

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH**

I.A.No.63 of 2021

U/Ss.30, 31 of IBC, 2016

I.A.Nos.43 & 89 of 2021

U/s. 60(5) R/w Sec. 30 (3) of IBC, 2016

In

C.P.(IB)No.389/BB/2019

In I.A.No.63/2021

Ms. Ramanathan Bhuvaneshwari
Resolution Professional of
M/s. Skylark Mansions Pvt. Ltd.
R/o. C-006, Pioneer Paradise,
24th Main Road, 7th Phase,
J.P.Nagar,
Bengaluru – 560 078

- Applicant/RP

In I.A.Nos.43 & 89 of 2021

Between:

ICICI Bank Limited,
6th Floor, Sobha Peal,
No.1, Commissariat Road,
Bengaluru – 560 025 & Anr.

- Applicants

And

Skylark Mansions Private Limited,
Project - Skylark Ithaca,
Through IRP
Mrs. Ramanathan Bhuvaneshwari,
R/o. at Skylark Chambers,
No.37/21, Yellappa Chetty Layout,
Ulsoor,
Bengaluru – 560 042

- Respondent

Date of Pronouncement: 21st April, 2021

Coram: 1. Hon'ble Shri Rajeswara Rao Vittanala, Member (Judicial)
2. Hon'ble Shri Ashutosh Chandra, Member (Technical)


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Parties/Counsels Present:**In I.A.No.63/2021**

Resolution Professional : Mrs. Ramanathan Bhuvaneshwari

In I.A.Nos.43/2021 (through Video Conference):

For the Applicant : Shri Sajjan Poovayya, Senior Counsel

For the Respondent : Mrs. Ramanathan Bhuvaneshwari, RP

In I.A.No.89/2021:

For the Applicant : Shri Manu Kulkarni a/w.
Shri Dharmendra Chatur

For the Respondent : Mrs. Ramanathan Bhuvaneshwari, RP

COMMON ORDER

Per: Rajeswara Rao Vittanala, Member (J)

1. I.A.No.63 of 2021 in C.P.(IB)No.389/BB/2019 is filed by Mrs. R. Bhuvaneshwari, Resolution Professional of M/s. Skylark Mansions Pvt. Ltd. (Applicant), Under Sections 30, 31 & other applicable provisions of the IBC, 2016, by inter alia seeking to approve the Resolution Plan submitted by M/s. B & B Infrastructure Ltd., which was duly approved by the CoC holding voting share of 85.55%; to direct the Suspended Directors of CD and the Promoters to cooperate in providing all the information, documents with respect to the project, including complete handing over of the site, handing over the original copies of all the approvals with respect to the project and all other information, for smooth taking over by the Successful Resolution Applicant etc.
2. I.A.Nos.43 of 2021 is filed by ICICI Bank Limited & Anr. (Applicants), U/s. 60(5) R/w Section 30 (3) of the IBC, 2016, by inter alia seeking to order, adjudge and declare that Resolution plans submitted by Mr. Kamal Pasha and Mr. Fahad (consortium) and B&B Infra are illegal and contrary to the provisions of Code, the Rules and Regulations made thereunder; to set aside the decision of the RP to accept the Resolution Plans submitted by

Mr. Kamal Pasha and Mr. Fahad (consortium) and B&B Infra for further consideration by the Committee of Creditors; to set aside the emails dated 11.02.2021 issued by the Respondent sharing the Resolution Plans with the Members of the CoC in CIRP of Skylark Mansions Private Limited- Project Skylark Ithaca etc.

3. Subsequently, they have filed another Application vide I.A.No.89 of 2021, U/s. 60(5) R/w Section 30 (3) of the IBC, 2016, by inter alia seeking to order, adjudge and declare that the Resolution Plans submitted by B&B Infrastructure Limited and approved by the CoC in the 10th meeting held on 17.02.2021 is illegal and contrary to the provisions of IBC, the Rules and Regulations made thereunder; to set aside the decision of CoC in its 10th meeting held on 17.02.2021 to approve the Resolution Plan of B&B Infrastructure Limited.
4. Brief facts of the case, as mentioned in I.A.No.63/2021, which are relevant to the issue in question, are as follows:
 - (1) Initially, C.P.(IB)No.389/BB/2019 filed by M/s. Skylark Ithaca Buyers Welfare Association (Petitioner/Financial Creditor), U/s. 7 of the IBC, 2016 was admitted by the Adjudicating Authority, vide its Order dated 07.02.2020, by initiating CIRP in respect of the Corporate Debtor; appointing Applicant as the IRP; imposing moratorium etc. In pursuant to the Admission Order, she made public announcement in Form- A on 21.02.2020, in the Regional News Paper (Vartha Bharati) and English Newspaper (Business Standard), inviting claims from Creditors of the Company. Subsequently, IRP was confirmed as RP in the 1st meeting of CoC was held on 17.03.2020.
 - (2) The Applicant noticed sizeable funds diverted from the project Skylark Ithaca to the CD and the related Parties. As the promoters did not cooperate in providing details of funds

diverted and also the assets purchased, the RP appointed Forensic Auditors Mazars Advisory services, to conduct a forensic audit. Even to the forensic Auditors, the Suspended Directors refused to provide all the information required. Even the CoC Member ICICI Bank being the Secured Financial Creditors refused to provide Bank statements of CD to conduct money trail with respect to funds diverted from the project Skylark Ithaca. Based on the Bank statements of the project Skylark Ithaca, the forensic Auditors had to conclude the audit and submitted the report in January 2021.

- (3) There is a clear entry in the Audited Financials of CD as well as in the project financials to the extent of Rs.113 Crores of collections from Home buyers diverted for purchase of land Bank in Hirandanahalli village, which is 8 kms away from the present project site. Additionally, around Rs.95 Crores consisting of loan funds/collections from home buyers were diverted, which was established in the money trail through Forensic Audit report. Accordingly, the Resolution Professional filed an Application U/S.66 to get back full amount of Rs. 208 Crores, which was diverted from the project, in order to make the Resolution Plan on the project Skylark Ithaca viable.
- (4) The RP appointed 2 sets of valuers, namely, Mr.Ranganath for Land and Building, Mr.Subbarao, for Financial Assets and Ms.Android for Land Building/Financial Assets, as per the provisions of IBC to value the assets of Corporate Debtor was informed to the COC.
- (5) In response to Invitation for EOI published on 16.11.2020, the Resolution Professional received 15 enquiries, which were responded by sending Detailed Invitation for EOI along with Eligibility/Ineligibility Criteria. Based on the same, Expression of Interest (EOI) was received from 4 interested PRAs as on 8.12.2020, being the last date for submission of EOI. The



Applicant/Resolution Professional verified the documents submitted along with EOIs received to confirm the Eligibility/Ineligibility criteria so to ensure compliance with Section 29A and other applicable provisions of the Code. As the EOIs met all the Criteria, 4 PRAs were shortlisted to submit Resolution Plan to CoC. The last date for submission of Resolution Plan was 22.01.2021. However, based on the request of two PRAs for extension of time, further time period was allowed till 30.01.2021.

- (6) The RP received 3 Resolution Plans on 30.01.2021. After, circulating the Resolution Plan to all the stakeholders the 8th CoC meeting was held on 2.2.2021 for discussion of the Resolution Plan. Following process was followed by CoC to negotiate with RAs. The 3 RAs, made their presentations, wherein inter alia are as follows:
- a) The CoC meeting was continued to the next day, the 3rd February as the Resolution Applicant B and B Infrastructure Ltd., could not complete the entire presentation of Resolution plan.
 - b) The Resolution Applicants were given time to amend their Resolution Plan with respect to various financial and other plans on or before 5.2.2021.
 - c) Meanwhile, the Financial Creditors and Home buyers also held further negotiations with the RAs and the amended Resolution Plans were submitted on 11.2.2021.
 - d) The modified Resolution Plans submitted were discussed by the CoC Members. The RP had prepared a comparative summary of all the criteria as set in Eligibility criteria, Evaluation Matrix and also the compliance of the mandatory conditions, etc, which was discussed in the 9th meeting of CoC on 11.02.2021.
 - e) As the RA - BSCPL (Aishu Dreamlands Pvt. Ltd.) did not agree for the mandatory conditions proposed by CoC,



namely, financial contribution from the RA, CoC continuing as monitoring committee and also the concept of joint signatory with respect to the release of the collections made from the Home buyers for construction. Hence, CoC decided to drop the proposal from submitting for voting and it was decided to put up the remaining 2 Resolution plans for E-voting etc.

- (7) The RP restricted to the project Skylark Ithaca. This is a Residential project constructed on a 19 Acres, 27 Gunte land parcel. The land belongs to various landowners, who provided Power of Attorney to the CD Skylark Mansions Private Limited, to construct the Residential flats. The Joint Development Agreement (JDA) was also entered into between the land owners and SMPL. The area approved for construction by BDA was 14,68,530 sq.ft, of which constructed area of 507,622 sq.ft was allocated to the landowners as consideration for the land provided. Constructed area 14,68,730 sq.ft was agreed as Development share. The average share of the Landowner and Develop works out to 28:72.
- (8) The Resolution plan inter alia provides the following to stakeholders of CD:
- a) Resolution for Home Buyers: Flats to be constructed and hand over as per sale agreement entered into already. The Home Buyers to pay a sum of Rs.1,250/- (Rupees One Thousand Two Hundred and Fifty Only) per sq.ft. of Saleable Area to the Resolution Applicant towards escalation cost of construction, over and above the remaining sale consideration payable by the Home Buyers.
 - b) Provision towards Exit Buyers: The Exit Customers, as per the list shared by in IM, shall be paid back the Principal Amount, after the Occupation Certificate is received, this amount shall be paid from the Sale Proceeds of the respective apartment to the new buyer.



- c) Provision towards Secured Financial Creditors, irrespective of their voting for/against the Resolution: Since the subject Project is getting completed with the further contribution of the Home Buyers, there is no money to repay the Institutional Creditors/financial institutions. As per Valuation report, the liquidation value works out to Rs. 111.42 crores. The Dues of Financial Creditors as per Section 53 waterfall mechanism is fully provided for, out of the funds recovered under from the avoidable transactions of Rs.208 crores. Balance, if any, left out of recovery shall be paid to other Financial Creditors, namely Home buyers and others in the Que.
- d) Provision towards Landowners: The Land Owners, as per their sharing agreement hold 28% of Developed Area in the Project which is arrived at 507,612 square feet (approximately 455 apartments). As the project was stalled for several years and the revenue is uncertain, to make the project viable, the Land Owners shall pay a sum of Rs.1,000/= (Rs. One Thousand Only) on their share of Saleable Area (507,612 Square Feet).
- e) Full amount admitted for Secured Financial creditors (ICICI Bank Ltd. and ICICI Home Finance Ltd.) out of recovery of Rs. 208 crores of avoidable transactions, irrespective of the nature of their voting.
- f) Other Financial Creditors - Home Buyers including Exit customer: Even though there is no amount eligible under the Section 53, waterfall, Resolution plan is to construct residential flats and handover the same. Any amount recovered out of the avoidable transaction, if any, eligible shall be returned to the Home buyers, as per waterfall mechanism.



g) Eligibility as per Section 53 waterfall mechanism, based on liquidation value and the amount provided accordingly in the plan is as below:

Sl No.	Creditor details	Nature of Creditors	Claims admitted Rs.	S.53 Waterfall – Amount Eligible Rs.	Resolution Plan approved
1	CIRP cost in full	Cost approved	1,00,00,000	1,00,00,000	Fully provided as upfront payment
1	ICICI Bank Ltd	Secured (Relinquished the Security)	1,10,28,11,280	1,08,50,84,568	Amount admitted fully provided from avoidable transactions of Rs.208 Crores
2	ICICI Home Finance Ltd	Secured (Relinquished the Security)	1,94,59,529	1,91,46,734	Amount admitted fully provided from Avoidable transactions Rs.208 Crores
3	Home Buyers	Unsecured	6,59,20,44,511	0	First shall be constructed and handed over to Home Buyers, by collecting additional contribution of rs.1250/- sq.ft. from Home Buyers. Any amount, recovered after meeting FCs claim as above shall be distributed.
4	HDFC – on behalf of Home Buyers	Unsecured	5,39,75,376	0	First shall be constructed and handed over to Home Buyers, by collecting additional contribution of Rs.1250/- sq.ft. from Home Buyers. Any amount, recovered after meeting FCs claim as above shall be distributed.
5	Operational Creditor	Unsecured	83,14,84,208	0	Nothing provided as there is no money left out.
	Total Distributed as per S.53		8,60,97,74,904	1,11,42,31,303	

(9) The Resolution Professional conducted 9th CoC meeting on 11.02.2021. In this meeting it was decided to go for e-voting from 13.02.2021 to 17.02.2021 and simultaneous voting of 2 Resolutions. Out of the Class of Creditors (home buyers), 82.67% were present and have cast their vote, of which 89.10% (of 82.67% present and voted) of the



Home Buyers who have cast their vote by VOTING FOR the Resolution 1 and accordingly, the AR cast his vote of 84.86% on behalf of all the Home buyers by VOTING FOR the Resolution. In the 10th CoC meeting, the CoC Members holding voting share 85.55% (84.86% of Home buyers and 0.69% HDFC) has approved the Resolution Plan submitted by Resolution Applicant namely M/S B AND B INFRASTRUCTURE LTD. Therefore, it is urged to allow the IA as prayed for.

5. Brief facts of the case, as mentioned in I.A.Nos.43 & 89 of 2021, which are relevant to the issue in question, are as follows:

(1) The Applicants are Banking Company/financial institution and are engaged in the business of providing loan/financial assistance to its valued customers. The Applicants extended the following loans for the project "Skylark Ithaca":

Sl No.	Particulars		
1	Bank/FI	ICICI Bank	ICICI HFC
2	Amount sanctioned (Rs. In million)	1,500.0	200.0
3	Amount disbursed (Rs. In million)	1,220.0	200.0
4	Amount outstanding (Rs. In million) (Claim filed in FORM C)	1,102.8	19.5

(2) In pursuance to the admission order dated 07.02.2020 passed by the Adjudicating Authority in the present case, the Applicant No.1 subsequently preferred an Appeal before the Hon'ble NCLAT. The Hon'ble NCLAT, by its order dated 10.08.2020, was pleased to direct functioning of the Resolution Professional only in regard to the project "Skylark ITHACA". Accordingly, the Applicants have filed their claims before the Respondent with respect to Project- Skylark ITHACA. The claim of the Applicant No.1 was admitted by the Respondent by her email dated 31.08.2020 and the claim of the Applicant No. 2 was admitted by her email dated



28.10.2020. Both the Applicants are Financial Creditors in the CIRP of Skylark Mansions Private Limited - Project Skylark Ithaca. Upon receipt of Resolution Plans from Resolution Applicants, on 11.02.2021, the Respondent shared three Resolution Plans with Creditors, and on the same day in the meeting of the CoC, it has been resolved to put up for e-voting two Resolution Plans namely: (a) Resolution Plan submitted by B and B Infrastructure Limited; and (b) Resolution Plan submitted by Mr. Kamal Pasha and Mr. Fahad (consortium).

- (3) The Respondent was required to present to the COC such plans which confirm the conditions referred to Section 30(2). Both the shortlisted Resolution Plans which are put up for voting are not in compliance with the requirements under Section 30(2) of the Code and Rules 37 and 38 the IRP for Corporate Persons Regulations, 2016. Therefore, the Resolution Plans ought not to have been presented to the CoC by the Respondent. The same has been done without complying with Section 30(2), Section 30(3) of the Code and Rules 37 and 38 the Insolvency Resolution Process.
- (4) Section 30(2)(b) of the IBC requires the Resolution Plan to provide for payment of debts of financial creditors, who do not vote in favour of the Resolution Plan, which shall not be less than the amount to be paid to such creditors in accordance with Section 53(1) in the event of liquidation of the Corporate Debtor. The explanation 1 of Section 30(2) (b) provides that the distribution in accordance with the Section 30(2)(b) shall be fair and equitable to such creditors. The mandates of Section 30(2) (b) and its explanation have not been complied with *inter alia* as:
- a. There is no provision for payment of debts of financial creditors who do not vote in favour of the resolution plan, at all;
 - b. Should the financial creditor vote against the resolution



plan, financial creditor, under Section 53 of the Code is required to be paid after the CIRP costs are met. However, the Resolution plan presently does not provide for the same. In fact, on the contrary the payment provision for financial creditors in the resolution process presently, is a contingent provision i.e. the financial creditor shall be paid only if amounts diverted by promoters are repaid. The same is not equitable or fair to creditor in addition to being not compliant with Section 30(2)(b).

- (5) Further, Rule 37 (a) provides that a Resolution Plan shall provide for measures as may be necessary for Insolvency Resolution and the same may include reduction in the amount payable to the creditors. Rule 38 (1-A) of the Insolvency Resolution Process for Corporate Persons Regulations, 2016 provides that the Resolution Plan should contain a statement as to how it has dealt with all stakeholders interest including that of Financial Creditors. Rule 38(2) provides that a resolution provides for the following:

Rule 38 (2) – A Resolution Plan shall provide”

- a) The term of the plan and its implementation schedule;
 - b) The management and control of the business of the corporate debtor during its term; and
 - c) Adequate means for supervising its implementation.
- (6) While there is no clarity, plan or method prescribed for recovery of diverted funds, the resolution plan extinguishes the claim of the Appellants entirely if no recovery of diverted funds is made at all. Further, the Resolution plan provides that the financial creditors will not receive any monies if there is no recovery of the diverted funds. However, the plan without any condition provides that any case/suit initiated by secured creditor against the corporate debtor in Debts Recovery



Tribunal or other authority in India or outside shall be withdrawn and all guarantees extended by the Corporate Debtor will stand null & void on approval of this plan. Therefore, the financial creditor will be losing its statutory and contractual rights of recovery of debts from the Corporate Debtor, even if no amounts are recovered by the financial creditor pursuant to the resolution plan.

- (7) The explanation 1 of Section 30 (2) (b) provides that the distribution in accordance with Section 30 (2) (b) shall be fair and equitable to such creditors. Should the Financial Creditor vote against the Resolution Plan, the Financial Creditor, under Section 53 of the Code, is required to be paid after the CIRP costs are met. However, the resolution plan by B&B Infra states as follows:

"Annexure IV-V. B (e) - It is not possible to settle any other creditor other than home buyers the cost of the project vis-a-vis the revenue to be generated on sale of available stock has a unbridgeable gap; and it is for this reason that the escalation cost is charged from the existing home buyers of both Phase-I and Phase-II and make the project viable. There can be a settlement only if the amount diverted from the project as avoidable transaction is brought back as per the legal action taken by the respected RP."

- (8) As per Rule 37 (a) provides that a Resolution Plan shall provide for measure as may be necessary for the insolvency resolution, and the same may include reduction in the amount payable to the creditors. However, the Resolution Plan proposed by B&B Infra, provides as follows:

Towards Institutional Creditors/Financial Institutions.

Since the subject Project is getting completed with the further contribution of the Home Buyers it is evident that there is no money to repay the Institutional Creditors /financial institutions. However as per the information

available the process to recover a huge sum is initiated by RP (the diverted funds/siphoned-off funds by CD); on recovery of such amounts the same shall be repaid to the institution creditors/financial institutions. Other Creditor, proportionately against their out standings.

(9) The Resolution Plans are neither equitable nor fair and provide for no assurance as regards the Applicants. The Resolution Plans are ex facie non-compliant. Consequently, the RP was required to have rejected the same without any further ado.

6. The Respondent/Resolution Professional, has filed her Statement of objections dated 22.02.2021 to I.A.No.43/2021, by inter alia contending as follows:

- (1) The Adjudicating Authority admitted the case by initiating CIRP against the Corporate Debtor vide order dated 7.2.2020. The Hon'ble NCLAT by an interim order dated 10.08.2020 passed in Appeal, directed the RP to keep the Corporate Debtor as a going concern and also restricted the CIRP to the project Skylark Ithaca. Therefore, the RP is duty bound to continue the present CIRP restricted to the project Skylark Ithaca. The RP has been following the complete process of law as outlined under IBC. 180 days' time line of CIRP after excluding the time lost due to the stay order of the Hon'ble High Court of Karnataka was to expire on 11.12.2020.
- (2) Even though the Applicant along with other Applicants have been insisting on direction to the RP to stop the CIRP, the Hon'ble NCLAT allowed the RP to continue with the CIRP on the project Skylark Ithaca due to the fact that CIRP is a time bound process with 270 days and any stay order, if granted, shall affect the objective of the code to maximise the assets of Corporate Debtor and also the objective to keep the CD as well as the project as going concern.
- (3) As per various NCLAT and Supreme Court rulings, the

wisdom of the COC is final with respect to the approval of Resolution Plan or liquidation. Also the IRP/RP are guided by the provisions of the Code and also the Regulations of IBBI during CIRP, duly overseen by the COC. The RP received 3 Resolutions on 30.01.2021 and 31.01.2021 and all the 3 Resolution Plans were forwarded to all the COC Members. After scrutiny of the Resolutions Plans as per law, only 2 eligible to be put up for voting. The RP prepared a comparative summary of all the criteria as set in Eligibility criteria, evaluation Matrix as approved by COC and also the compliance of the mandatory conditions were discussed threadbare in the meeting on 11.2.2021.

- (4) As on 12.2.2021, at the request of ICICI Bank, the evaluation matrix for all 3 plans Evaluation Criteria comparison for all 3 plans and also mandatory conditions complied by all three plans as per law as discussed in the COC were forwarded to the Applicant to enable them to submit the same to the higher Authorities. The Complaint that the Resolution Plans do not contain the provisions for payment of Financial Creditor, who vote against the Resolution Plan and also the provision made for payment to the Applicants is contingent is a wrong and misleading. Both the Resolution Plans provide for 100% of their claims of the Applicant being secured creditors, payable out of the dues recoverable from the avoidance Application, irrespective of the nature of vote and hence complies with the law about their eligibility U/S.53 of waterfall mechanism.
- (5) The RP already submitted an Application for avoidable transactions of Rs. 208 crores of which Rs. 113 crores money diverted from the project is confirmed by the Directors as per signed Financial of CD as well as the project Skylark Ithaca. This Rs.113 crores is not accounted as contingent in the audited financials and hence the claims of Rs.112 crores of the Applicants provided against the avoidable transaction is



valid and hence neither conditional nor contingent. Hence the Resolution Plan submitted for e-voting complied with the legal provisions by giving plan for making the complete 100% payment to secured creditors, irrespective of the nature of voting.

- (6) The Applicants are also Respondents in the Application filed for avoidable transactions, as they allowed their loan funds sanctioned for the project diverted to the related parties, against RBI master circular to the Banks regarding the control on the end-use of the project funding. There is no provision under provisions of Code, which suggests that the Creditors will not get their claim amount from the avoidable truncations and calling the same as contingent is absolutely incorrect. Also there are no provisions that the funds diverted as part of avoidable transactions cannot be allotted to any creditor as part of resolution plan.

7. The Respondent/Resolution Professional has filed her separate Statement of objections dated 16.04.2021 to I.A.No.89/2021, by alia contending as follows:

- (1) The claims received with respect to the project Skylark Ithaca are as below:

Sl. No.	Creditors Detail	Amount Claimed Rs.	Amount Admitted Rs.	Voting rights - %	Security interest, if any	Remarks
Financial Creditors forming CoC:						
1	HDFC	51,10,23,462	5,39,75,376	0.69	Unsecured	Filed on behalf of 18 home buyers
2	Home Buyers	7,26,29,29,702	6,59,20,44,511	84.86	Unsecured	881 No. of home Buyers
3	ICICI Bank Ltd	1,10,28,11,280	1,10,28,11,280	14.20	Secured	
4	ICICI Home Finance Ltd.	1,94,59,529	1,94,59,529	0.25	Secured	
Total A- Financial Creditors		8,89,62,23,973	7,76,82,90,696	100		

- (2) Claims from Operational Creditors admitted – Rs. 83.15 crores and hence total claims admitted is Rs.859.98 crores. As

against admitted amount, the assets available are: a) cash and bank balance – Nil; b) Project site which is incomplete in terms of construction; c) funds diverted to the related parties in the form of avoidable transactions of Rs. 208 crores.

- (3) The objective of I&B Code is to maximise the assets of CD and to balance the interest of the stakeholders. Also, As per Section 30(2(b)) of I & B code, the Financial creditors who do not vote in favour of the Resolution Plan is to be paid in accordance with their eligibility u/s 53 of the waterfall mechanism. She has relied upon the judgement of Hon'ble NCLAT, NEW DELHI in Company Appeal (AT) (Insolvency) No. 926 of 2019 in the matter of *Flat Buyers Association Winter Hills – 77, Gurgaon Vs Umang Realtech Pvt. Ltd through IRP & Ors.*, read with Supreme Court Ruling in the case of *“Committee of Creditors of Essar Steel India Limited v. Satish Kumar Gupta & Ors.”*, in support of the case. Wherein it is inter alia held that *“So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together with negotiating with a prospective resolution applicant for better or different terms which may also involve differences in distribution of amounts between different classes of creditors”*. Another judgment relied upon is the judgement of the Hon'ble Supreme Court rendered in the case of *Jaypee Kensington Boulevard Apartments Welfare Association & Ors. Vs. Nbcc (India) Ltd. & Ors.* Wherein it is inter alia held that Financial Creditors, who voted against the Resolution Plan is to be paid in the form of Cash and NOT in kind. In this case, there is no cash available and cash has to come only out of the amount diverted by the promoters.

- (4) The above status of the assets of CD and the claims admitted, the Resolution Applicant has submitted the Resolution Plan with the following reasoning: i) the Allottees cannot be given a hair cut with respect to the flats and the flats are to be completed for handing over. Hence the Allottees were asked to pay Rs. 1250/per sqft to complete the construction, as there is shortage of funds to complete construction. ii) The other financial creditors, namely, the Applicants are to be provided for payment of their claim in full in CASH as per the eligibility U/S.53.
- (5) The summary of the Resolution Plan approved by 85.55% of CoC is as below:
- i) The Secured financial creditors, namely, the Appellants, are being provided fully, irrespective of the nature of their voting, out of the funds of Rs. 208 crs. diverted to the related parties, by using the waterfall mechanism U/S.53.
 - ii) The Home buyers, the Financial Creditors, are provided the flats booked in their names, on payment of the over dues and also on payment of Rs. 1250/- per sq. ft of the saleable area as allotted in their names.
 - iii) The operational creditors have been provided out of the avoidable transactions, as per the eligibility under section 53 of the Code, if any.
- (6) The Resolution plan provides for full payment of the claims of the Appellants out of the recovery from avoidable transactions, as the same is recognized as 'Liability' as confirmed by the suspended Directors in the audited Financials of 2018-19, in this regard, she has relied upon latest Supreme court Judgement in Civil Appeal No. 323 of 2021 dated 15th April 2021 in the case *Asset Reconstruction Co. (India) Ltd. vs. Bishal Jaiswal & ANR*, wherein the Hon'ble Supreme Court has inter alia held that acknowledgement of liability in the Balance Sheet extends the period of Limitation.



- (7) The Code/Regulation does not prohibit the Resolution Plan by considering the avoidable transactions, as per action initiated by the RP by a separate Application to AA. On the other hand, the IM is to be given along with details of Avoidable transactions. The allegation made by the Applicants that the Resolution Plan is not in compliance with the section 30(2) of the Code and the corresponding regulations is not correct and it is totally a wrong and baseless allegation.
- (8) The Applicants have manipulated the facts and made wrong statement that the Resolution Plan was submitted on 11.02.2021, and on the same day it was put up for E-voting. The Resolution Plans were originally submitted on 30.1.2021, considered by CoC in the meeting held on 2.2.2021 and also held detailed discussions with the Resolution Applicants. Accordingly, the RAs were asked to modify the Resolution plans and the modified version was submitted on 11.2.2021. After detailed discussion of the Resolution Plan, the CoC approved the Plan to be submitted for E-voting. As per the Evaluation Matrix, the Deposit of Rs.2 Crores is to be remitted before submission of the CoC Approved Resolution Plan to the Adjudicating Authority. As there was little delay, as requested by the Resolution Applicant and after intimating the CoC members, the Respondent RP submitted the Resolution Plan to the Adjudicating Authority on 4.3.2021, considering the CIRP deadline of 11.3.2021. Subsequently, even before the Resolution Plan was taken up for hearing by AA, the DD was submitted by the Resolution Applicant on 12.3.2020. The Resolution Professional provided 'format for Resolution Plan' as part of RFRP in order to ensure that the Resolution Plans submitted are legally compliant. Accordingly, all the Resolution Plans have been submitted to the RP which was discussed with CoC and approved by CoC.



8. The Resolution Plan in question has submitted by the Resolution Professional cannot be accepted now, as I.A.Nos.41 of 2021 and 413/2020 are filed U/S.66 and other applicable provisions of the IBC, 2016, are pending for disposal on the file of this Adjudicating Authority. Moreover, the Resolution Plan is mainly depending upon the realisation of avoidable transactions in these Applications.
9. Heard Mrs. Ramanathan Bhuvaneshwari, Resolution Professional, Shri Sajjan Poovayya, learned Senior Counsel for the Applicant in I.A.No.43/2021, Shri Manu Kulkarni, learned Counsel for the Applicant in I.A.No.89/2021. We have carefully perused the pleadings of all the parties, extant provisions of the Code and the Rules made thereunder.
10. Mrs. Ramanathan Bhuvaneshwari, Resolution Professional, Shri Sajjan Poovayya, learned Senior Counsel for the Applicant in I.A.No.43/2021, Shri Manu Kulkarni, learned Counsel for the Applicant in I.A.No.89/2021, have once again reiterated their respective contentions taken in their pleadings, as briefly stated supra. Therefore, they are not being repeated here.
11. In the light of various contentions raised by the Parties, as briefly stated supra, the following main issues arise for consideration of AA:
 - (1) Whether Resolution Professional can proceed with CIRP and even finalise it by approving one of Resolution Plans, when the core issue of admission order dated 7th February, 2020 passed in C.P.(IB)No.389/BB/2019 by the Adjudicating Authority, is Sub judice before the Hon'ble NCLAT in the Appeals filed by ICICI Bank Ltd., vide Company Appeal (AT) (Insolvency) No.682 of 2020, and another Appeal filed by Mrs. Nishaat Saleem vide Company Appeal (AT) (Insolvency) No. 647 of 2020 having passed interim orders;

- (2) Whether Interim orders dated 10th August, 2020 and 24th November, 2020 in the said Appeals are deemed to be final orders so as to conclude CIRP by accepting Resolution Plan and filing an Application to approve the Resolution Plan by Resolution Professional;
 - (3) Whether the Adjudicating Authority is merely rubber stamp to put its seal on Resolution Plan as approved by COC, when a Resolution Plan itself is coupled severe illegalities and contrary to law, as contended by the Resolution Professional;
 - (4) Whether judicial review is not available when the Resolution Plan itself found to be irregular or contrary to law;
12. Initially Skylark Ithaca Buyers Welfare Association has filed C.P.(IB)No.389/BB/2019, by inter alia seeking to initiate CIRP against Skylark Mansions Private Limited (SPML) only, which was admitted by the Adjudicating Authority by an order dated 7th February, 2020 by initiating CIRP; appointing the Applicant as IRP etc. Aggrieved by the said order of admission, two Appeals were filed by ICICI Bank Ltd., vide Company Appeal (AT) (Insolvency) No.682 of 2020 and another by Mr. Nishaat Saleem vide Company Appeal (AT) (Insolvency) No. 647 of 2020 before the Hon'ble NCLAT. The Hon'ble NCLAT, passed an interim order dated 10.08.2020, which inter alia reads as follows;

"The issue raised in both these Appeals are whether the Allottees of 'Ithaca Estates Pvt. Ltd.' are the Financial Creditors qua 'Skylark Mansions Pvt. Ltd, and in the meanwhile, the 'Interim Resolution Professional' will ensure that the company remains going concern and will take assistance of the (suspended) Board of Directors. The Appellant/ Corporate Debtor shall provide all assistance as required and cooperate with the Interim Resolution Professional and the persons who are working will perform their duties including the paid Directors. The person who is authorised to sign the bank cheques may sign cheques only after authorisation of the



'Interim Resolution Professional' with counter signature of the 'Interim Resolution Professional' at the back side of the cheques. In such case, the Bank shall release the payment. The Interim Resolution Professional will place this order before the Banks, in which accounts of Corporate Debtor are maintained. The Bank Account(s) of the 'Corporate Debtor' be allowed to be operated for day-to-day functioning of the company such as for payment of Current Bills of the Suppliers, Salaries and Wages of the employees'/workmen, electricity bills etc. We make it clear that this direction will be only in regard to project 'Skylark ITHACA'

13. Subsequently, the said Appeals are listed for hearing on various dates viz., 30.09.2020, 24.11.2020, 7.01.2021, 02.02.2021, 26.02.2021 etc. On 24.11.2020, the Hon'ble NCLAT has passed further clarificatory order to the initial order dated 10th August, 2020, which reads as under:

"With reference to interlocutory order dated 10th August, 2020, we make it clear that while directing the Interim Resolution Professional to ensure that the Company remains going concern and while passing a slew of directions to ensure that the operations of the going concern are conducted smoothly, we clarified that the interim direction shall be confined to the Project Skylark Ithaca. The Interlocutory order does not empower the Interim Resolution Professional to engage in any activity which is not permitted within the ambit of Interlocutory Order or to dispossess or sell property of the Corporate Debtor. Since we intended to hear the matter on merit, we did not consider making any variation in the interim direction. Interim direction will continue. The Interim Resolution Professional, Ms. Ramanathan Bhuvaneshwari has extended assurance that she will not conduct any sale of the assets of the Corporate Debtor. List these appeals 'for hearing' on 15th December, 2020 on the top of the list."



14. As stated by the Hon'ble NCLAT, the issue raised in both these Appeals are whether the Allottees of 'Ithaca Estates Pvt. Ltd.' are the Financial Creditors qua 'Skylark Mansions Pvt. Ltd. The Hon'ble NCLAT has also permitted the persons, who are working to perform their duties including the paid Directors. The Bank Account(s) of the 'Corporate Debtor' is/are allowed to be operated for day-to-day functioning of the Company such as for payment of Current Bills of the Suppliers, Salaries and Wages of the employees'/workmen, electricity bills etc., but only with concurrence of Resolution Professional. It is also clarified that Interlocutory order does not empower the Interim Resolution Professional to engage in any activity which is not permitted within the ambit of Interlocutory Order or to dispossess or sell property of the Corporate Debtor. The Hon'ble NCLAT, by prima facie holding that CIRP in question would not extend to all projects of CD, and thus restricted the interim order only to project 'Skylark ITHACA' and thus permitted the Resolution Professional to take necessary steps only to see that CD is a going concern and she cannot go beyond that mandate, as interim order(s) are used to be passed to protect the interest of Parties, while main case is pending. Therefore, interim orders passed by the Hon'ble NCLAT, as stated supra, cannot be deemed to final order and thus Resolution Professional can finalise even CIRP itself. The Resolution Professional has exceeded her power/authority granted by the Hon'ble NCLAT. Therefore, the action taken by Resolution Professional in finalising CIRP and accepting Resolution Plan is untenable under law and it liable to be set aside. It is settled position of law that judicial review is permissible on administrative action/disputes between parties, which include examining all proceedings, Resolution Plan etc., initiated under provisions of Code.
15. Even I.A.No.63 of 2021, which is filed under Sections 30 & 31 of



Code, is not in accordance with law, wherein instead of restricting the prayer for approving Resolution Plan in question as provided in those Sections she has added some other prayers, which can be filed separately. Therefore, she has also sought directions to the Suspended Directors of CD and the Promoters to cooperate in providing all the information, documents with respect to the project, including complete handing over of the site, handing over the original copies of all the approvals with respect to the project and all other information, for smooth taking over by the Successful Resolution Applicant, which is beyond scope of the instant Application.

16. So far as the contention of Resolution Professional that she is bound by provisions of Code and she has to finalise CIRP in question in time bound manner, irrespective of any Court/Tribunal order is untenable and baseless. And the same is liable to be rejected. As stated supra, the Hon'ble NCLAT has already clarified by saying that Interlocutory order does not empower the Interim Resolution Professional to engage in any activity which is not permitted within the ambit of Interlocutory Order or to dispossess or sell property of the Corporate Debtor. All parties to litigation are ultimately bound by order(s) passed by Court/Tribunal. So far as the contention of Resolution Professional that Adjudicating Authority has no Authority to interfere in the decision taken by COC is concerned, it is misconception of law. In the first instance before approving a Resolution Plan, Adjudicating Authority has to examine whether CIRP is conducted is in accordance with law and it takes interest of all stake holders of a Company etc. Even in the case as relied upon by the Resolution Professional, judgement in *Company Appeal (AT) (Insolvency) No. 926 of 2019 in the matter of Flat Buyers Association Winter Hills – 77, Gurgaon Vs Umang Realtech Pvt. Ltd through IRP & Ors.*, read with Supreme Court Ruling in the case of *“Committee of Creditors of Essar Steel India*



Limited v. Satish Kumar Gupta & Ors.” Wherein it is inter alia held that ‘So long as the provisions of the Code and the Regulations have been met, it is the commercial wisdom of the requisite majority of the Committee of Creditors which is to negotiate and accept a resolution plan, which may involve differential payment to different classes of creditors, together etc”.

17. The Resolution while contending that provisions of Code and Regulations made thereunder, do not prohibit the Resolution Plan by considering avoidable transactions, for the reasons best known to her, she has certified that taking alleged avoidable transactions in question, as part of Resolution Plan, is in accordance with law and tried to justify the same in the instant Applications. It is also relevant to point out here that Resolution Professional, while contending that she is bound by extant provisions of Code, while conducting CIRP in question, has taken alleged avoidable transactions in question for the purpose of Resolution Plan. It is to be held that commercial wisdom of COC can be considered to be binding when all ingredients of extant provisions of Code and Rules are strictly adhered and the interest of all Stakeholders of CD taken care of.
18. As per law, once Resolution plan approves by the Adjudicating Authority, the Applicant ceases to be Resolution Professional and cannot prosecute I.A relating to avoidable transactions and then she would distribute the money realised from such alleged preferential transaction to Secured Creditors and other claimants. The Resolution Professional, instead of waiting to realise amount from alleged avoidable transactions, she can ask Resolution Applicant to contribute Rs.113 + 95 crores, which is alleged to be avoidable transactions and distribute it to stakeholders instead of throwing them to wait till contingent claims is decided. And thereafter, the Resolution Applicant can be permitted to prosecute



pending I.A., seeking to recovery of avoidable transitions and it can avail it on realisation. Preferential transaction is a contingent claim and it cannot be taken for granted until and unless Adjudicating Authority convinced about the same and ordered to contribute it ultimately. And basing on that contingent claim, the Resolution Professional and Resolution Applicant cannot draw their plans, which is untenable under law and against principles of natural justice. In the instant case, Home Buyers (Unsecured Creditors) occupies predominant share in COC, Viz., 84.86%, whereas, Secured Creditor ICICI Bank holds 14.20% claim. In the Resolution Plan, not only ignored the interest of Secured Creditors, but thrown huge responsibility on Home Buyers, and Landowners without any basis. Moreover, as stated supra, CIRP in question cannot be concluded basing on interim orders passed by the Hon'ble NCLAT, as stated supra and should awaits final decision in Appeals pending. Once, the Appellate Tribunal decides the issue as to whether CIRP initiated in respect of CD, would apply to CD alone or only to Ithaca Project only or both, then process for finalisation of CIRP has to be undertaken. Therefore, finalisation of Resolution plan is premature.

19. So far as time line prescribed for conclusion of CIRP proceedings are concerned, such time lines would apply in normal circumstances, where no other legal proceedings are pending. When the process of Corporate Insolvency is interdicted by legal proceedings, the period taken for such legal proceedings can sought to be excluded by filing appropriate Application before the Adjudicating Authority. Therefore, the Resolution Professional cannot exceed the Authority and power granted by the Hon'ble NCLAT, in terms of above interim orders, and the action taken by her not only contrary but also to be contemptuous in nature.
20. For the aforesaid reasons and circumstances of the case, and Law



on the issue, we are of the considered opinion that the Resolution Professional exceeded her authority and power as granted by the Hon'ble NCLAT in interim orders passed, and thus finalised CIRP by submitting Resolution Plan to COC and got it approved. Therefore, I.A.No.63 of 2021 is not only premature but Resolution Plan as approved is also not in accordance with law. Hence, I.A. No. 63 of 2021 is liable to be dismissed.

21. In the result, I.A.No.63 of 2021 in C.P. (IB)No.389/BB/2019 is hereby dismissed. Consequently, I.A.Nos.43 & 89 of 2021 have become infructuous. And this order is subject to final result of Appeals pending on the file of Hon'ble NCLAT. No order as to costs

ASHUTOSH CHANDRA
MEMBER, TECHNICAL

RAJESWARA RAO VITTANALA
MEMBER, JUDICIAL

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