

Whispering Towers Flat Owners Welfare ... vs Mr. Abhay Narayan Manudhane Rp & Ors on 4 January, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 896 of 2021
(Arising out of Order dated 29.09.2021 passed by the Adjudicating Authority
(National Company Law Tribunal), Mumbai Bench, Court-III in I.A. 2118/2021 in
C.P.(IB)-27(MB)/2019)

IN THE MATTER OF:

Whispering Tower Flat
Owner Welfare Association
B-704, Runwal Pride CHSL,
Behind R Mall,
LBS Marg, Mulund (W),
Mumbai-400080,
Through Dr. Haresh Manglani
R/o 604, Mulund Devi CHSL,
BP Singh Road, Mulund-West,
Mumbai - 400080.

.... Appellant

Vs

1. Abhay Narayan Manudhane,
Resolution Professional of the
Corporate Debtor
1204, Marker Chamber V,
Jamnalal Bajaj Road, Nariman Point,
Mumbai - 400021.
2. Bank of India,
Through the Chief General Manager,
Star House,
C-5, "G" Block, Bandra Kurla Complex,
Bandra (East), Mumbai - 400051.
3. Housing Development and
Infrastructure Limited (HDIL)
Through the Resolution Professional
Wadhawan House, Plot No.32/A,
Union Park Road No.5,
Bandra (West), Mumbai-400050.

.... Respondents

Present:

For Appellant: Mr. Soumya Roop Sanyal, Ms. Heena Gopal

Rohra, Advocates.

Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021

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For Respondents: Mr. Shahdab Jan, Ms. Prerna Wagh, Ms.
Meghna Rao, Advocates for R-1 (RP).

Mr. Nishith Dhruva, Ms. Pratiksha Agarwal,
Mr. Prakash Shinde, Mr. SM Algaus, Ms.
Sneha Botwe and Mr. Kaushal Parsekar,
Advocates for R-2.

With

Company Appeal (AT) (Insolvency) No. 980 of 2021

(Arising out of Order dated 29.09.2021 passed by the Adjudicating Authority
(National Company Law Tribunal), Mumbai Bench, Court-III in I.A. 2118/2021 in
C.P.(IB)-27(MB)/2019)

IN THE MATTER OF:

1. Majestic Towers Flat Owners Association
Through its President
Mr. Chandrakishore Kolindewala,
P3/13 Deep Sadan CHS Ltd.,
Sundernagar SV Road,
Malad (West), Mumbai-400064.
2. Galaxy Apartment F Wing
Welfare Association
Through its President
Mr. Sanjay Chandrakant Kangne
C/o Satish Adsul, Shop No.3,
Building No.28, Viswadarshan CHS,
Nehru Nagar, Mumbai - 400024.

.... Appellants

Vs

1. Housing Development and
Infrastructure Limited (HDIL)
Through its Resolution Professional
Abhay Narayan Manudhane,
201, Shubh Ashish, 129, Model town,
Andheri (West), Mumbai,
Maharashtra - 400053.
2. Bank of India,
Through its Assistant General Manager,
Star House, C-5, "G" Block,
Bandra Kurla Complex,
Bandra (East), Mumbai - 400051.

Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 2

3. Rakesh Wadhawan,
Shareholder, HDIL,
Wadhawan House, 32/A, Golf Links,
Union Park, Bandra (West),
Mumbai 400052. Respondents

Present:

For Appellants: Mr. Sunil Fernandes, Mr. Darpan Sachdeva,
Mr. Shubham Sharma, Advocates.

For Respondents: Mr. Shahdab Jan, Ms. Prerna Wagh, Ms.
Meghna Rao, Advocates for R-1 (RP).

Mr. Nishith Dhruva, Ms. Pratiksha Agarwal,
Mr. Prakash Shinde, Mr. SM Algaus, Ms.
Sneha Botwe and Mr. Kaushal Parsekar,
Advocates for R-2.

With

Company Appeal (AT) (Insolvency) No. 1045 of 2021
(Arising out of Order dated 29.09.2021 passed by the Adjudicating Authority
(National Company Law Tribunal), Mumbai Bench, Court-III in I.A. 2118/2021 in
C.P.(IB)-27(MB)/2019)

IN THE MATTER OF:

Sarang Kumar Wadhawan
Presently in judicial custody
At Mumbai Central Prison,
Mumbai Appellant

Vs

Abhay Narayan Manudhane
Resolution Professional of
Housing Development and
Infrastructure Limited,
1204/1221, Maker Chamber V,
Jamnalal Bajaj Road,
Nariman Point, Mumbai - 400021. Respondent

Present:

For Appellants: Ms. Disha Shah and Mr. Subir Kumar,
Advocates.

For Respondents: Mr. Shahdab Jan, Ms. Prerna Wagh, Ms.
Meghna Rao, Advocates for R-1 (RP).

Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021
JUDGMENT

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ASHOK BHUSHAN, J.

These three Appeals have been filed against same judgment dated 29.09.2021 passed by the National Company Law Tribunal, Mumbai Bench, rejecting the I.A. No.2118 of 2021 filed by the Resolution Professional seeking extension of Corporate Insolvency Resolution Process (CIRP).

2. The Appellant in Company Appeal (AT) (Insolvency) No. 896 of 2021 is an Association formed by the Homebuyers of the flats proposed to be constructed and delivered by the Corporate Debtor of a Project titled "Whispering Towers" located at Village Nahur, Taluka Kurla. In the aforesaid project almost 1500 flats were to be constructed.

3. In Company Appeal (AT) (Insolvency) No. 980 of 2021, there are two Appellants. Appellant No.1 - Majestic Towers Flat Owners Association is an Association of 290 allottees, who purchased flats in the project known as "Majestic Towers" at Bandra, Mumbai. Appellant No.2-Galaxy Apartment is an Association of Homebuyers comprising 96 allottees of 'F Wing' of the Project - "Galaxy Apartments" situated at Kurla, Mumbai.

4. Company Appeal (AT) (Insolvency) No. 1045 of 2021 has been filed by the Appellant, Ex-Promoter/ Director of the Corporate Debtor - Housing Development & Infrastructure Limited.

Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 4

5. All the Appellants are aggrieved by the rejection of Application No.2118 of 2020 filed by Resolution Professional before the Adjudicating Authority for extension of CIRP period. There being common question of facts and law, all the Appeals are heard together and are being decided by this common judgment.

6. On an Application filed by M/s Bank of India under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as the 'IB Code'), the Corporate Insolvency Resolution Process was initiated by an order dated 20th August, 2019 passed by the Adjudicating Authority against the Corporate Debtor namely - M/s Housing Development & Infrastructure Ltd. The Corporate Debtor a Real Estate Company started several multi- storied Housing Project. The Company pursuant to grant of license by various statutory Authorities launched several Housing Projects. After admission of the Application under Section 7 on 29th August, 2019, Interim Resolution Professional was appointed, who was also approved as Resolution Professional by the Committee of Creditors (CoC). After issuance of Form-G by Resolution Professional, the CIRP proceeded for substantially longer period, but no Resolution Plan could be received by the Resolution Professional. On representation submitted by various Homebuyers' Association of various projects, requesting the Resolution Professional to undertake Project Wise Resolution, the Resolution Professional included the same in Agenda, but the same could not be earlier considered favourably by the Committee of Creditors. The CoC in its 18th Meeting held on 08.09.2021 approved the Resolution, decided to consider Company

Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 5 re-run of the CIRP and explore the possibility of Project wise Resolution and put the same for e-voting. The CoC approved division of the assets of the Corporate Debtor into eight Project for the purpose of exploring possibility of partial/ piecemeal resolution. Resolution Professional was authorized to explore the possibility of re-run the process by inviting Expression of Interest for entire Company as a going concern with an option to submit Resolution Plan for one or more Project individually or jointly with other Projects. Resolution Professional was authorized to take necessary action in the above regard.

7. After CoC's decision dated 08.09.2021, the Resolution Professional filed an I.A. No.2118 of 2021 wherein, after narrating the sequence of event, prayed for extension of CIRP period. In the Application, it was mentioned by the Resolution Professional that the CIRP period was to come to an end till 15th September, 2021 and was extendable till 30th September, 2021. The details of eight Projects were also mentioned in the Application for which Project wise Resolution was sought for. After the CoC's decision dated 8th September, 2021, Resolution Professional invited Expression of Interest for rehabilitation of the Corporate Debtor Project Wise. In response to which 25 Expression of Interests were received by the Resolution Professional.

8. The Application filed by Resolution Professional, came for consideration before the Adjudicating Authority and Adjudicating Authority noticed that Committee of Creditors has decided on 8th September, 2021 to Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 6 go for Project Wise Resolution, but observation of the Adjudicating Authority was that it was because of the pressure from the Homebuyers that CoC agreed to explore the possibility of Resolution Plan of the Corporate Debtor by dividing the total assets into eight Projects. The Adjudicating Authority observed that even after more than 730 days, there is no sight of completion of CIRP and the RP and CoC merely want to explore the possibility of Resolution. With these observations, the Application was rejected.

9. The submission of the learned Counsel for the Appellant is that it was on the request made by Homebuyers, the Resolution Professional included Agenda for Project Wise Resolution, which initially at two times could not receive approval of the CoC, but ultimately in CoC meeting dated 8th September, 2021, it was approved. It is submitted that in event the Corporate Debtor is thrown to liquidation, the most sufferer will be the Homebuyers, who are thousands in numbers in different Projects and belong to lower middle class Society, who by collecting necessary finances and after taking loans from different Banks have made payments to the Corporate Debtor for allotment of flats. It was only 8th September, 2021 that CoC agreed to explore possibility of Project Wise Resolution, hence, reasonable time ought to have been allowed by the Adjudicating Authority by extending the CIRP period. He further submits that with regard to whole Project, when CIRP proceedings were initiated, not a single Resolution Plan was received, whereas, after the decision dated 8th September, 2021, 25 Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 7 applications have been received, evidencing interest in the Project wise Resolution.

10. Learned Counsel for the Appellant submits that Adjudicating Authority has not considered the ratio laid down by Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta and Ors. (2020) 8 SCC 531. The learned Counsel for the Appellant has also

relied on a judgment of this Tribunal in Company Appeal (AT) (Insolvency) No. 926 of 2019 - Flat Buyers Association Winter Hills - 77, Gurgaon vs. Umang Realtech Pvt. Ltd through IRP & Ors.

11. The learned Counsel appearing for Resolution Professional candidly submitted that the Resolution Professional is not opposing the present Appeal and would govern itself by any orders passed by this Tribunal. The Resolution Professional has also relied on Committee of Creditors' decision dated 8th September, 2021 and has stated that with regard to eight Projects as noted in the decision of CoC, 25 Expression of Interests have been received. It is further submitted that minimum number of 70 days are required to run the process.

12. We have considered the submissions of learned Counsel for the parties and have perused the record.

13. The first two Appeals have been filed by the Homebuyers Association of Project Whispering Towers Flat Owners Welfare Association and Majestic Towers Flat Owners Association with Galaxy Apartment F Wing Welfare Association, who are allottees of different flats in the above two Projects Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 8 namely Whispering Towers and Majestic Towers, Projects of the Corporate Debtor. Homebuyers as a class of voters have about 10% voting shares in the Committee of Creditors.

14. The object of the IB Code is the resolution of the insolvency of a Corporate Debtor. Efforts of all stakeholders has to be towards resolution of insolvency. There can be no dispute that the law mandates that CIRP proceedings have to be concluded within 330 days. Hon'ble Supreme Court, after noticing the above requirement of 330 days in Section 12, laid down in (2020) 8 SCC 531 - Committee of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta and Ors. that normally as per law, insolvency resolution process has to be completed within 330 days maximum, but in exceptional cases, the period can be extended by Adjudicating Authority/ Appellate Tribunal. In paragraph 127 of the judgment, following has been laid down:

"127. Both these judgments in Atma Ram Mittal [Atma Ram Mittal v. Ishwar Singh Punia, (1988) 4 SCC 284] and Sarah Mathew [Sarah Mathew v. Institute of Cardio Vascular Diseases, (2014) 2 SCC 62 : (2014) 1 SCC (Cri) 721] have been followed in Neeraj Kumar Sainy v. State of U.P. [Neeraj Kumar Sainy v. State of U.P., (2017) 14 SCC 136 : 8 SCEC 454] , SCC paras 29 and 32. Given the fact that the time taken in legal proceedings cannot possibly harm a litigant if the Tribunal itself cannot take up the litigant's case within the requisite period for no fault of the litigant, a provision which mandatorily requires the CIRP to end by a certain date -- without any Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 9 exception thereto -- may well be an excessive interference with a litigant's fundamental right to non-arbitrary treatment under Article 14 and an excessive, arbitrary and therefore unreasonable restriction on a litigant's fundamental right to carry on business under Article 19(1)(g) of the Constitution of India. This being the case, we would ordinarily have struck down the provision in its entirety. However, that would then throw the baby out with the bath water, inasmuch as the time taken in legal proceedings is

certainly an important factor which causes delay, and which has made previous statutory experiments fail as we have seen from Madras Petrochem [Madras Petrochem Ltd. v. BIFR, (2016) 4 SCC 1 : (2016) 2 SCC (Civ) 478] . Thus, while leaving the provision otherwise intact, we strike down the word "mandatorily" as being manifestly arbitrary under Article 14 of the Constitution of India and as being an excessive and unreasonable restriction on the litigant's right to carry on business under Article 19(1)(g) of the Constitution. The effect of this declaration is that ordinarily the time taken in relation to the corporate resolution process of the corporate debtor must be completed within the outer limit of 330 days from the insolvency commencement date, including extensions and the time taken in legal proceedings. However, on the facts of a given case, if it can be shown to the Adjudicating Authority and/or Appellate Tribunal under the Code that only a short period is left for completion of the insolvency resolution process beyond 330 days, and that it would be in the interest of all stakeholders that the corporate debtor be put back on its feet instead of being sent into liquidation and that the time taken in legal Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 10 proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority and/or Appellate Tribunal, the delay or a large part thereof being attributable to the tardy process of the Adjudicating Authority and/or the Appellate Tribunal itself, it may be open in such cases for the Adjudicating Authority and/or Appellate Tribunal to extend time beyond 330 days. Likewise, even under the newly added proviso to Section 12, if by reason of all the aforesaid factors the grace period of 90 days from the date of commencement of the Amending Act of 2019 is exceeded, there again a discretion can be exercised by the Adjudicating Authority and/or Appellate Tribunal to further extend time keeping the aforesaid parameters in mind. It is only in such exceptional cases that time can be extended, the general rule being that 330 days is the outer limit within which resolution of the stressed assets of the corporate debtor must take place beyond which the corporate debtor is to be driven into liquidation."

15. The Hon'ble Supreme Court in the above case has held that it would be in the interest of all stakeholders that the Corporate Debtor will be back on its foot instead of being sent into liquidation. It was further held that time taken in legal proceedings is largely due to factors owing to which the fault cannot be ascribed to the litigants before the Adjudicating Authority/ Appellate Tribunal. In the present case, it's the case of Appellant (Company Appeal (AT) (Insolvency) No. 896 of 2021) that I.A. No.827 of 2021 was filed praying that Tribunal may direct the Respondent to form a special Resolution Plan for the "Whispering Towers Project" by seeking Resolution Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 11 Applicants specifically for the said Project and create Special Purpose Vehicle for completion of the said Project to enable the members of his Intervener Association to get possession of their homes, which Application remained pending.

16. We have noted above that in the Corporate Insolvency Resolution Process, no Resolution Plan was received. The Committee of Creditors deliberated on the request of the Resolution Professional to undertake Project Wise Resolution. It is useful to quote following extract from the Minutes of the

Committee of Creditors' Meeting dated 8th September, 2021:

"The Chairperson stated that in order to achieve maximization of value , assets/ projects of the CD can be divided into various verticals/ groups/ projects based on the viability/ security interest. The Chairperson reiterated that in 13th CoC meeting held on 30th January, 2021 the RP proposed project wise resolution comprising of 7 projects/ verticals and suggested that on same line CoC members can divide assets in 7 or more groups. The subject matter was discussed, when representative of LIC suggested that HDIL towers may be considered as separate group/ verticals as they have exclusive charge on this asset. After discussion, the CoC decided to consider 8 verticals for project wise resolution wherein the assets which are not covered under any of the verticals can be clubbed under one residual category. The indicative list of assets/ projects is as follows:

1. Majestic Towers
2. Whispering Towers
3. Premier Exotica Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021
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4. Galaxy Apartment
5. BKC Inspire
6. Paradise City
7. HDIL Towers (Building)
8. Rest of the Company and assets not included above The CoC members suggested that RP be authorized to increase the numbers of Project9so, if required, based on the viability/ security interest in specific asset/ group of assets.

The Chairperson further stated that re-run of CIRP and project wise resolution will be subject to grant of further time by Hon'ble NCLT for which the necessary Application will be filed by the RP. Timeline for re-run of CIRP was also displayed at the meeting.

On a query regarding powers of Hon'ble NCLT for extension beyond timeline prescribed under Section 12 of the Code, the Legal Advisor stated that the Hon'ble NCLT has inherent powers under Rule 11 of NCLT Rules to grant or pass orders on any matter not expressly covered under any Section of Code as may be required, depending on the facts and circumstances of each case. Based on the views of the CoC members, it was decided to consider re-run of the CIRP and explore possibility of project wise resolution and put the same for e voting. The Chairperson further stated that liquidation of the CD as proposed earlier will not be put up for e voting.

The Members of the CoC took note of the same and the Chairperson informed that re-run of CIRP and possibility of project wise resolution would be put up for e-voting as Item B-1 below.

Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 13 The Chairperson further informed that proposal regarding extension/ exclusion/ further time by Hon'ble NCLT would be put for e-voting as Item B-2."

17. Item No.B-1 was taken up for consideration and it was resolved that Committee of Creditors approves division of assets of the Corporate Debtor into 8 project for the purpose of exploring possibility of partial/ piecemeal resolution. The Resolution Professional invited Expression of Interest and it has been submitted by Resolution Professional that 25 Expression of Interests have been received, but on account of refusal of extension by Adjudicating Authority, no further steps could be taken.

18. From the materials on the record, it is clear that CIRP period along with extensions granted from time to time was to come to an end on 15th September, 2021/ 30th September, 2021 and in the Application filed by Resolution Professional, further extension was sought. There is no doubt that maximum period of 330 days has already come to an end in the month of September 2021. The Adjudicating Authority made observation that even after 730 days, there is no sight of completion of CIRP and RP and COC merely want to explore the possibility of Resolution. Adjudicating Authority lost sight that after extension given from time to time the period expired only in the month of September 2021. The Adjudicating Authority after noticing the Resolution of the CoC dated 8th September, 2021 observed that the said Resolution has been taken because of the pressure from the Homebuyers. The Resolution taken on 8th September, 2021 as Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 14 extracted above was with regard to Project Wise Resolution, dividing entire assets into eight Projects. This Project Wise Resolution became possible only after 8th September, 2021. The Committee of Creditors, whose commercial wisdom has to be given due weight, rightly took the decision for Project Wise Resolution.

19. No Resolution Applicant is ready to undertake huge real estate Project which has amply been proved when Expression of Interest for Project Wise Resolution was called, 25 Applicants have already shown their interest in different Projects. The Adjudicating Authority failed to give due weight to the Resolution/ decision of the CoC dated 8th September, 2021 and erred in not allowing even a reasonable period for proceeding further with Project Wise Resolution.

20. The Hon'ble Supreme Court time and again reminded that the object of IBC is to resolve the insolvency resolution process and liquidation is to be adopted as a last resort.

21. The learned Counsel for the Appellant has also relied on the judgment of this Tribunal in Company Appeal (AT) (Insolvency) No. 926 of 2019 (supra) wherein this Tribunal has also observed that Corporate Insolvency Resolution Process against real estate Company is limited to project as per approved Plan.

22. We in the facts of the present case are of the view that Adjudicating Authority ought to have given reasonable extension of period for proceeding Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 15 further with Resolution Project Wise for which 25 Expression of Interests have already been received with the Resolution Professional.

23. In view of the above discussion, we allow the Appeal and set aside the order of the Adjudicating Authority dated 29.09.2021, allow the Application being I.A. No.2118 of 2021 in C.P.(IB)-27(MB)/2019 filed before the Adjudicating Authority and grant extension of 90 days from the date of this order during which period the Resolution Professional and the Committee of Creditors may complete the Project Wise Resolution as decided in their meeting on 8th September, 2021. No order as to costs.

[Justice Ashok Bhushan] Chairperson [Justice Jarat Kumar Jain] Member (Judicial) [Dr. Alok Srivastava] Member (Technical) NEW DELHI 4th January, 2022 Ash/NN Company Appeal (AT) (Insolvency) Nos.896, 980 & 1045 of 2021 16