NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1542 of 2023

[Arising out of order dated 06.10.2023 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench Court-IV in IA-2688/2023 in CP.IB.68(MB)2021]

IN THE MATTER OF:

Mr. Girish Nalavade
Representative of other Homebuyers
of Modella Textile Industries Ltd.
Resident of:
Krishna, B Wing, Neelkanth Palms,
Thane 400610 **...Appellant**

Versus

1. **Bhrugesh Amin**
   BDO India LLP The Ruby-Level 9
   NW Wing Senapati Bapat Marg,
   Dabar, Mumbai City, Maharashtra.

2. **Edelweiss Asset Reconstruction Company Ltd.**
   Edelweiss House, Windsor LN, Kolivery
   Village East Mumbai, Maharashtra.

3. **Consortium of M/s Ashar Ventures,**
   M/s Ashar Realtors, M/s Toscano Infrastructure
   Pvt. Ltd. & Ashar IT park, 11th Floor B Wing,
   Wagle Estate Thane (West), Mumbai-400604.

4. **Modella Textile Industries Ltd.**
   (Undergoing Corporate Insolvency Resolution Process)
   CIN : U45201MH1971PLC15082.

...Respondents

Present:

Appellant:	**Ms. Anjali Sharma, Mr. Ganesh Remani, Mr. Deepak Bashts, Mr. Sachin Daga, Advocates.**
For Respondents:	**Mr. Krishnendu Datta, Sr. Advocate with Mr. Ayush J. Rajani, Ms. Khushboo Shah, Ms. Varsha Himatsingka, Advocates for R-1.** **Mr. Amit Sibal and Mr. P Nagesh, Sr. Advocates with Mr. Ajay Bhargava, Ms. Trishala Trivedi, Ms. Phalguni Nigam, Advocates for R-2.** **Mr. Arvind Varma, Sr. Advocate with Mr. Chirag J. Shah, Mr. Utsav Trivedi, Ms. Shivani Bhushan, Ms. Diksha Tyagi, Ms. Aishwarya Singh, Advocates for R-3/SRA.**

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 Appellant arises out of the Order dated 06.10.2023 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench, Court-IV) in IA-2688/2023 in CP.IB.68(MB)2021. By the Impugned Order, the Adjudicating Authority dismissed the I.A. No. 2688/2023 filed by present Appellant representing 77 Homebuyers as a class of creditor seeking rejection of the Committee of Creditors ('**CoC**' in short) approved resolution plan filed by the Resolution Professional ('**RP**' in short) pending for approval of the Adjudicating Authority in IA-2319/2023. Aggrieved by this impugned order, the present appeal has been preferred by the Appellant.

2. Coming to the factual matrix at hand, the salient points are as outlined below:

- The Appellant and other Home Buyers had purchased flats in the real estate project - 'Nirmal Sports City' of the Corporate Debtor- Modella Textile Industries Ltd. in 2012-13.
- ECL Finance Limited (**'ECLF'** in short), which was a part of the Edelweiss group granted a Term Loan to the Corporate Debtor on 24.07.2013.
- The Corporate Debtor/Respondent No. 4 passed a resolution on 10.03.2016 for the issuance of unlisted, unrated, secured, redeemable, Non-Convertible Debentures (**'NCD'** in short) by way of private placement which were offered to the Edelweiss group. The Debenture Trustee for the issue was IDBI Trusteeship Services Ltd. and a Debenture Trust Deed ('**DTD**' in short) was executed between the Corporate Debtor and IDBI Trusteeship Services Ltd. on 22.03.2016.
- ECLF granted another loan on 28.09.2016 to the Corporate Debtor. The Corporate Debtor passed another resolution for the issuance of NCD on 02.11.2017 by way of private placement again to the Edelweiss group companies and another DTD was executed on 17.11.2017 with respect to this issue of debentures.
- In the year 2017, the Corporate Debtor entered into an Agreement with Godrej Properties Limited and relaunched the project as "Godrej Alive". Under the project "Godrej Alive," all the Home Buyers were offered to either continue in the project as per the terms and conditions earlier

agreed in the allotment letters from the Corporate Debtor or to exit the project with 9% compound interest. However, this project also failed to take off.

- The Corporate Insolvency Resolution Process ('**CIRP**' in short) of the Corporate Debtor was initiated upon admission of a petition under Section 7 of IBC on 04.05.2022.
- In the 12th CoC meeting, the resolution plan proposed by a consortium of Ashar Ventures and Ors/Respondent No. 3 was approved by the CoC with 88.95% vote share. The proposed resolution plan of Respondent No.3/SRA was voted against by the Homebuyers who had 11.05% vote share.
- The Respondent No. 1/RP had filed I.A. No 2319 before the Adjudicating Authority for approval of the resolution plan of Respondent No.3/SRA while the present Appellant representing 77 Homebuyers had filed I.A. No. 2688/2023 in C.P. (IB) No. 68(MB)2021 inter-alia seeking rejection of the said plan.
- The Adjudicating Authority dismissed the I.A. No. 2688/2023 filed by the Appellant. Assailing the impugned order, the present appeal has been preferred.

3. We have heard Ms. Anjali Sharma, Learned Counsel appearing for the Appellant; Shri Krishnendu Dutta, Learned Sr. Counsel for the Resolution Professional; Shri P. Nagesh and Shri Amit Sibal Learned Sr. Counsels for the Respondent No.2/Financial Creditor and Shri Arvind Verma, Learned Sr. Counsel appearing for the SRA.

4. Making his submissions, the Learned Counsel for the Appellant submitted that the Appellant is a creditor in a class who represents 77 Homebuyers of the Corporate Debtor. The Homebuyers had purchased flats in the 'Nirmal Sports City' real estate project of the Corporate Debtor. As this project did not take off, the project was relaunched as Godrej Alive. Under this project, the Homebuyers were given the option to either continue in the project or exit the project with 9% compound interest. It is the contention of the Appellant that the Homebuyers of which the Appellant was also a part, chose to continue in the project. When this project did not take off and the Corporate Debtor was admitted into CIRP on 04.05.2022, the Respondent No. 2/Financial Creditor filed a claim of Rs. 998.96 crores which comprised a principal amount of Rs. 502.91 crores and an exorbitant interest amount, basis which the Resolution Professional constituted the CoC with Respondent No. 2/Financial Creditor having 88.95% voting share and the remaining 11.05% voting share being vested with the Homebuyers. It was therefore contended that the CoC had a skewed composition and therefore irregularly constituted.

5. Further submission was made that the Corporate Debtor had received term loans from ECLF which was a part of Edelweiss Group of Companies. The Corporate Debtor had issued NCDs which were offered to the Edelweiss Group of Companies. It was alleged that the term loans were disbursed even though there was no development of the property and that the first term loan was repaid even without any investment/development in the Nirmal Sports City project. It has been contended that the Respondent No. 2/Financial

Creditor had been disbursing money without satisfying itself as to the condition precedent listed out in the DTD and loans were paid off using the debentures issued. This was a clear case of evergreening of loans at a time when there was no investment/development of the housing projects.

6. It has been contended by the Learned Counsel for the Appellant that the DTDs executed on 22.03.2016 and 17.11.2017 also reveal that the Corporate Debtor and the Respondent No. 2/Financial Creditor are "related parties" as defined under Section 5(24)(h) and 5(24)(m). It was pointed out that the Respondent No. 2/Financial Creditor had controlling powers over the operations of the Corporate Debtor and hence a related party. The Resolution Professional was duty bound to verify and ascertain the related party status which it failed to do thus wrongly allowing the Respondent No. 2/Financial Creditor to join the CoC and participate in its meetings. Though this related party contention was raised in an additional affidavit filed by the Appellant prior to arguments, it has been ignored by the Adjudicating Authority. The impugned order is therefore assailed on the grounds of having failed to deal with the related parties issue raised by the Appellant.

7. It is further the case of the Appellant that it was not open to the RP to constitute the CoC with a related party of the Corporate Debtor and to allow the Respondent No. 2/Financial Creditor a right of representation, participation and voting in the meetings of the CoC. By allowing the admission of the Respondent No. 2/Financial Creditor into the CoC, the CoC stood illegally constituted and hence the decisions flowing from the CoC are also illegal. Due to the failure of the RP to conduct proper investigation into the

claims made by the Respondent No. 2/Financial Creditor, this led to skewed composition of the CoC. Thus, the CoC with Respondent No. 2/Financial Creditor thereon could not have approved the resolution plan of the Corporate Debtor by dint of being a related party. Consequently, the constitution of the CoC with the Respondent No. 2/Financial Creditor being a related party renders the constitution of CoC as invalid and hence all actions/decisions of the CoC deserves to be set aside.

8. It was asserted that the repeated disbursement of loan by the Respondent No. 2/Financial Creditor without any development of the real estate project taking place on ground coupled with nil revenue generation and allowing of loan repayments through subsequent disbursal of term loans showed the questionable conduct of the Respondent No.2/Financial Creditor and the Corporate Debtor. It has been further contended that inspite of these peculiar financial transactions, the RP did not take necessary steps to investigate these transactions. The RP conducted a transaction audit review which was limited to two years prior to the insolvency commencement date rather than covering the entire period from 2013-14 onwards when the term loans were disbursed. This time reduction of the review to two years was decided by the Resolution Professional on his own without obtaining the consent of the CoC at a time when the 2nd CoC had approved transaction audit to be conducted for a period of a five years.

9. Further submission was pressed that the Resolution Professional did not pro-actively acquire information about the reservation in respect of the subject parcel of land raised by Thane Municipal Corporation (**'TMC'** in short).

It was contended that TMC reservation was only at the initial proposal stage and no notification had been issued inviting objections to any such acquisition. Even the legal opinion received by the RP indicated that TMC reservation may not be applicable to the said parcel of land. Since this apprehension of TMC reservation was not allayed, this led to withdrawal of large number of potential resolution applicants ('**PRA**' in short) leaving only the Respondent No. 3/SRA as the sole bidder which was detrimental to the interest of the Homebuyers. Even the Authorised Representative (**'AR'** in short) of the Homebuyers had raised this issue in the 8th and 9th CoC meetings that the Homebuyers did not wish to accept the terms as set out by a single bidder. Despite requests from the Homebuyers, the Resolution Professional failed to issue fresh Form-G and ignoring the concerns raised by the AR, the RP proceeded to place the resolution plan of Respondent No. 3/SRA before the CoC. The resolution plan by providing an exit option with upfront cash payment without allowing Homebuyers to continue in the project deprived the Homebuyers of their right to home. Harping on the misconduct of the Resolution Professional, it was pointed out that there was material irregularity in the exercise of powers by the Resolution Professional which the Adjudicating Authority has failed to take notice of and that it erroneously approved the resolution plan of the Respondent No. 3/SRA.

10. Refuting the contentions raised by the Appellant, counter submissions were made separately by the Sr. Learned Counsels for Respondent Nos. 1, 2 and 3. Since the grounds arrayed largely overlap, for reasons of convenience, we propose to summarise their contentions together. Strong reservations were

raised on the locus of the Appellant to file this appeal as creditor in class. It is also pointed out that the Homebuyers constitute a "creditor in class" and are represented by an AR. The Appellant has failed to substantiate his status as AR. It is contended that the cause title of the application shows that it has been filed by one, Mr. Girish Nalavade, in his individual capacity. Furthermore, the Appellant failed to disclose the name and detailed particulars of the 77 Homebuyers whom it claims to represent. Moreover, the Appellant was only authorised by 77 Homebuyers to file I.A. 2688/2023 before the Adjudicating Authority. The emails issued by the Homebuyers authorising the Appellant to file I.A. 2688/2023 was prior to the issue of impugned order. There is nothing on record which refers to any subsequent authorisation from this group of Homebuyers to the Appellant to file this appeal on their behalf before this Tribunal.

11. It has also been vehemently contended that the resolution plan has already been implemented and all the 77 Homebuyers including the present Appellant have accepted the payment of 100% principal amount in terms of the approved resolution plan. Moreover, the Home Buyers not having objected to the said receipt of payments as per the resolution plan cannot now raise objections. The Homebuyers having received their entire 100% due, the present appeal has been rendered infructuous. The Appellant after maintaining a class action with 77 Homebuyers before the Adjudicating Authority cannot maintain an individual action before this Tribunal. This would be impermissible in law. The relief claimed by the Appellant to restart the entire the CIRP process at a time when resolution plan is fully

implemented amounts to derailment of the resolution process. This would amount to restarting the clock of CIRP which is not the intent of the IBC and that too when the Appellant is the lone homebuyer out of the entire class of creditors.

12. It is also the case of the Respondents that the appeal deserves to be dismissed since it is in the teeth of the decision of the Hon'ble Supreme Court in ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs NBCC (India) and Ors. (2022) 1 SCC 401*** ('**Jaypee**' in short). Once a decision is taken to accept a plan by a vote of more than 50% of the voting share of the creditors in a class, the minority is bound by the decision of the majority.

13. We have duly considered the arguments advanced by the Learned Counsels for both parties and perused the records carefully.

14. The first point before us for consideration is to determine the sustainability of the argument advanced by the Learned Counsel for the Appellant that the constitution of the CoC stood vitiated because of the related party status of the Financial Creditor and Corporate Debtor. The claim of the Respondents is that this this ground was raised for the first time before the Adjudicating Authority at the time of filing the written submissions on 12.08.2023 which date was subsequent to reservation of the order by the Adjudicating Authority on 04.08.2023. In such circumstances, it has been contended by the Respondents that this issue is an afterthought which the Appellant has created to build a false pretext to challenge the resolution plan

which has been approved by the CoC with requisite majority. However, the Appellant has countered this by submitting that the related party contention was raised by them in an additional affidavit filed by them on 01.08.2023 which pre-dated arguments before the Adjudicating Authority.

15. Be that as it may, to remove all ambiguities we have decided to go into the contentious issue of the related party status raised by the Appellant. To begin with, we may notice Section 5(24)(h) and (m) which have been relied upon by the Appellant to claim that the Financial Creditor/Respondent No. 2 is a related party and hence could not have found a place in the CoC. The relevant clauses read as follows:

> *"5(24) "related party", in relation to a corporate debtor, means—*
>
> *(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;*
>
> *(m) any person who is associated with the corporate debtor on account of—*
>
> *(i) participation in policy making processes of the corporate debtor; or*
>
> *(ii) having more than two directors in common between the corporate debtor and such person; or*
>
> *(iii) interchange of managerial personnel between the corporate debtor and such person; or*
>
> *(iv) provision of essential technical information to, or from, the corporate debtor;"*

16. It has been contended by the Learned Counsel for the Appellant that the DTDs executed by the Corporate Debtor on 22.03.2016 and 17.11.2017 reveal that the Corporate Debtor and the Financial Creditor/Respondent No.

2 are “related parties” as defined under Section 5(24)(h) and 5(24)(m). It was pointed out that the Financial Creditor/Respondent No. 2 had controlling powers over the operations of the Corporate Debtor. The DTDs provided the control of the Financial Creditor/Respondent No. 2 over the decisions of the Board of Directors of the Corporate Debtor; control over appointment and removal of key managerial personal of the Corporate Debtor; the powers of the Financial Creditor/Respondent No. 2 as Monitoring Agent; control over business plan of the Corporate Debtor; control over modalities of sale of units besides control over revenue and other accounts of Corporate Debtor. These features clearly amplified their related party status. Consequently, the constitution of the CoC with the Financial Creditor/Respondent No. 2 being a related party therein renders the constitution of CoC to be invalid and all actions/decisions of the CoC therefore deserves to be set aside.

17. To fulfil the ingredients of Section 5(24)(h), it is required to be proven and substantiated that any Director, Partner or Manager of the Corporate Debtor is accustomed to act on the advice, direction or instruction of the Financial Creditor/Respondent No. 2. In the present facts of the case, there is no dispute that the Financial Creditor/Respondent No. 2 had extended term loans to the Corporate Debtor and DTDs were executed. However, no categorical material or proof has been placed on record to indicate that the Financial Creditor/Respondent No. 2, on the strength of the DTDs, gave any advice, direction or instruction to Director, Promoter or Manager of the Corporate Debtor and that the latter was accustomed to act accordingly. It is usual practice for lending institutions to keep a watch and safeguard their

investments. Hence even if the DTDs provided for appointment of a Monitoring Agent, it does not conclusively establish that the Corporate Debtor was accustomed to act on the directions or instructions of the Monitoring Agent. Without any cogent basis or concrete proof, to assume that the Corporate Debtor was acting on the advice, direction or instruction of the Financial Creditor, as has been contended by the Appellant, does not appeal to our reasoning.

18. As regards whether the conditions stipulated in the four sub-clauses of Section 5(24)(m) have been fulfilled or not, again there has to be tangible and specific material that the Appellant is required to produce to substantiate their standpoint on each of the subclauses distinctively and separately. We however notice that the Appellant merely adverted attention to the fact that DTDs contain certain clauses by virtue of which it can be inferred that Section 5(24)(m) is attracted, however, no further details have been provided to provide a foundational basis to their contention. Participation by the Financial Creditor/Respondent No. 2 in policy making process could have been possible only through Director of the Corporate Debtor which is not the case in the present matter. There is no sign of any evidence either before us to establish that Financial Creditor/Respondent No. 2 by their conduct participated in the policy making process of the Corporate Debtor. Nothing concrete has been placed on record which amplifies interference on the part of the Financial Creditor/Respondent No. 2 in the day to day functioning of the Corporate Debtor or in the appointment of managerial staff and employees of the Corporate Debtor. There is no material placed before us to either suggest that

essential technical information was exchanged between the Financial Creditor/Respondent No. 2 and the Corporate Debtor.

19. At this stage, we would also like to add that it is an undisputed fact that the Appellant by virtue of being a member of the class of creditors of Homebuyers was represented on the CoC through the AR of the Homebuyers. The AR of the Homebuyers had participated all through the CIRP process including at the stage of filing I.A. No. 2688/2023. Perusal of the CoC meetings shows that at no stage was the issue of related party status of the Respondent No. 2/Financial Creditor and Corporate Debtor voiced before the CoC. It is also an undisputed fact that the related party status was not raised in the reliefs sought or prayers made before the Adjudicating Authority while filing IA No. 2688/2023.

20. Given this position, that on both counts, that is, absence of material placed on record and lack of substantiation of pleadings made by the Appellant of related party status of the Financial Creditor/Respondent No. 2 and the Corporate Debtor, we are disinclined to subscribe to the bogey of related party issue raised by the Appellant. Having failed to adequately demonstrate the related party status of the Financial Creditor/Respondent No. 2, and the Corporate Debtor, we do not find any irregularity on the part of the RP in constituting the CoC with the Financial Creditor/Respondent No. 2 as a member thereof. This answers the first issue raised before us.

21. This brings us to the second contention of the Appellant that the Financial Creditor/Respondent No. 2 was assigned a higher vote share than

its entitlement. It is contended by the Appellant that the Financial Creditor/Respondent No. 2 had inflated its claim by adding penal interest to the outstanding principal amount and that this was wrongly admitted by RP thus wrongly imparting majority vote share to the Financial Creditor/Respondent No. 2. This contention has been effectively dealt by the Adjudicating Authority in the impugned order which is to the effect:

> *"10. We find that, during the course of argument in IA-3327 /2023, the Resolution Professional was asked to place on record detailed working of claim of R2 with supporting documents substantiating each component of their claim. During the argument, the bone of contention was limited to interest claimed on Penal Interest. The Counsel for R2 submitted that even if that amount is not considered, the vote share of R2 shall remain more than the minimum threshold required for approving the plan, hence, this objection is meaningless. We find merit in this argument and are of conscious that the issue of inflated claim is dealt by us separately in IA3327 /2023, where we had found no infirmity in the admission of claim of R2. Accordingly, we reject this contention."*

22. We have no cogent grounds to disagree with the above findings of the Adjudicating Authority. On going through the minutes of the CoC meetings, we find that since the 1st CoC meeting onwards, the RP had unceasingly placed on the agenda for discussion one Item which read as: "**Take note of the list of creditors who have submitted their claims and the status of verification of such claims**". The RP had in each CoC meeting ventured to apprise the CoC members on the statement of claims received and the methodology of arriving at voting rights of each financial creditor on the CoC. That the RP was working out the admitted claims of all the financial creditors

diligently and assigning them corresponding vote share is evident from the fact that while in the 1st CoC meeting, the vote share of the Financial Creditor/Respondent No. 2 was 99.52%, the same got reduced to 93.94% in the 6th CoC meeting and then further reduced to 88.95% in the 12th CoC meeting as against the vote share of the Homebuyers rising from 0.48% in the 1st CoC meeting to 11.05% in the 12th CoC meeting. In none of these CoC meetings, the AR had raised any objections either on the claims admitted in respect of the Financial Creditor/Respondent No. 2 or raised any objections on their vote share. Thus, to say that there was discriminatory treatment of the claims made by the Appellant as against what was offered to the Financial Creditor/Respondent No. 2 is clearly misconceived since the RP was diligently updating the claims and the corresponding vote share of the financial creditors. Not having pointed out any irregularity on the part of the RP in constituting the CoC with the Financial Creditor/Respondent No. 2 having majority vote share prior to the CoC approving the resolution plan, it cannot be agitated now at this belated stage when the resolution plan stands approved. Thus, to answer the second issue, the CoC is found to have been validly constituted based on the duly verified claims of the financial creditors, to which no objections were raised by the Appellant, we find no cogent reasons to hold the decisions taken by the CoC to be either irregular or invalid.

23. This brings us to the third issue as to whether the RP was actively following up the TMC reservation issue or not. When we examine the minutes of CoC meetings which have been placed on record in the Appeal Paper Book, it is clearly evident that all developments pertaining to TMC reservation has

been figuring right from the 6th CoC meeting onwards. On the steps taken by the RP with regard to the TMC reservation, we notice that the RP kept the CoC informed in a timely manner of the fact that TMC had passed a resolution declaring the subject parcel of land as reserved. The CoC was periodically kept apprised of the follow up steps taken by the RP in dealing with this issue which included visit to the TMC office and filing of an RTI application to find out the correct status of the reservation. The Resolution Professional had also taken up the matter through the architect to enquire about the reservation status besides seeking legal opinion on the matter and appointing a legal firm to seek appropriate legal remedy. Thus, the Resolution Professional cannot be held responsible for having suppressed any material fact pertaining to the TMC reservation issue from the CoC members including the AR. Keeping in mind the above-cited multifarious efforts made by the RP, the bonafide of the RP in this regard cannot be doubted. Hence, we do not find any infirmity or error in the findings recorded by the Adjudicating Authority in respect of the conduct of the Resolution Professional which is to the following effect:

> *"11…….We find from the minutes of 10th CoC meeting held on 10.3.2023 placed in IA 2319 of 2023 that the Resolution Professional had taken steps to find out the correct position relating to TMC reservations and have also filed an application to TMC for clarification on Development Plan vide letter dated 26.09.2022 through its Architect Sakaar Architects and also reminded TMC for withdrawal of said Reservation vide letter dated 26.12.2022. The Resolution Professional had also sought legal opinion from DSK Legal on23.12.2022 and had appointed M/s J Sagar Associates for filing appropriate writ petition."*

24. Having found no merit in the contention raised by the Appellant of the RP having mishandled the TMC reservation issue, we now like to dwell upon a related issue raised by the Appellant that since the TMC reservation issue was not handled properly by the RP, it led to a situation where majority PRAs had withdrawn and only a solitary bidder was left in the fray. It is also the case of the Appellant that their apprehensions in this regard were expressed by the AR in the CoC but the RP did not give due weightage to the proposal of the Homebuyers to go in for fresh round of bidding to create room for better offers.

25. When we look at the impugned order, we find that the TMC reservation issue and concerns expressed by the AR of the Homebuyers has been dealt at length by the Adjudicating Authority in the impugned order before holding that there is no merit in this argument of the Appellant. The relevant excerpts of the impugned order are as reproduced below:

> *"11. The other issue pertains to reservation of Thane Municipal Corporation (TMC) in respect of project land, over which the commercial/residential development was to take place. The applicant alleges that the R1, the Resolution Professional, should have approached appropriate legal forum to deal with the so-called reservation of TMC, and this negligence in seeking appropriate clarification in this respect caused other prospective Resolution Applicant to withdraw from the process, thus, leaving R3 as the only Resolution Applicant. The Applicant has stated that the* ***Home buyers have emphasized on option of continuing the project at old rates agreed with the corporate debtor, and the bids for the fresh Resolution Plan should be invited again*** *so that there would be more competition and better offers as opposed to the current offer in the discussion from 9th meeting of CoC held on 01.02.2023. We note that a joint meeting (at the request of home buyers) was scheduled amongst home buyers, the AR, the Resolution Professional and the Lead Lender to address the concerns*

of the home buyers, however, the Home-buyers insisted upon flat against their claim, and not the cash refund.

12. The Prospective Resolution Applicants, Successful Resolution Applicant, withdrew on account of TMC reservation, and no bias can be established merely on account of their act of withdrawal on account of facts pertaining to TMC reservation, ***as all the Prospective Resolution Applicants were shared all facts pertaining to this aspect without any additional advantage having been accorded to the Successful Resolution Applicant. It was not argued before us that the Successful Resolution Applicant knew what others didn't or the Successful Resolution Applicant was not told about such Reservation what others were told. Every Prospective Resolution Applicant is within its right to make a business decision based on its risk appetite and no collusion can be inferred merely from this fact.***

13. We also find that the issue of TMC reservation was argued at length during the other Objector's IA, and it was also found that, no notification inviting objections to the proposed acquisition has so far not been made by the Competent Authority, as ***the reservation over the Project Land is at the initial proposal stage. However, we find that the Town Planning Authority can take into account future proposals also while according to the approval to the building plan*** *as held in Indian National Trust for Art & Cultural Heritage & Ors. Vs. The State of Maharashtra & Ors., 2006 SCC Online Bom 527****.*** *Accordingly, we feel that there exists a doubt as whether the approval of Town Planning Authority will be after considering such proposed changes in the land use, which is still to be legally binding on the land-owners?* ***We note that the R3 has proposed 100% payment of principal amount during the course of argument and has filed an additional affidavit to this effect.*** *Since, a Resolution Plan is required to be certain as well as feasible, we feel that contemplation of flats to the home-buyers, as against proposed cash pay-out, will make the plan uncertain and will also put question mark on its feasibility. Accordingly, we do not find merit in this argument also.*

26. To examine the tenability of the findings of the Adjudicating Authority, we proceed to look at the sequence of events in the CoC meetings and the role

of RP in this context. We find that during the 6th CoC meeting, the AR had submitted that many Home buyers had requested the RP to communicate to the PRAs to allow existing Homebuyers to complete purchase of homes originally allotted to them on payment of balance consideration. In deference thereto, we find that the RP, based on these inputs received from the AR, had already uploaded the choice of the Home Buyers in the Virtual Data Room and communicated to PRAs to provide resolution to the claims of home buyers with options to get refund of amount paid or settlement of claims by way of allotment with balance consideration payable by homebuyers.

27. Further, the 7th CoC meeting held on 26.12.2022 in its minutes clearly records that RP had received only one resolution Plan from the SRA/Respondent No.3 and that CoC members requested RP to circulate the financial proposal of the plan after conducting compliance check which task was also complied to by the RP. The subsequent 8th CoC meeting held on 20.01.2023 notes that 21 PRAs had withdrawn from submitting plan proposal and that the comments of the CoC members including the Homebuyers as received on the plan of the SRA had been shared by the RP with SRA. It is also an undisputed fact that the RP requested the AR of Homebuyers in this 8th meeting of CoC to have a meeting with Homebuyers to discuss broad contours of the resolution plan of the SRA/Respondent No.3. Further both the 8th CoC meeting and the 9th CoC meeting held on 01.02.2023 noted that the AR of the Home Buyers had conveyed to the RP that the Home Buyers wanted an option in the resolution plan of continuing in the real estate project at the same rate that was agreed upon at the time of the allotment. It was

therefore decided that a joint meeting be held with the AR, RP, Financial Creditor/Respondent No. 2 as Lead Lender and the Home buyers. At all the stages outlined above, the RP had taken due note of the suggestions made by the AR of the Homebuyers and acted on these suggestions and there were no complaints made by the Appellant in this regard. Neither was any action taken by the RP which can be treated as patently collusive with the Financial Creditor/Respondent No. 2 or the SRA/Respondent No.3.

28. Meantime, since the 330 days of CIRP was ending on 30.03.2023, the RP placed the resolution for extension of CIRP by 60 days beyond 330 days so as to consider the resolution plan of the sole resolution applicant and this was approved by CoC members with 100% vote in the 10th CoC meeting held on 20.03.2023. This action of the RP was in order as it was in conformity with the timelines set by the IBC. It was reiterated by the AR of Homebuyers in this meeting that the Homebuyers wanted the SRA to accede to their option of continuing in the project at the same rate as agreed at the time of allotment failing which fresh bidding process be started. Accordingly, a meeting was facilitated by the RP between the Homebuyers and the SRA while also clarifying the position that it is the commercial call of the SRA while submitting their resolution plan.

29. During the 12th CoC meeting held on 18.05.2023, the AR requested the RP to discuss the possibility of further time extension of CIRP since the Homebuyers wanted the CoC with the help of RP to resolve the issue with respect the TMC reservation and initiate fresh bid process. However, the Financial Creditor/Respondent No. 2 had taken the view that since the

resolution plan of the SRA is legally compliant and the CIRP process has already been extended beyond the 330 days period, the plan submitted by them should be put to vote. The RP had accordingly put the resolution plan to vote which resolution plan was approved by 88.95% vote share in the 12th CoC meeting.

30. Given this factual position, as borne out from the CoC meeting proceedings, we do not find any reason to entertain any doubts in our minds about the impartial and professional conduct of the RP. The RP had provided adequate opportunity for the financial feasibility and viability of the plan proposal to be evaluated both by the Financial Creditor/Respondent No. 2 and the AR of Homebuyers. The RP cannot be blamed to have acted in a partisan manner or in such a manner so as to jeopardise the fate of the Homebuyers. Neither can it be held against the RP that he acted in collusion with the SRA or the Financial Creditor/Respondent No. 2. Merely because the Appellant was dissatisfied with the resolution plan, it does not entitle the Appellant to level such grave allegations of collusion on the part of the RP and the Respondents No. 2 and 3. The RP at all stages had facilitated the Homebuyers in raising their concerns and objections to the resolution plan through the AR and in fact also provided them the window of opportunity of taking up their issues with the SRA. Under such circumstances, but for bald assertions, there is nothing to show that there has been negligence or dereliction of duties and responsibilities cast on the RP which can be said to have caused any serious miscarriage of justice to the Appellant. We are of the considered opinion that no cause of action survives on this count.

31. This brings us to the last question before us as to whether the approval of the resolution plan by the Adjudicating Authority deserves to be set aside or the CoC approved resolution plan be sent back for the SRA/Respondent No. 3 to make necessary changes to the plan in the order to cater to the needs and demands of the Homebuyers as has been urged by the Appellant. To put the matter in perspective we may first notice the prayers of the Appellant which is as extracted below:

> *"A. That, the CoC approved resolution plan be rejected by this Hon'ble Tribunal and the application for the approval of CoC Approved Resolution Plan filed by the Resolution Professional shall be dismissed.*
>
> *B. That, the fresh bidding in the instant matter be ordered by the Hon'ble Tribunal.*
>
> *C. That, in alternative this Hon'ble Tribunal be pleased to send back the CoC approved resolution plan, and direct the Respondent No. 3 to make necessary changes to the plan in the order to cater to the needs and demands of the home buyers. Copy of the Minutes of Meeting of Home Buyers with Respondent No. 3 held on 25th March, 2023 is attached herewith as Annexure A10.*
>
> *D. That, the evaluation matrix should be suitably amended to provide for special attention to the needs of home buyers.*
>
> *E. That, the home buyers be required to contribute towards only those expenses which are approved and ratified by the homebuyers and not be bound to incur those expense which re approved by Respondent No. 2 on behalf of entire CoC.*
>
> *F. Any other suitable relief or direction which this Hon'ble Tribunal may consider appropriate in the facts and circumstances of the case. For this act of kindness, the Applicant herein shall every prayer.*
>
> *G. The Applicant states that this Application is filed with the limited information that has come to the notice or information of the Applicant. The Applicant craves liberty to add, amend, and modify the statements, averments and grounds*

mentioned herein. The Applicant craves leave to produce additional documents and details."

32. It is an undisputed fact that the resolution plan of the SRA has been approved by the CoC with requisite vote share. This resolution plan duly approved by the CoC with 89.05% vote share was placed before the Adjudicating Authority which has already approved the resolution plan. In the instant case, we find that when the resolution plan came up for consideration and approval before the Adjudicating Authority, the SRA improvised and upwardly revised its offer by way of an affidavit agreeing to pay 100% of the principal amount of the Homebuyers as against refund of approximately 40% of the claim amount admitted by the RP which was initially contained in the CoC approved resolution plan. This amount was acceptable to the Homebuyers and has not been objected to by any of the 77 Homebuyers. The orders of the Adjudicating Authority in I.A. 2319/2023 approving the resolution plan has not been challenged as can be seen from the prayers contained in the immediately preceding paragraph.

33. The moot question before us therefore is whether in the given circumstances, the Appellant as a disgruntled solitary homebuyer or at best representing 77 Homebuyers can raise objections against the collective business decision taken by the CoC approving the resolution plan of the SRA. In the present matter at hand, neither any contravention of law nor material irregularity has been brought on record. It is settled law that once the CoC has approved the resolution plan by requisite majority and the same is in consonance with applicable provisions of law and nothing has come to light

to show that the RP had committed any material irregularities in the conduct of the CIRP proceedings, the same cannot be a subject matter of judicial review and modification. In any case, quite apart from the fact that the resolution plan is already under implementation it has also not been controverted by the Appellant that all the 77 Homebuyers including the Appellant have accepted the offer of 100% of their principal amount from the SRA. That being the case, the Appellant being a dissatisfied Homebuyer in a hopelessly minority position, he has no option but to '*sail along*' or '*drag along*' with the overwhelming majority which has accepted the resolution plan in terms of the legal precepts articulated in the ***Jaypee judgement*** supra which is to the effect:

> *"212.... That is the purport and effect of 'drag along' or 'sail along' provisions in the scheme of the Code. .....*
>
> *214. The homebuyers as a class shall be deemed to have voted in favour of approval of the resolution plan of NBCC; and once having voted so, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. The statute, that is IBC, has itself provided for estoppel against any such attempted opposition to the plan by a constituent of the class that had voted in favour of approval. The misplaced assumptions on the part of dissatisfied homebuyers have gone to the extent that they have attempted to put themselves at par with the dissenting financial creditors like ICICI Bank, who carry an entirely different legal status in CIRP, for being not within the class of homebuyers and being of a different class of financial creditors. The said financial creditor has rightly opposed these submissions and has rightly pointed out that its rights in terms of Section 30(2)(b) of the Code stand at an entirely different footing."*

34. The intent, objective and purpose of IBC being time bound resolution of insolvency of the Corporate Debtor, it clearly does not provide any leeway or scope to dissatisfied individual Homebuyers in a minority like the present Appellant to override the commercial wisdom of the majority in the CoC. We not find any merit in the contention of the Appellant to reject the CoC approved resolution plan which has since been approved by the Adjudicating Authority. Any indulgence shown would tantamount to derailing the resolution process and setting the clock back which we cannot countenance.

35. For the foregoing reasons, we are of the considered view that there are no sufficient and plausible grounds made which warrant any interference with the impugned order. There is no merit in the appeal. The appeal is dismissed. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 19.03.2024
Ram N.