(2024) 04 NCLT CK 0031

In the National Company Law Tribunal

Case No : Interlocutory Application. No. 26 Of 2022 In CP(IBC)No. 2517/MB/C-II/2018

Rashmi Atlani — APPELLANT

Vs

Arun Kapoor — RESPONDENT

Date of Decision : 12-04-2024

Acts Referred:
Insolvency and Bankruptcy Code, 2016 — Section 30(2), 60(5)
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2024) 04 NCLT CK 0031

Hon'ble Judges : Kuldip Kumar Kareer, Member (J);Anil Raj Chellan, Member (T)

Bench : Division Bench

Advocate : Nitish Bangera, Amir Arsiwala, Nupur Shah, Vidit Divya Kumat.

Final Decision : Disposed Of

Judgement

Kuldip Kumar Kareer, Member Judicial.

1. This is an application filed by the Applicant under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (‘Code’) seeking following reliefs:

a. To not approve the resolution plan until flat buyer’s issues are being resolved;

b. Name of the Applicant be included in the list of flat buyers;

c. The Applicant be allotted Flat No. 1103 Georgia or any other alternate flat along with covered car parking in her name;

Case of the Applicant in brief:

2. The Applicant had bought Flat No. 1103 in building named Monarch Brookefields and Wing-Georgia, built by the Corporate Debtor, vide Registered Agreement for Sale dated October 21, 2016 for purchase of the flat for a purchase consideration of INR 43,00,000/- (Rupees Fourty-Three Lakhs only).

3. By an Order dated 27th September, 2019 passed by this Hon’ble Tribunal, the

Corporate Insolvency Resolution Process ('CIRP') was initiated against the Corporate Debtor. The Applicant had filed his claim with the IRP/RP of the Corporate Debtor and the claim was admitted and the name of the Applicant was reflected at Serial No. 230 against Flat No. 1103 in the List of Buyer. However, as per the approved resolution plan in 13th CoC Meetings dated 15.11.2021 and 19.11.2021, the Applicant is only entitled to 25% of the claim amount and not entitled to any flat. Hence this application.

4. Reply of the Respondent: The Respondent has filed his Reply in the above-captioned matter on Affidavit dated 22nd March, 2022. The contentions placed by the Respondent are briefly stated as under:

I. It is not the case of the Applicant that the approved resolution plan is illegal, unlawful or in contravention of section 30(2) of the Code. The real grievance of the Applicant appears to be that she will only be entitled to 25% of her admitted claim under the terms of approved resolution plan. Therefore, this is essentially a challenge to the commercial/business terms as set out in the approved resolution plan.

II. It is submitted that the financial creditors belonging to the class of homebuyers have collectively voted in favour of the approved resolution plan and therefore, it is not open to the Applicant to seek to individually challenge the same at this belated stage. It is now settled position of law as per the decision rendered by the Hon'ble Supreme Court of India in Jaypee Kensington Boulevard Apartments Welfare Association & Ors. v/s. NBCC (India) Ltd reported in (2022) 1 SCC 401, that an individual creditor belonging to a class of creditors does not have any locus standi to challenge a resolution plan when the class as a whole has already voted in favour of the same resolution plan.

III. It is an admitted position that the Applicant had paid a sum of Rs. 43 lakhs to the Corporate Debtor for acquiring a residential flat and for this reason, she has been recognised as a financial creditor belonging to the class of allottees. While the Applicant has a registered agreement for sale, it is an admitted position that the Corporate Debtor did not have the permission to construct 11th floor in building wing named Georgia. The permission to construct any floor beyond the 09th Floor was withdrawn by the concerned municipal authority and this fact is not in dispute. As per the approved resolution plan, the allottees are divided into three categories viz. Category A, Category B and Category C. The Applicant falls under Category 'C' whereby the flat purchasers falling under this category are those who either do not have any registered agreements in the favour, or who have registered agreements which were executed after the flats allotted to them became illegal/unlawful under the revised sanctioned plans. These flat purchasers would be entitled to 25% of their admitted principal claim at the end of the term of the approved resolution plan. Alternatively, they may choose to purchase new flats from the resolution applicant at prevailing market rates in which case they would be entitled to credit of 25% of their admitted principal amount.

IV. It is reiterated that it was not the Respondent's decision that the Applicant be entitled to only for 25% of the claim amount, but rather it is the business decision of the resolution applicant which has been approved by the CoC. It is not open to the Applicant to seek to challenge the commercial wisdom of CoC at this stage, especially when she herself is the member of CoC. While the Applicant had paid Rs. 43 Lakhs towards the purchase of flat, her claim has been admitted to the extent of Rs. 63,03,803/- which includes interest in accordance with the provisions of IBC.

ANALYSIS AND FINDINGS

5. We have heard the learned counsels for both the parties and perused the record.

6. Counsel for the Applicant submits that the Applicant is entitled to possession in an alternate flat for which permission has been received, though only a claim had been filed by the Applicant. Counsel for the Applicant submits that 11th floor on which the Applicant had booked the flat, turned out to be illegal since permission for the same was withdrawn. However, the Applicant cannot be punished for acts of illegalities on the part of builder/Corporate Debtor. Counsel for the Applicant submits that the acts of cancellation of allotment and refund of money that too only to the tune of 25% of the admitted claim, both by the RP, are patently illegal and the Applicant is still entitled to allotment though the flat in question turned out be illegal for no fault of the Applicant.

7. Counsel for the Respondent/RP submits that the Applicant had sought to acquire a flat in the project of the Corporate Debtor which did not exist as no permission was received or obtained for that entire floor. The Applicant cannot be equated with other allottees as it is a debatable question whether the allotment of an illegal unit could amount to "allotment" in law at all. Thus, according to the ld. Counsel, the Applicant cannot be treated at par with other homebuyers who have a genuine claim against sanctioned units in the project. Counsel for the Respondent submits that it is not the case of the Applicant that the approved resolution plan is illegal, unlawful, or in contravention of Section 30(2) of the Code in any manner. Therefore, the ld. Counsel submits that the proposed payment to be made to the Applicant, who is classified in Category 'C' to the approved resolution plan, only to the tune of 25% of the Applicant's admitted claim out of the proceeds of resolution plan, is a business decision based on commercial considerations and therefore, the same is not amenable to judicial review by this Tribunal. Hence, the instant application should be dismissed.

8. We have meticulously examined the submissions canvassed across the bar on behalf of the Applicant as well as the Respondent and having heard those submissions and after going through the records, we give our findings hereinbelow.

9. By way of this application, the Applicant herein is seeking prayers to stay the resolution plan which has been approved by the CoC and not to approve the

same until flat buyer's issues are resolved, and for the allotment of Flat No. 1103 in project 'Georgia' or any other alternate flat in the said project with covered car parking in the name of the Applicant.

10. We find that the Applicant's claim was admitted by the Respondent during the CIRP of the Corporate Debtor to the tune of Rs. 63,03,803/-, out of which the principal amount is Rs. 43,00,000/- and remainder is interest on principal in accordance with the provisions of Code. The resolution plan submitted by one M/s. Planet Builders and Developers was approved by the CoC in its 13th Meeting held on 15.11.2021 and 19.11.2021. It is not the case of the Applicant that the approved resolution plan is illegal, unlawful, or in contravention of Section 30(2) of the Code in any manner. The Applicant has not challenged her categorisation in the resolution plan, but only inter-alia prayed for allotment of flat in the real estate project, 'Georgia', which was constructed by the Corporate Debtor.

11. As per the terms of the approved resolution plan, the Applicant has been classified as Financial Creditors in a Class belonging to the allottees, wherein the Applicant has been categorised in Category 'C'. The criteria to be classified in Category 'C' is either payment should have been received towards flat which had valid Commencement Certificate ('CC') at the time of purchase but registered after the amended CC or allotted but remained unregistered, or payment were received towards flats with invalid CC irrespective of being registered or unregistered. As per the proposal, these flat buyers will be paid 25% of their admitted principal at the end of the plan i.e. T+730 days. The flat buyers can also opt to purchase new flats after approvals for balance/additional or future FSI from the Resolution Applicant at prevailing or current market rates in case of which 50% of their admitted principal will be adjusted towards the new deal. All of these decisions have been taken and approved by the CoC in its commercial wisdom and therefore, in the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of CoC; and there is no scope for substituting any commercial term of the resolution plan approved by CoC. Hence, on this ground alone, the present application deserves to be dismissed.

12. The Respondent has stated in his reply that financial creditors belonging to the class of homebuyers have collectively voted in favour of the approved resolution plan and, therefore, it is not open to the Applicant to seek to individually challenge the same at this belated stage. This fact has not been disputed, denied or rebutted by the Applicant as no rejoinder has been filed by the Applicant. The Hon'ble Supreme Court of India Jaypee Kensington Boulevard Apartments Welfare Association v/s. NBCC (India) Ltd reported in (2022) 1 SCC 401 has observed at Para 211 of the Judgment that there is no scope for any homebuyer arrogating 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. The Hon'ble Apex Court has further observed at Para 214 that once the homebuyers as a class

having voted in favour of approval of the resolution plan, any particular constituent of that class cannot be heard in opposition to the plan by way of objection or appeal. Hence, in view of the judgment of the Hon'ble Supreme Court in Jaypee Kensington Boulevard Apartments Welfare Association (supra) and in view of the facts and circumstances of the instant case, we are of the considered view that the Applicant has no locus in raising objection to the resolution plan since the class of allottees to which the Applicant belongs, have already voted in favour of the impugned resolution plan.

13. In view of the above findings, we are not inclined to allow this application and accordingly, I.A. No. 26 of 2022 in the above-captioned petition, being devoid of merit, is hereby dismissed with no order as to costs.