
(2023) 10 NCLT CK 0018

In the National Company Law Tribunal

Case No : IA-3327/2023 IN CP.IB.68(MB)2021

Godrej Properties Limited Vs Bhurgesh Amin & Ors ?

Date of Decision : 06-10-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 32A, 60(5)
Negotiable Instruments Act, 1881 — Section 142

Citation : (2023) 10 NCLT CK 0018

Hon'ble Judges : Kishore Vemulapalli, Member (J);Prabhat Kumar, Member (T)

Bench : Division Bench

Advocate : Nimay Dave, Yash Momaya, Samit Shukla, Maulik Bhansali, Ravi Kadam, Ayush J. Rajani, Khushboo Shah, Gaurav Joshi, Ekta Tripathi, Sahil Mahajan

Final Decision : Dismissed

Judgement

Prabhat Kumar, Member (Technical)

1. This IA No. IA-3327/2023 is filed by M/s Godrej Properties Ltd., whose claim was admitted in class of Homebuyers in the Corporate Insolvency Resolution process in the case of M/s Modella Textile Industries Limited ('Corporate Debtor') seeking:

a. Rejection of the Resolution Plan submitted by Respondent No. 2, i.e., the Resolution Applicant;

b. In alternate, Declaration that the DMA is valid, subsisting and a concluded contract which is binding on the Resolution Applicant and the Resolution Applicant is liable to make payment of all the contractual dues under the DMA to the Applicant;

c. In alternate, declaration that the amount paid by the Corporate Debtor under the said Cheque bearing No. 617046 dated December 27, 2018 are due and payable to the Applicant and is binding on the Resolution Applicant; and

d. stay of the hearing and disposal of Interim Application No. 2319 of 2023 for

approval of the Resolution Plan.

2. The present Application has been preferred by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") challenging, inter alia, the Amended Resolution Plan dated May 10, 2023 ("Resolution Plan") submitted by the Ashar Group ("Resolution Applicant"). The Resolution Plan is in ex facie violation of the provisions of the Code, and if approved, would cause great harm and prejudice to the Applicant in the present case.

3. The Applicant herein was appointed by the Corporate Debtor as the Development Manager for certain services qua the development of a plot of land bearing Survey No. 464,465A, 465, 466 situated at Village Panchpakhadi, Taluka Thane, District Thane (Project) under the terms and conditions mentioned under the Development Management Agreement dated 23.09.2017 (DMA). In consideration and upon execution, the Corporate Debtor had agreed to pay to the Applicant (i) an up-front development management fee of Rs.10,00,00,000/- (Rupees Ten Crores only); (ii) 10% of revenue in saleable area as the development management fee which shall be payable on monthly basis (iii) Development Managers overheads as defined under the DMA, on the terms and conditions as more particularly set out therein, more specifically detailed out in Clause 10.1.1 and 10. 1.2 of the DMA.

3.1. The Applicant herein has duly performed its roles and obligations under the DMA and was even the Promoter qua the project registered with Maharashtra Real Estate Regulatory Authority (MahaRERA) since the year 2019.

3.2. Applicant under the terms of the DMA raised various invoices towards its payments of overhead apportionment expenses towards the projects as well as miscellaneous expenses towards the Project on behalf of the Corporate Debtor. On 15th September, 2017, the Applicant issued its invoice bearing No. CI003000 of Rs. 11,80,00,000/- (Rupees Eleven Crores Eighty Lacs) towards Development Management Fees in accordance with Article 10.1.2 of the said DMA. Besides this, the applicant claims to have incurred various expenditures towards overheads and other miscellaneous costs for which invoices were raised from time to time. The Corporate Debtor is stated to have admitted receipt of these invoices, however, has failed to pay these amounts which are due and payable to the Applicant.

a) Tax Invoices for the period November 2018 — August 2019 for the expenses paid on behalf of the Corporate Debtor amounting to Rs.2,44,54,532/- (Two Crore Forty Four Lakh Fifty-Five- Thousand Five Hundred and Thirty Two only);

b) Tax Invoices for the period April 2018-September 2019 for overhead apportionment amounting Rs.4,12,59,171/- (Four Crore Twelve Lakh Fifty Nine Thousand One Hundred and Seventy One only):

c) Tax Invoices raised by TS Communication LLP amounting to Rs.3,30,25,676/- (Three Crore Thirty Lakh Twenty Five Thousand Six Hundred and Seventy Six):

and

d) Invoices raised towards legal fees amounting to Rs.91,10,850/- (Ninety One Lakh Ten Thousand Eight Hundred and Fifty Only).

3.3. The Corporate Debtor under the terms of DMA had issued a negotiable instrument being a cheque drawn on Union Bank at Mulund West branch bearing No. 617046 dated December 27, 2018 ("said Cheque"). The said Cheque was dishonoured by the Corporate Debtor and thus, pursuant to Negotiable Instruments Act, 1851, the Applicant herein has instituted SS Complaint No. 895 of 2019- before the 72nd Metropolitan Magistrate Court at Vikhroii under S. 138 read with Section 142 of Negotiable Instruments Act, 1851, which is pending adjudication and necessary summons/warrants have been issued against the Corporate Debtor, the Directors and the signatory of the said Cheque.

3.4. The Corporate Debtor failed to fulfil its obligations qua all its commitments including that of the Financial Creditor (Beacon Trusteeship Limited) which led to initiation of the Corporate Insolvency Resolution Process vide Order dated 4th May, 2022.

3.5. The Resolution Professional issued the Information Memorandum dated September 13, 2022, wherein the Applicant has been referred to as the Development Manager under the DMA. The RP through its Advocates issued a Public Notice dated August 25, 2022, inviting claims on the right, title and interest on the assets of the Corporate Debtor, wherein the Applicant herein through its Advocates raised its objections and made a categorical reference to the DMA stating that no third party rights ought to be created in respect of the said Premises, hampering the rights of the Applicant. It is a matter of fact, that the Resolution Professional was duly aware of the said fact.

3.6. It is also an admitted position that the DMA was never rescinded, cancelled or terminated by either of the Parties nor is hit by any of the provisions of the Code. Thus, the DMA is subsisting and binding upon the Corporate Debtor as well as the Resolution Applicant.

3.7. Despite the knowledge of the existence, subsistence and continuance of the DMA since the inception, the Resolution Applicant under the garb of "Other Approvals" under the Resolution Plan has illegally and unlawfully sought to terminate the DMA and even gone to the extent of extinguishing the continuing debts in form of the Negotiable Instruments in the Present case the Cheque, which have accrued and are to be accrued under the DMA.

3.8. In view thereof. the Resolution Plan has sought to infringe upon the contractual rights of the Applicant, which needs to be deleted, struck down and quashed by this Hon'ble Tribunal.

4. We heard the Counsel and perused the material available on record.

4.1. The Applicant has claimed that the DMA was never cancelled at any point of

time, hence the Resolution Professional's statement in the Credit Information Statement dated 16.05.2023 (IM) that the said DMA is cancelled but such assertion is without any evidence to show as to how the DMA was cancelled. The Applicant has further asserted its vested right in DMA stating that the Resolution Professional at all times was aware of the subsistence of the DMA and the cascading rights, covenants and obligations 'which are fastened on the Corporate Debtor under the DMA which were also duly informed to public at large under the IM, and that the said DMA is also uploaded on the MahaRERA website. which is easily accessible on the public domain. The Applicant drew our attention to the relevant clause in the Resolution Plan wherein it is stipulated that 'Any Development Management Agreement entered into by the Corporate Debtor shall stand cancelled, extinguished and/or terminated. No further liabilities in regard to any DM Agreement shall accrue to the Corporate Debtor', and 'Any Cheque/negotiable instrument 'issued by the Corporate Debtor shall be deemed to cancelled and cannot be enforced against the Corporate Debtor from the Effective Date'.

4.2. It is an admitted fact that the applicant had filed its claim in respect of amounts stated in the present application, which was admitted in part; has filed another Interlocutory Application No.3322/2023 in relation to partial rejection of its claim and the same is being disposed of by this Tribunal via separate order; and the amount under the said cheque claimed to be due and payable are included in the amount of claim admitted by the Resolution Professional as well as the amount of claim rejected and disputed before us. Accordingly, the prayer pertaining to Cheque does not survive. As regards relief from criminal action in relation to dishonour of cheque as stipulated in the Resolution Plan, we feel that this relief is otherwise covered under section 32A of the Code specifically. Hence, the applicant can not make it as basis for rejection of the CoC approved Resolution Plan.

4.3. As regards unilateral cancellation of Resolution Plan, we find that the applicant had collected certain sums from the prospective home-buyers by way of advance booking of Flats on the Project, and later on refunded the same to such Home-buyers after the Project could not take off. The said amount has been admitted as claim of the Applicant by the Resolution Professional under the class of Home-buyers, and there is no dispute on this fact. After having claimed the said amount as their claim, the applicant cannot plead any vested right in the saleable area of project, arising in its favor under the DMA.

4.4. Clause 21.3.1 of the Development Management Agreement provides for termination of the Agreement on account of "either Party being declared Bankrupt or becoming or being declared insolvent or has a receiver or manager appointed over all or substantially all of its assets..." Clause 1.1.8 defines "Bankruptcy" to "mean any matter in connection with any liquidation, dissolution, reorganization, Winding up, readjustment of debts, insolvency, bankruptcy, assignment for the benefit of creditors, administration or reorganization, action

to appoint or application for a consent to the appointment of, or the taking of possession by, a receiver, custodian trustee, liquidator, administrator, operating agency or similar officer for all or any part of a Person's assets or revenues" a case of proceeding under any applicable supervision of payments or bankruptcy laws or regulations; or a petition seeking to take advantage of any Applicable Law providing for relief of debtors".

4.5. The Corporate Insolvency Resolution process as contemplated in Insolvency & Bankruptcy Code stipulate change of management from the existing management to the Creditor driven process where an Insolvency Professional is appointed to manage the affairs of the Corporate Debtor under the superintendence and control of Committee of Creditors. This is akin to appointment of receiver/operating agency whereby the ownership and management of the Corporate Debtor is sought to be transferred to new owners/management in terms of approved resolution process.

4.6. The applicant's contention that certain rights got vested in it under the Development Management Agreement, and such rights can not be taken away by prescription in the Resolution Plan by the Successful Resolution Applicant. We find that the Applicant was entitled to 10% share in the saleable revenue of the developed project in lieu of Management Services to be provided by it under the DMA. However, no services came to be rendered, and the consideration for whatever services were rendered by the applicant till commencement of CIRP have been claimed by the Applicant as Operational Debt, which has been admitted in part and remaining is under adjudication before us. Hence, the consideration for the services provided under DMA stands discharged. The Applicant can not claim right to provide services in future also, and such right accrue to it only in terms of approved resolution plan. Accordingly, we do not find that stipulation of cancellation of Development Agreement violate any law, accordingly survive as a ground to reject the plan, as pleaded by the Applicant.

4.7. We find that the Hon'ble Supreme Court in the case of Jaypee Kensington Boulevard Apartments Welfare Association (2021) ibclaw.in 63 SC held so at para 103 of the decision after arriving at a conclusion that "the contract in question, the CA, even though not a statutory one, is nevertheless a contract entered into between the concessionaire and statutory authority, that is, YEIDA". The Hon'ble Supreme Court further held at para 171.1.1 that "In view of the above, all the contentions regarding operation of RERA and claim thereunder or any other claim for compensation or interest, when not standing in conformity with the approved resolution plan, deserve to be rejected. In fact, the question as to what kind of agreement should be entered into with financial creditors like homebuyers is essentially a matter falling within the arena of commercial decision; and needless to repeat that in the process of approval of a resolution plan, the factors related with commerce are left to the wisdom of the Committee of Creditors. When the Committee of Creditors has approved the proposals of NBCC in the resolution plan, the same cannot be tinkered with reference to the grievance of some of the

homebuyers about deprivation of adequate interest or compensation.....”.

4.7.1. From the above discussion we find that the Hon’ble Supreme Court had drawn a distinction between a commercial contract between parties, of which none is statutory authority, and contracts where one of the party is a statutory authority. We find that the ratio of decision is that while contract between parties where none is a statutory authority can be altered/modified by way of resolution plan, which is approved by requisite majority of CoC in its commercial wisdom. We also find that the resolution plan does not contemplate to modify the tripartite agreement where MHADA is one of the party. We find that this distinction is borne out from submissions at para 160.5 of the decision in the case of Jaypee Kensington Boulevard Apartments Welfare Association (Supra) which came to be upheld in later paras, the relevant part of which is reproduced hereunder –“It is also submitted that resolution plan can alter the contracts with financial creditors and the Code gives wide powers to the resolution applicant to modify financial and operational contracts so as to best serve the interests of all the stakeholders. It is submitted that, as per the proposal under the resolution plan, NBCC would construct and deliver the flats to homebuyers but would not be paying outstanding interests to any homebuyer, and such a proposition is permissible under Regulation 37(f) of CIRP Regulations, that permits a resolution plan to reduce any debts due to any creditors; and such an amendment to the contracts having been agreed to by the overwhelming majority of the CoC, remains binding on all the homebuyers”.

4.7.2. The Hon’ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association finally has concluded at Para 170 that “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”.

5. In view of the foregoing, we are of the considered view that the present IA-3327 of 2023 is deserves to be dismissed.