevard Apartments Welfare Association & Ors v NBCC(India) Ltd in Civil Appeal No. 3395 of 2020*** ("***Jaypee"*** in short).

11. This makes it necessary for us to see at this stage whether the Adjudicating Authority had taken note of Clause 9 of the resolution plan while passing the impugned order which is the main pillar of objection raised by the Appellants. Perusal of the impugned order clearly shows that the Adjudicating Authority had duly considered the objections raised by the Appellants with respect to Clause 9 of the resolution plan and held as follows: -

> *"10. …… The said clause was part of the plan, and the plan was* ***duly approved by members of CoC with a whopping majority of 96.93%.*** *A resolution plan providing a lesser amount than admitted does not make it illegal. Hence, there is no reason for this Tribunal to direct the Resolution Applicant to amend clause 9.2.2 (B) (iii) of the Resolution Plan.*
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> *11. We agree with the submissions made by the Learned Counsel for the Resolution Professional and we are of the considered view that the* ***commercial wisdom of the CoC as has been held by the Hon'ble Supreme Court in various judgments cannot be called in question****. Moreover, the Resolution Plan makes adequate provisions for consideration of the claims of the Applicants. Therefore, we are not inclined to entertain the present application."*
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> ***(Emphasis supplied)***

12. In the present facts of the case, we find that the Appellants were given a chance to raise their objections before the RP as well as the Authorized Representative of the Home Buyers. The RP did not falter in accepting their claims in spite of expressing some reservations initially. The RP had also

facilitated the Appellants in routing their objections to the Authorized Representative and the latter had provided them the window of opportunity of taking up their issues with the resolution applicants. We are of the considered opinion that the RP and the Authorized Representative did not fail in the discharge of their responsibilities and no cause of action survives on this count.

13. We also notice that it is an undisputed fact that the Appellants constitute a total of 25 home buyers with admitted claims of about Rs.14 crore as against a total of approximately 1500 home buyers in the said project with a claim totalling to Rs. 1110.20 crores. The resolution plan has been admittedly approved by the CoC with 96.93% vote share. In the instant case where the resolution plan has been admittedly approved by the CoC with 96.93% vote share, the issue before us is whether objections raised by a wafer-thin, miniscule minority amongst the homebuyers against the collective business decision taken by the Home Buyers can survive and be amenable to judicial intervention.

14. The Learned Counsel of the Appellant pointed out that in the recent judgment of the Hon'ble Supreme Court in ***Vishal Chelani & Ors v. Debashish Nanda in Civil Appeal No. 3806 of 2023*** it has been held that resolution plan which treats homebuyers having decrees from RERA differently from others forming part of the same class is bad in law. We have no quarrel with the proposition of law laid down in the above judgment. However, we find the facts in that case to be distinguishable from the present matter. During the insolvency proceedings in that case, a resolution plan was presented, making a distinction between home buyers who had sought relief

under RERA and those who had not. Those homebuyers who enjoyed RERA relief were made to file their claims in Form-C while other homebuyers were allowed to file claim in Form-CA thus putting the latter set of homebuyers to some advantage. However, no such distinction is made in the present case between home buyers who invoked NCDRC remedies and those who did not. All home buyers, irrespective of their foray into the realms of NCDRC or not have been treated as financial creditors and allowed to file their claims in Form-CA and to participate as creditors in a class in the CoC in the present insolvency proceedings. Hence the facts of the two cases being different, the ratio is not applicable.

15. It is the case of the Respondent No. 1 that in the given statutory framework of IBC there is only limited judicial review which can be exercised by the Adjudicating Authority and that the supremacy of the commercial wisdom of CoC has been reaffirmed repeatedly and consistently by the Hon'ble Supreme Court. It was also submitted that dissenting minority amongst Creditors in class have to be treated at par with other Home Buyers in terms of the ***Jaypee*** judgment.

16. It will be useful to extract the relevant portions of the ***Jaypee*** judgment supra as hereinunder:

> *"163. Taking up other aspects of the rival submissions and having examined the scheme of the Code in relation to a plan of insolvency resolution, we are clearly of the view that the propositions of some of the associations and* ***individual homebuyers to claim themselves as 'dissenting homebuyers' and thereby, 'dissenting financial creditors' do not stand in conformity with the scheme of the Code*** *and the manner of voting on a plan of resolution by the Committee of Creditors.*
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> *** *** *** ***

164.3. In the face of clear language of sub-section (3A) of Section 25A of the Code, read with the law declared by this Court in Pioneer Urban(supra), the suggestion on behalf of the dissatisfied homebuyers that the said provision was only intended to iron out the logistical issues and technical difficulties is required to be rejected altogether. The said provision, as held by this Court, is to iron out the creases that might have been felt in the proper working of Section 25A; and it is made explicit that the allottees, even if not a homogeneous group, they could vote only either to approve the resolution plan or to disapprove the same. ***Divergence of the views within their own class may exist but, when coming to the vote in the Committee of Creditors, their vote would be that of a class.***

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 authorised representative over the resolution plan in accordance with the majority decision of the class he is authorised to represent, a plan of resolution involving large number of parties (like an excessively large number of homebuyers herein) may never fructify and the only result would be liquidation, which is not the prime target of the Code.* ***In the larger benefit and for 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 authorised representative on the entire class of the financial creditor/s he represents.***

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165. In the present case, on one hand, it has consistently been submitted by the stakeholders, particularly the homebuyers, that liquidation of JIL should be eschewed, but on the other hand, some of the associations and homebuyers have attempted to find faults with the resolution plan to which their majority, who voted, took the decision for approval. ***There is***

no scope for any homebuyer suggesting himself to be a dissenting financial creditor merely because he was not with majority within the class. His dissatisfaction does not partake the legal character of a dissenting financial creditor.

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.*

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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……***

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175. For what has been discussed above, we hold that the homebuyers as a class having assented to the resolution plan of NBCC, ***any individual homebuyer or any association of homebuyers cannot maintain a challenge to the resolution plan and cannot be treated as a dissenting financial creditor or an aggrieved person;*** *the question of violation of the provisions of the Real Estate (Regulation and Development) Act, 2016 does not arise; the resolution plan in question is not violative of the mandatory requirements of the CIRP Regulations; and when the resolution plan comprehensively deals with all the assets and liabilities of the corporate debtor, no housing project could be segregated merely for the reason that the same has been completed or is nearing completion."*

(Emphasis supplied)

17. 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. In the present facts of the case, when the majority has approved the resolution plan, the objections raised by the Appellants are inconsequential in so far as they represent the homebuyers in minority. It has been clearly held in the Jaypee matter that when the Home Buyers as a class have voted in favour of a resolution plan, a particular constituent of that class and that too in a minority 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. 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 impressed with the plea raised by the Appellants that the

Adjudicating Authority had committed an error in rejecting their IA without having considered the main petition seeking approval of the resolution plan.

18. On the contention raised by the Appellants that their interests have been prejudiced since the resolution plan is contingent and conditional, it has been countered by the Respondent No. 1 that it is a misconceived argument. It was contended that clause 9 deals with the compensation amounts received by the Appellants as ordered by NCDRC including legal costs incurred by them. The Resolution Plan has made adequate provisions for consideration of the claims of the Appellants. It was submitted that the resolution plan clearly provides for treatment that would be provided to the Appellants in case the units are not resold. We find that the Adjudicating Authority has taken due note of these provisions in clause 9 of the resolution plan which take care of the concerns of the Appellants and find place in Para 10 of the impugned order as extracted hereunder: -

> *"To compensate such allottees towards additional cost including legal cost incurred by them, Resolution applicant propose to pay 35% of the additional amount realized by the resolution applicant on sale of units booked by such allottee. The additional amount realized will be the difference between the value received by the RA on sale of such units and the value of the unit as per BBA Agreement.*
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> **** **** ****
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> *To further compensate allottee in this category, in case of allotment of units, the total amount already refunded to such allottee on effective date will be received back in 6 equal monthly installments without any interest. The allottee need to pay due installments if pending and further dues installments based on completion stage within 15 days of demand notice."*

Merely because there is a reduction in the claim of any creditor does not make the resolution plan fall foul of law. We quite agree with the Adjudicating

Authority that "*resolution plan providing a lesser amount than admitted does not make it illegal*". Any clause in the resolution plan which requires creditors to take a hair-cut cannot be construed as being violative of Section 30(2)(e) of the IBC.

19. Under such circumstances there is nothing to show that there has been transgression of the bounds of rules and regulations which have caused any serious miscarriage of justice to the Appellants. We are of the considered opinion that the Adjudicating Authority did not commit any error in dismissing IA 4171/2021.

20. We do not find any good grounds to entertain this appeal. Appeal is dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi
Date: 20.10.203

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