(2020) 06 NCLT CK 0055

In the National Company Law Appellate Tribunal

Case No : Interlocutory Application Nos. 2504 Of 2019, 5, 2056, 2208 Of 2020 In (IB) No. 755 (PB) Of 2018

SCSL Buildwell Private Limited APPELLANT

Vs

Pal Infrasturcture And Developers Pvt. Ltd RESPONDENT

Date of Decision : 26-06-2020

Acts Referred:
Insolvency And Bankruptcy Code, 2016 — Section 21(6A), 25A, 25A(3A)

Citation : (2020) 06 NCLT CK 0055

Hon'ble Judges : B.S.V. Prakash Kumar, J;Hemant Kumar Sarangi, Member (Technical)

Bench : Division Bench

Advocate : Gyanendra Kumar, Dilip Kr. Niranjan, Gaurav Mitra, Kanishk Khetan, Nipun Gautam, Ganga Ram Aggarwal, Sangeeta Budhiraja, Yashavi Virendra

Final Decision : Dismissed

Judgement

B.S.V. Prakash Kumar, J

IA No. 2504 of 2019 & IA No. 2056 of 2020

1. In the wake of unprecedented and uncertain situation due to outbreak of the Novel Corona virus (COVID-19) and considering the advisories issued by the Government of India, this application for urgent hearing in I.A. No. 2504 of 2019 has been heard through video conferencing to maintain social distancing. The parties are being represented by the respective counsels through video conferencing, following the norms of social distancing/physical distancing in letter and spirit.

2. It is an application filed for urgent hearing in I.A. No. 2504 of 2019 sought for the correction of voting results wrongly computed by the IRP in violation of Section 25A(3A) of Insolvency and Bankruptcy Code (for brevity 'the Code') and for appointment of Mr. Ganga Ram Agarwal as Resolution Professional in the place of present IRP. For this application despite listed on 15.11.2019,

22.11.2019, 11.12.2019, 08.01.2020, 29.01.2020, 11.02.2020, 20.02.2020, 16.03.2020 and on 20.04.2020, it has not been adjudicated till date owing to the objections raised by this IRP and other Homebuyers who voted against the approval for replacement of the present IRP. Looking at the inordinate delay taken place in hearing this application for appointment of RP in the place of IRP and CIRP proceedings have not been proceeded any further in view of this situation, we hereby allow this application for urgent hearing and heard I.A. No. 2504 of 2019.

3. In I.A. No. 2504 of 2019, the counsel appearing on behalf of three Allottee Associations has stated that in the second CoC meeting, the class of Allottees (Homebuyers) comprised of 72.394% voting in the CoC voted for replacement of the IRP with the RP aforementioned with a voting share of 38.92% of the class of allottees comprising of 72.394%.

4. But whereas the IRP has not moved an application for replacement on the premise that the allottees voted in favour of the approval is far below 66% of voting share of the total voting without taking Sub Section 3(A) of Section 25A of the Code into consideration though it has been specifically stated in the said Section that if a decision is taken by a vote of more than 50% voting share of the financial creditors of a class represented by Authorized Representative, the vote cast by the Authorized Representative on behalf of the Respective class is to be treated as 100% voting on behalf of Respective class of financial creditors who voted for more than 50% in favour of the approval. The applicant counsel has further stated that the removal of IRP is complete discretion of the CoC and the same required no reason or justification to be recorded in this regard. The counsel has also placed the ratio decided by Hon'ble the Supreme Court in Pioneer Urban Land and Infrastructure Ltd. v. Union of India (Writ Petition (Civil) No. 43 of 2019, decided on 09.08.2019) to say that whenever a class of creditors voted for more than 50% then such voting shall be treated as 100% on behalf of the Respective class.

5. As against this submission, the IRP has submitted that out of total Homebuyers not even half of them were present at the time of voting for replacement of the IRP, therefore though more than 50% voting has come out of the allottees attended to the meeting, it cannot be construed as 100% voting on behalf of the class of Homebuyers. He has further stated that the other financial creditors comprised of remaining 23% having voted against the resolution for replacement of IRP and for appointment of Mr. Ganga Ram Agarwal as Resolution Professional, therefore this voting shall not be taken into consideration for approval of replacement of the IRP with Mr. Ganga Ram Agarwal as Resolution Professional.

6. When this Bench has asked the IRP as to whether meeting has taken place and voting has been done as stated by the applicant counsel, the IRP has conceded that in the second CoC meeting resolution was proposed and voted as stated by the applicant counsel.

7. On looking at this factual scenario against the legal proposition envisaged under the Code, it is evident that if a class of creditors represented by Authorized Representative voted for more than 50% on a resolution, such voting is to be considered as 100% by the respective class of creditors in the resolution passed by the CoC. In this case, for the class of creditors were present in the meeting voted for more than 50% for replacement of IRP with the RP, such approval with more than 50% shall be treated as 100% on behalf of the Homebuyers to the resolution passed by the CoC as contemplated under Section 25A(3A) of the Code which is as follows:

"Section 25A(3A)

Notwithstanding anything to the contrary contained in sub-section (3), the authorised representative under sub-section (6A) of section 21 shall cast his vote on behalf of all the financial creditors he represents in accordance with the decision taken by a vote of more than fifty per cent, of the voting share of the financial creditors he represents, who have cast their vote."

8. In support of the aforesaid proposition, the applicant has also relied upon Pioneer Urban Land and Infrastructure Ltd. (supra) in para No. 55 which is as follows:

.... Given the fact that allottees may not be a homogenous group, yet there are only two ways in which they can vote on the Committee of Creditors - either to approve or to disapprove of a proposed resolution plan. Sub-section (3A) goes a long way to ironing out any creases that may have been felt in the working of Section 25A in that the authorised representative now casts his vote on behalf of all financial creditors that he represents............"

9. In view of the aforesaid legal proposition and the existing factual situation, we are of the view that no further enquiry is required, therefore we arrive to a conclusion that the resolution passed by the CoC is with more than 66% for approval of the replacement of IRP with RP, hence this application is hereby allowed for replacement of Mr. Dilip Kumar Niranjan (IRP) with Mr. Ganga Ram Agarwal as RP. Accordingly, this I.A. No. 2504 of 2019 is hereby allowed by appointing Mr. Ganga Ram Agarwal as RP.

IA No. 5 of 2020 & IA No. 2208 of 2020

10. It is an application filed by an association namely Pal Allottee Welfare Association & Ors. saying that it is representing 300 home buyers of the corporate debtor. It has further stated that the insolvency professional approved as resolution professional by the CoC to replace IRP is not reasonable by new RP by this bench for the following reasons:-

1. The class of home-buyers represented by AR have not given 100 % voting to appoint Mr. Ganga Ram Agarwal as RP, therefore, unless 100 % voting has been given for appointment of the RP, the voting made by the AR on behalf cannot be construed as 72 % on behalf of the home buyers.

2. Since, the person filed for approval of proposal of appointment of RP being a person indulged in embezzlement of funds of the respective home-buyers association, the application filed by the said person for approval of appointment of IRP shall not be considered.

3. For the person proposed to be appointed as RP being the partner of M/s. AAA Associate, a firm dealing with insolvency and Bankruptcy and the owner of the M/s. AAA Associate owns a flat in PAL Garden Sector 89, Faridabad Project, therefore he shall not be appointed as RP.

11. As against these points, the counsel appearing on behalf of the applications filed for appointment of RP has stated that this applicant has not obtained any vakalatnama from any of the home-buyers whom he alleged to have been representing, it is signed by a person on behalf of the so called home-buyers association, therefore, this applicant will not have any locus to represent 300 home buyers of the corporate debtor. He has also stated that it is not the case of this applicant that these home-buyers have made claim applications as on the date CoC gave approval for appointment of RP in the place of IRP.

12. There is no application by the IRP stating that the AR has given incorrect information to the CoC as to voting of home-buyers for approval of the RP

13. In the back drop of these facts, admitted position is these 300 so called home-buyers have never given any vakalatnama or authorised the person giving vakalatnama to represent them before the Bench.

14. Since the IRP himself stated that as on the date of CoC meeting, only 375 home-buyers claim applications are admitted and the IRP having no objection to the number given by AR showing how many home buyers voted in favour of approval of the RP and how many against the RP and how many abstained from voting. For there being no objection over the figures given by the AR, it is evident that out of 375, 371 home buyers participated in the voting, wherein more than 50 % voted in favour of appointment of RP in place of the present IRP. Since, more than 50 % of the class of home buyers voted for approval for appointment of the RP, this approval shall be construed as 100 %, on this understanding, since the proposal for appointment of RP has been approved with more than 50 per cent, the voting done by the home buyers shall be considered as 100 % voting, therefore, there is no merit in saying requisite approval is not present for proposal of appointment of RP by the CoC.

15. Since these home buyers who are said to have made their claims after the CoC meeting for approval of resolution for appointment of the RP, subsequent claimants making an allegation against past action cannot invalidate the decisions taken by the CoC. Moreover, it appears all these advocates file vakalatnamas on behalf of associations without having any vakalatnama directly from the respective home buyers. The IRP who is supposed to remain neutral, has come against the CoC as if he has personal interest in the affairs of the CD.

16. It is evident on record that if any allegation is there against the proposed RP, if at all they have any strength for change of the RP, they can place their proposal before the CoC with 33 per cent to pass a resolution for replacement of the RP but not by making bald allegation and not allowing this bench to pass orders for more than 6 months. By this litigation, for the last six months there is no progress in CIRP, in view thereof this application is hereby dismissed as misconceived.

