

Mayukh Chakraborty vs K V Developers Private Limited & Ors on 1 June, 2022

Author: Ashok Bhushan

Bench: Ashok Bhushan

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 390 of 2022
(Arising out of Order dated 11.11.2021 passed by the Adjudicating Authority
(National Company Law Tribunal), New Delhi, Bench-III in I.A. No.5146 of 2021
in C.P.(IB) No.236/(ND)/2020)

IN THE MATTER OF:

Puneet Kaur, through her Attorney
Amrit Pal Singh
R/o Flat No.57, Sanchar Vihar
Sector 62, Noida
Uttar Pradesh-201301.

.... Appellant

Vs

1. K V Developers Private Limited
Through the Resolution Professional
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara
New Delhi - 110032.
2. Mr. Pankaj Narang,
Resolution Professional of
K V Developers Private Limited
203 - 204, Jeevan Villa, 2nd Floor,
Near Gurudwara, 111, Ansari Road,
Daryaganj, Delhi - 110002.
3. Committee of Creditors
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara
New Delhi - 110032.
4. Consortium of Sumit Kumar Khanna and
M/s. Brij Kishore trading Pvt. Ltd.
Successful Resolution Applicant of
K V Developers Private Limited
Through Mr. Sumit Kumar Khanna
D - 153, Sector 40, Noida,
Uttar Pradesh - 201303.

... Respondents

Company Appeal (AT) (Insolvency) Nos. 390, 391,
392, 393 & 394 of 2022

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With

Company Appeal (AT) (Insolvency) No. 391 of 2022
(Arising out of Order dated 26.10.2021 passed by the Adjudicating Authority
(National Company Law Tribunal), New Delhi, Court-III in I.A. No.4864 of 2021 in
C.P.(IB) No.236/(ND)/2020)

IN THE MATTER OF:

Mayukh Chakraborty
R/o 8204, ATS One Hamlet,
Sector 104, Noida,
Uttar Pradesh - 201301.

.... Appellant

Vs

1. K V Developers Private Limited
Through the Resolution Professional
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara
New Delhi - 110032.
2. Mr. Pankaj Narang
Resolution Professional of
K V Developers Private Limited
203 - 204, Jeevan Villa, 2nd Floor,
Near Gurudwara, 111, Ansari Road,
Daryaganj, Delhi - 110002.
3. Committee of Creditors
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara
New Delhi - 110032.

... Respondents

With

Company Appeal (AT) (Insolvency) No. 392 of 2022
(Arising out of Order dated 04.01.2022 passed by the Adjudicating Authority
(National Company Law Tribunal), New Delhi, Court-III in I.A. No.5119 of 2021
in C.P.(IB) No.236/(ND)/2020)

IN THE MATTER OF:

1. Mahesh Chandra Sahu
R/o Flat No.1603, ATS Greens 2,
Sector 50, Noida,
Uttar Pradesh - 201301.

Company Appeal (AT) (Insolvency) Nos. 390, 391,
392, 393 & 394 of 2022

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2. Shruti Anand
R/o Flat No.702, Greenwich Tower A,
Grand Omaxe, Sector - 93B
Noida, Uttar Pradesh - 201301. Appellants

Vs

1. K V Developers Private Limited
Through the Resolution Professional
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara, New Delhi - 110032.
2. Mr. Pankaj Narang
Resolution Professional of
K V Developers Private Limited
203 - 204, Jeevan Villa, 2nd Floor,
Near Gurudwara, 111, Ansari Road,
Daryaganj, Delhi - 110002.
3. Committee of Creditors
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara,
New Delhi - 110032. ... Respondents

With

Company Appeal (AT) (Insolvency) No. 393 of 2022
(Arising out of Order dated 04.01.2022 passed by the Adjudicating Authority
(National Company Law Tribunal), New Delhi, Court-III in I.A. No.4863 of 2021
in C.P.(IB) No.236/(ND)/2020)

IN THE MATTER OF:

Ravi Raghavachary,
R/o Flat No.57, Sanchar Vihar,
Sector 62, Noida,
Uttar Pradesh - 201309. Appellant

Vs

1. K V Developers Private Limited
Through the Resolution Professional
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara
New Delhi - 110032.

Company Appeal (AT) (Insolvency) Nos. 390, 391,
392, 393 & 394 of 2022

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2. Mr. Pankaj Narang
Resolution Professional of
K V Developers Private Limited
203 - 204, Jeevan Villa, 2nd Floor,
Near Gurudwara, 111, Ansari Road,
Daryaganj, Delhi - 110002.

3. Committee of Creditors
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara
New Delhi - 110032.

... Respondents

With

Company Appeal (AT) (Insolvency) No. 394 of 2022

(Arising out of Order dated 07.12.2021 passed by the Adjudicating Authority
(National Company Law Tribunal), New Delhi, Court-III in I.A. No.5602 of 2021
in C.P.(IB) No.236/(ND)/2020)

IN THE MATTER OF:

Shabnam, W/o Sajid Ali,
R/o E18/2, 2nd Floor, Shaheen Bagh,
Abul Fazal Enclave Part - II,
New Delhi - 110025.

.... Appellant

Vs

1. K V Developers Private Limited
Through the Resolution Professional
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara
New Delhi - 110032.

2. Mr. Pankaj Narang
Resolution Professional of
K V Developers Private Limited
203 - 204, Jeevan Villa, 2nd Floor,
Near Gurudwara, 111, Ansari Road,
Daryaganj, Delhi - 110002.

3. Committee of Creditors
K V Developers Private Limited
621/9, First Floor, 18 Quarters,
Vishwas Nagar, Shahdara
New Delhi - 110032.

... Respondents

Company Appeal (AT) (Insolvency) Nos. 390, 391,
392, 393 & 394 of 2022
Present:

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For Appellant(s):

Mr. Mahesh Kumar and Ms. Simran

Soni, Advocates.

For Respondent:

Mr. Abhinav Vasisht, Sr. Advocate
with Mr. Rakesh Kumar Bajaj and Mr.
Harish Taneja, Advocates for R-1 & 2.

Mr. Nitin Kumar and Mr. Gagan
Gulati, Advocate for R-3.

Mr. Sumesh Dhawan and Ms. Vatsala
Kak, Advocates for R-4.

JUDGMENT

ASHOK BHUSHAN, J.

These five Appeal(s) have been filed by Homebuyers of Corporate Debtor - K V Developers Private Limited aggrieved by order of the Adjudicating Authority refusing to entertain their belated claims as Financial Creditors of the Corporate Debtor.

2. In Company Appeal (AT) (Insolvency) No. 390 of 2022 the order dated 11.11.2021 rejecting the I.A. No.5146 of 2021 has been challenged. The Adjudicating Authority while rejecting the I.A. observed that the claim by the Applicant in the matter was filed after delay of eight months from the cut-off date as decided by Resolution Professional. The Resolution Professional having already been put up to voting prior to the filing of claim, the Application was rejected.

In Company Appeal (AT) (Insolvency) No. 391 of 2022, order dated 26.10.2021 of the Adjudicating Authority rejecting the I.A. 4864 of 2021 filed by the Appellant has been challenged, by which order, Adjudicating Company Appeal (AT) (Insolvency) Nos. 390, 391, Authority observed that the Resolution Plan for the Corporate Debtor having already approved by the Committee of Creditors ("CoC"), the claim of the Appellant filed after lapse of eight months from the cut-off date cannot be entertained.

In Company Appeal (AT) (Insolvency) No. 392 of 2022 order dated 04.01.2022 has been challenged, by which I.A. No.5119 of 2021 filed by the Appellant has been rejected observing that Committee of Creditors has already approved the Resolution Plan on 20.07.2021, which is pending consideration before the Tribunal for final approval, hence the Applicant, who had submitted Application after a gap of more than eight months, cannot be entertained.

In Company Appeal (AT) (Insolvency) No. 393 of 2022, the order dated 04.01.2022 has been challenged, by which order I.A. No.4863 of 2021 filed by the Appellant has been rejected observing that CoC has already approved the Resolution Plan on 20.07.2021, which is pending consideration before the Tribunal, hence, Applicant who has come after a gap of more than eight months, cannot be entertained.

In Company Appeal (AT) (Insolvency) No. 394 of 2022, the order dated 07.12.2021 has been challenged, by which order, I.A. No.5602 of 2021 filed by the Appellant has been rejected observing that CoC having already considered the Resolution Plan and the Applicant has come up after a gap of more than eight months by filing a claim on 09.11.2021, the claim cannot be entertained.

Company Appeal (AT) (Insolvency) Nos. 390, 391,

3. The claim of the Appellant(s) were filed against the same Corporate Debtor, i.e., K V Developers Private Limited, a real estate Company arising out of more or less same facts and circumstances. All these Appeal(s) have been heard together and are being decided by this common judgment.

4. For deciding all these Appeal(s), it is sufficient to notice the facts and sequence of events in Company Appeal (AT) (Insolvency) No. 390 of 2022 - Puneet Kaur vs. K V Developers Private Limited:

(i) The Adjudicating Authority vide order dated 28.10.2020 admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the "Code") filed by LIC Housing Finance Limited, a Financial Creditor.

The Respondent No.2 Shri Pankaj Narang was appointed as Interim Resolution Professional, who was subsequently confirmed as Resolution Professional. The Resolution Professional published Form-A dated 30.10.2020 inviting claim from creditors on or before 11.11.2020. Publication was also made in two newspapers.

(ii) The Appellant(s) who have booked their flats with the Corporate Debtor, could not know about the publication of Form-A and the initiation of Corporate Insolvency Resolution Process ("CIRP"). The Appellant in Company Appeal (AT) (Insolvency) No. 390 of 2022, resides in UK; the Appellant in Company Appeal (AT) (Insolvency) No. 392 of 2022, resides in Jhansi; the Appellant in Company Appeal (AT) (Insolvency) No. Company Appeal (AT) (Insolvency) Nos. 390, 391, 393 of 2022 resides in Chennai, "although he has given address of Noida, which is same as that of attorney of Appellant in Company Appeal (AT) (Insolvency) No. 390 of 2022. The Appellant's husband in Company Appeal (AT) (Insolvency) No. 394 of 2022 resides in Bangalore. Due to Appellant(s) not being residing in Noida, where the office of the Corporate Debtor situated, could not have learnt about Corporate Insolvency Resolution Process ("CIRP") and, hence, could not file their claims within time.

(iii) The Appellant in Company Appeal (AT) (Insolvency) No. 390 of 2022 filed its claim on 14.07.2021, whereas, Successful Resolution Applicant namely - Consortium of Sumit Kumar Khanna and M/s. Brij Kishore trading Pvt. Ltd. Filed its Resolution Plan on 09.04.2021, which was put for E-voting from 13.07.2021 to 19.07.2021. The Appellant in Company Appeal (AT) (Insolvency) No. 390 of 2022 has filed her claim in Form-CA to the Resolution Professional for an amount of Rs.23,18,422/-. Along with claim, the Appellant has submitted allotment letter dated 22.02.2016 and 15 payment receipts of Rs.23,18,422/-.

(iv) The Resolution Plan submitted by the Successful Resolution Applicant was approved on 20.07.2021 by 100% voting in the 15th CoC meeting. The Resolution Professional filed I.A. No.3447 of 2021 under Section 30, sub-section (6) before the Company Appeal (AT) (Insolvency) Nos. 390, 391, Adjudicating Authority seeking approval of the Resolution Plan. I.A. No.5146 of 2021 was filed by the Appellant - Puneet Kaur before the Adjudicating Authority praying for direction to the Resolution Professional to admit the claim of the Applicant, which Application came to be rejected by impugned order dated 11.11.2021.

(v) The facts and sequence of events in other four Appeal(s) are more or less same. The case in all other Appeal(s) is also that they could not know about the CIRP and they filed their claim belatedly. The claim of Appellant in Company Appeal (AT) (Insolvency) No. 391 of 2022 was filed on 23.07.2021 in Form- CA for an amount of Rs.34,00,000/- along with allotment letter containing receipts of the payments made.

In Company Appeal (AT) (Insolvency) No. 392 of 2022 a claim was filed on 23.07.2021 raising a claim of Rs.27,57,259/- along with Form-CA, allotment letter and receipt of the payments were filed.

In Company Appeal (AT) (Insolvency) No. 393 of 2022, a claim was submitted on 23.07.2021 for an amount of Rs.18,63,489/- along with Form-CA with allotment letters and payment receipts were also filed.

In Company Appeal (AT) (Insolvency) No. 394 of 2022, the claim was submitted on 09.11.2021 for an amount of Company Appeal (AT) (Insolvency) Nos. 390, 391, Rs.38,55,267/-, Builder Buyers Agreement and payment receipts were also filed along with Form-CA.

(vi) As noted above, Appellant(s) filed IAs before the Adjudicating Authority seeking direction to the Resolution Professional to admit their claims, which have been rejected by the Adjudicating Authority observing that claims having been filed after gap of eight months from the last date of the submission of the claim, they cannot be admitted. Further, CoC has already approved the Resolution Plan. Aggrieved by the orders passed by the Adjudicating Authority, Appellant(s) have come up in this Appeal,

5. We have heard Shri Mahesh Kumar, learned Counsel for the Appellant, Shri Abhinav Vasisht, learned Senior Counsel has appeared for Resolution Professional, Shri Nitin Kumar, learned Counsel appeared for CoC and Shri Sumesh Dhawan, learned Counsel appeared for Successful Resolution Applicant.

6. learned Counsel for the Appellant(s) submits that Appellant(s) are Financial Creditors and even though, they could not file their claims within the time prescribed in Form-A, but details of their allotment and payments made by them already existed in record of the Corporate Debtor. It was the duty of the Resolution Professional to inform the Appellant(s) to file their claims and further the claim of the Appellant(s) qua the Corporate Debtor being matter of record, Resolution Professional could very well included Company Appeal (AT) (Insolvency) Nos. 390, 391, their claims in the Information Memorandum prepared under Regulation 36 of CIRP Regulations as liabilities to

Corporate Debtor to inform the Resolution Applicant to take into consideration the liabilities towards those Homebuyers, who could not file their claims. The Resolution Professional could have included the names of all the Homebuyers and mentioned about them in the Information Memorandum. The Resolution Professional has not included the names of the Appellant(s) in the Information Memorandum, which has caused great prejudice to the Appellant(s). The Appellant(s), who are Homebuyers cannot be equated with other Financial Creditors. The Homebuyers have to be treated in different category.

7. The learned Counsel for the Appellant(s) further submits that claims of the Appellant(s) ought to have been admitted based on the record of the Corporate Debtor. It is further submitted that the Resolution Professional has dealt with claims including the belated claims submitted before the Resolution Professional are 225+239 total 464, whereas, Resolution Plan does not indicate any provision with regard to money, which was deposited by the Appellant(s) and the claim of possession of flats by the Appellants. It is submitted that in the reply filed by the Resolution Professional in these Appeal(s) in paragraph 11 of the reply, it was stated that claims towards the Homebuyers/ Allottees including the Appellant herein have already been dealt with in the Resolution Plan and Appellant(s) are abusing the process of this Appellate Tribunal by filing the Appeal for seeking relief. It is submitted that fact is that there is no provision in the Resolution Plan Company Appeal (AT) (Insolvency) Nos. 390, 391, with regard to claims of the Appellant(s) and other Homebuyers, who could not file their claims.

8. The learned Senior Counsel for Resolution Professional Shri Abhinav Vasisht refuting the submissions of the learned Counsel for the Appellant(s) submits that Appellant(s) have submitted their claim much after submission of the Resolution Plan. Only Appellant in Company Appeal (AT) (Insolvency) No. 390 of 2022 has filed the claim before the approval of the Resolution Plan. All other Appellant(s) have filed their claims subsequent to approval of Resolution Plan by CoC. It is submitted that Appellant(s) having not filed their claims within time and filing of their claim was also beyond 90 days as provided by Section 12 of the Code, no error has been committed by Resolution Professional in not including the Appellant(s) in the List of Creditors. There was no occasion to include the name of the Appellant(s) in Information Memorandum, since, they have not filed their claim within time. There is no obligation on the Resolution Professional to inform the Homebuyers for filing their claims, apart from making publication in Form-A as required by Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (hereinafter referred to as the "CIRP Regulations"). The law as it exists, does not oblige the Resolution Professional to send any information to Homebuyers.

9. The learned Counsel for the Successful Resolution Applicant also supported the submission of learned Senior Counsel for the Resolution Professional and submitted that claims filed by all the Appellant(s) were Company Appeal (AT) (Insolvency) Nos. 390, 391, beyond the time prescribed for filing the claim. The Resolution Plan was approved by the CoC on 20.07.2021 and except Appellant in Company Appeal (AT) (Insolvency) No. 390 of 2022, all other claims were filed after 20.07.2021. The Appellant(s) having not filed their claim before the prescribed time, their rights have extinguished after the approval of the Resolution Plan by the CoC on 20.07.2021. The Adjudicating Authority has rightly rejected the IAs filed by the Appellant(s). The Resolution Plan has been

submitted based on the Information Memorandum prepared by the Resolution Professional. The Regulation 36(2)(d) of CIRP Regulations mentions that Information Memorandum shall contain a List of Creditors containing the names of creditors and the amount claimed by them and amount of their claims admitted and the security interest, if any, in respect of such claims. The Resolution Applicant has submitted the Resolution Plan as per Information Memorandum and now no claim can be entertained after approval of the Resolution Plan. The CIRP has been conducted in the time bound manner and now the Application for approval of Resolution Plan is pending consideration before the Adjudicating Authority.

10. The learned Counsel for the parties in support of their submissions have relied on various judgments of this Tribunal as well as Hon'ble Supreme Court, which shall be referred to while considering submissions in detail.

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

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12. From the submissions of learned Counsel for the parties, following are the questions, which arise for consideration in these Appeal(s):

(1) Whether the Adjudicating Authority has rightly rejected the IAs filed by the Appellant(s) seeking direction to include their claims, which was belatedly filed?

(2) Whether after approval of the Resolution Plan on 20.07.2021 by CoC, the claim of the Appellant(s) stood extinguished?

(3) Whether the Resolution Professional was obliged to include the details of Homebuyers as reflected in the records of the Corporate Debtor in the Information Memorandum, even though they have not filed their claim before the Resolution Professional within time?

(4) Whether Resolution Applicant ought to have also dealt with Resolution Plan regarding Homebuyers, whose names and claims are reflected in the record of the Corporate Debtor, although they have not filed any claim?

Question No.(1)

13. There is no dispute between the parties that the claim by the Appellant(s) were filed beyond the timeline prescribed in Form-A. Form-A required that the claims to be filed by 11.11.2020, whereas the claims were filed by the Appellant(s) on 14.07.2021, 23.07.2021 and in 09.11.2021. The learned Counsel for the Respondent has placed reliance on a judgment of this Tribunal in Mukul Kumar vs. M/s RPS Infrastructure - Company Company Appeal (AT) (Insolvency) Nos. 390, 391, Appeal (AT) (Insolvency) No. 1050 of 2020, where this Tribunal has held that the Resolution Plan has already

been approved by the CoC and pending resolution for approval, new claims cannot be entertained. In paragraph 34 of the judgment, following has been laid down:

"34. With the aforesaid, we are of the view that when the Resolution Plan has already been approved by the CoC and it is pending before the Adjudicating Authority for approval, at this stage, if new claims are entertained the CIRP would be jeopardized and the Resolution Process may become more difficult. Keeping in view the object of the IBC which is resolution of Corporate Debtor in time bound manner to maximize the value, if such request of claimant is accepted the purpose of IBC would be defeated. Hon'ble Supreme Court in the case of CoC of Essar Steel India Ltd. (Supra) held as under:-

88. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to Company Appeal (AT) (Insolvency) Nos. 390, 391, and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, the NCLAT judgment must also be set aside on this count."

14. The same principle has been reiterated in another judgment of this Appellate Tribunal, i.e., Harish Polymer Product v. George Samuel RP for Jason Dekor Private Limited - Company Appeal (AT) (Insolvency) No.420 of 2021.

15. The List of Creditors was already published by Resolution Professional, which did not include the name of the Appellant(s). The Resolution Plan as submitted by Resolution Applicant was based on List of Creditors as published by Resolution Professional. It is true that Homebuyers whose number runs in several hundred in real estate project belong to different class of Financial Creditors. All Homebuyers who have booked a flat may not normally be residing in the area where Corporate Debtor has its corporate office and registered office. The publication in the newspaper is normally done in the area where Corporate Debtor has its registered office and corporate office and there is every likelihood that all Homebuyers could not know within the fourteen days period allowed in Form-A to file their claim and practically Homebuyers who are hundreds in number neither come to know about the CIRP nor did they file their Company Appeal (AT) (Insolvency) Nos. 390, 391, claim within the fourteen days' time allowed. Even in maximum 90 days period as provided in Section 12(2), on several occasion, Homebuyers could not file their claims. The Homebuyers are a class

belonging to middle class of society and majority of whom, who book flat has taken loan from Banks and other financial institutions and they are saddled with liability to pay their loan from their hard-earned income they make payment to the Corporate Debtor in hope of getting a possession of the flat for their residence. Non-submission of claim within the time prescribed is a common feature in almost all project of real estate. But as law exists today, they cannot be included in the List of Creditors and that too after approval of Plan by CoC. We, thus, do not find any ground to interfere with order of the Adjudicating Authority rejecting their Application for admission of their claim. However, their claims need to be dealt in a manner, which we shall deal in later part of this judgment.

Question No.(2)

16. The submission raised on behalf of Resolution Professional as well as Successful Resolution Applicant is that after approval of the Resolution Plan by CoC on 20.07.2021, the claim of all the Appellant(s) stood extinguished, which submission is refuted by the learned Counsel for the Appellant(s). The question to be answered is as to whether after the approval of the Resolution Plan by the CoC, which does not include the claim of the Appellant(s), the claim of the Appellant(s) stood extinguished? The answer is to be found in statutory provision of Section 31, sub-section Company Appeal (AT) (Insolvency) Nos. 390, 391, (1), which deals with the approval of Resolution Plan is to the following effect:

"31. Approval of resolution plan. - (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-

section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation."

17. The Hon'ble Supreme Court in *Ghanashyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited*

- (2021) 9 SCC 657 while dealing with the above question, concluded in paragraph 102.1 and held that once Resolution Plan is approved by the Adjudicating Authority, the claims as provided in the Resolution Plan shall Company Appeal (AT) (Insolvency) Nos. 390, 391, stand frozen and all such claims, which are not part of Resolution Plan shall stand extinguished. Paragraph 102.1 is as follows:

"102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan."

18. It is thus clear that extinguishment of claim of the Appellant(s) shall happen only after approval of the Plan by the Adjudicating Authority. The argument of the Respondents that since CoC has approved the Resolution Plan, the claim of the Appellant(s) have been extinguished, cannot be accepted as there is no extinguishment of claim of the Appellant(s) on approval of Plan by the CoC. Question No.(2) is answered accordingly. Question Nos. (3) and (4) Since, both the above questions are interrelated, they are taken up together.

19. We have noticed above that in the event a claim belatedly filed by a Homebuyer is not accepted to be taken up, such Homebuyer cannot be included in the List of Creditors as prepared under CIRP Regulations. The Company Appeal (AT) (Insolvency) Nos. 390, 391, case of Homebuyers has been now recognized as Financial Creditors under the provisions of the Code as amended by Act 26 of 2018 (w.r.e.f 06.06.2018). The amendment in Code was brought to mitigate the misery of Homebuyers and to give them participation in the CIRP of a real estate Company. Looking to the procedure as is prevalent regarding filing of the claim by Financial Creditors, large number of Homebuyers are unable to file their claim within the time due to various genuine reasons related to such Homebuyers. Homebuyers make payment to the Corporate Debtor, receive allotment letter from the Corporate Debtor and also enter into Builder Buyers Agreement. All the documents pertaining to Homebuyers are on the record of the Corporate Debtor and Interim Resolution Professional/ Resolution Professional does take charge also of all the records of the Corporate Debtor. Even though, Interim Resolution Professional/Resolution Professional are not obliged to include the name of such Homebuyers, who have not filed the claim within the time in their List of Creditors, but there is no reason for not collating the claims of such Homebuyers whose claims are reflected from the records of the Corporate Debtor, including their payments and allotment. Regulation 36 of CIRP Regulations as amended with effect from 4th July, 2018 provides:

"36. Information memorandum. (1) Subject to sub- regulation (4), the resolution professional shall submit the information memorandum in electronic form to-

(a) each member of the committee within two weeks of his appointment as resolution professional; and Company Appeal (AT) (Insolvency) Nos. 390, 391,

(b) to each prospective resolution applicant latest by the date of invitation of resolution plan under clause (h) of sub-

section (2) of section 25 of the Code.] (2) The information memorandum shall contain the following details of the corporate debtor-

(a) assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation: 'Description' includes the details such as date of acquisition, cost of acquisition, remaining useful life, identification number, depreciation charged, book value, and any other relevant details.]

(b) the latest annual financial statements;

(c) audited financial statements of the corporate debtor for the last two financial years and provisional financial statements for the current financial year made up to a date not earlier than fourteen days from the date of the application;

(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;

(e) particulars of a debt due from or to the corporate debtor with respect to related parties;

(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;

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(g) the names and addresses of the members or partners holding at least one per cent stake in the corporate debtor along with the size of stake;

(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;

(i) the number of workers and employees and liabilities of the corporate debtor towards them;

(j) 15[***]

(k) 16[***]

(l) other information, which the resolution

professional deems relevant to the committee."

20. There are two important provisions of Regulation 36. Regulation 36(2)(a) and Regulation 36(2)(l). Regulation 36(2) oblige the Resolution Professional to include the details of Corporate Debtor regarding assets and liabilities. The word "liabilities" is an expensive word. The "liability" has been defined in P Ramanatha Aiyar - Advanced Law Lexicon in following words:

"The term 'liability means a liability to pay money or money's worth and it includes "any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution. [(English) Insolvency Act, 1986, section 382(4) as cited in Chitty on Contracts, 27th Edition, 1994 Vol. I, c.20, para 20- 037, p.1015]"

Company Appeal (AT) (Insolvency) Nos. 390, 391,

21. When the allotment letters have been issued to the Homebuyers, payments have been received, there are Homebuyers and there is obligation on the part of real estate Company to provide possession of the houses along with other attached liabilities. The liability towards those Homebuyers, who have not filed their claim exists and required to be included in the Information Memorandum. Further, under Regulation 36, sub-regulation 2(l), there is column for other information, which the Resolution Professional deems relevant to the Committee. The liabilities which have been undertaken by the Corporate Debtor, huge money received by the Corporate Debtor from Homebuyers, whose claims, which could not be filed within time, could not be wished away by the Resolution Professional, on the convenient ground that claims have not been filed by such Homebuyers. The purpose of CIRP of Corporate Debtor is to find out all liabilities of the Corporate Debtor and take steps towards resolution. Unless all liabilities of the Corporate Debtor are not known or included in the Information Memorandum, the occasion to complete the CIRP shall not arise.

22. In the above context, we refer to certain observation of this Tribunal in Company Appeal (AT) (Insolvency) No. 871-872 of 2019 - Santosh Wasantrao Salokar vs. Vijay Kumar V. Iyer decided on 24th January, 2020 along with other Appeals, where this Tribunal made observations in paragraph 23 as follows:

"23. It is further observed in respect of Company Appeal (AT) (Insolvency) No. 892-893 of 2019 & Company Appeal (AT) (Insolvency) Nos. 390, 391, (AT) (Ins) No.924 - 925 of 2019 that various claims are collected by the Resolution Professional during the CIRP process by inviting the claim from individual, organisations etc. But there are several micro claimant as also large claimants like Government claimants particularly Sales tax department, Income Tax Department etc., who generally are not filing claim, filing claim at a belated stage or filing not in appropriate format as a result of which Government dues are not considered although it may be reflected in the financial statements/books of Accounts of Corporate Debtor and similarly micro claims relating to Individual, MSME, and other small traders are also not considered by the Resolution Professional because of time constraint, belated receipt or non receipt of the claim even though the same may be provisioned for in the books of Accounts of Corporate Debtor hence in order to strengthen the system including the preparation of information memorandum as per regulation 36 of IBBI, it would be fair and proper if appropriate provision is incorporated under IBBI, (Insolvency Resolution Process for Corporate persons) Regulation 2016 for preparation of Balance Sheet as on date of initiation of CIRP process and the same gets audited from a regular Statutory Auditor of the Corporate Debtor certifying all schedules, including micro details of both Assets and Liabilities so that admitted liabilities in the Corporate Debtor records are not ignored

even if such claims are not received in time etc. It will aid & smoothen the existing system of collection and consideration of claim and these small individuals, MSME, SME and Government Department will not be the sufferer. It will also avoid large number of cases being filed by such left out Creditors." Company Appeal (AT) (Insolvency) Nos. 390, 391,

23. We thus are of the considered opinion that Information Memorandum ought to have included the claim of those Homebuyers, who have not even filed their claims to correct liabilities of the Corporate Debtor for its appropriate resolution. In the present case, in the reply filed by Resolution Professional in paragraph 11, following statement has been made:

"11. It is pertinent to mention herein that the claims towards the Homebuyer/ Allottees including the Appellant herein have already been dealt with in the Resolution Plan as submitted by Respondent No.4. it is stated that despite the same, the Appellant is abusing the process of this Hon'ble Appellate Authority by filing the captioned Appeal for seeking reliefs against the Respondents on frivolous grounds."

24. During the course of hearing, when pointed query was made to the Counsel appearing for Resolution Professional and Successful Resolution Applicant that what is the provision made for those claims including the claims of the Appellant(s), who have not filed their claim. The answer given was that their claims shall stand extinguished. The reply in paragraph 11 as quoted above sought to give impression that claim of the Homebuyers, who have not filed their claims have been dealt with in the Resolution Plan, but during the submission, it has been stated that their claims stand extinguished.

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25. However, we further take exception to the statement made in paragraph 11 that Appellant(s) are abusing the process of this Tribunal by filing the Appeal. The Appellant(s), who are Homebuyers and have made payments to the Corporate Debtor, has every right to agitate their claim. The Resolution Professional and Resolution Applicant having not given any credence to their claims, cannot be heard in saying that Appellant are abusing the process by filing Appeal in the Appellate Tribunal.

26. The learned Counsel for the Appellant(s) has also placed reliance on a judgment of this Tribunal in Company Appeal (AT) (Insolvency) No. 700 of 2021 - Amit Goel vs. Piyush Shelters India Private Ltd. decided on 18.01.2022 with other connected Appeals. In the aforesaid Company Appeal(s), Appeal(s) were filed challenging the order passed by the Adjudicating Authority approving the Resolution Plan with regard to real estate Corporate Debtor. In the above case, the claims were divided in two categories. The submissions of the Appellants were noted in paragraph-4 to the following effect:

"4. The Appellants have stated that later, in the 8th CoC meeting which took place on 25.09.2019, it was decided to publish the 4th Expression of Interest (EOI) which was published in Jansatta and Financial Express newspapers on 01.10.2019 with last date

for submitting EOI on 07.10.2019. It is claimed by the appellants that Maya Buildcon, which had earlier withdrawn its resolution plan, filed CA no. 282/2019 before Adjudicating Authority that it be allowed to submit a revised resolution plan. This application remained pending but the RP allowed a Company Appeal (AT) (Insolvency) Nos. 390, 391, consortium which included Maya Buildcon to submit a resolution plan and place it before the CoC for consideration. A revised plan was subsequently approved by the CoC in e-voting held on 6/7 November 2019. While the resolution plan was pending consideration of the Adjudicating Authority an applicant Vishal Saxena, who could not file his claim in time. obtained order of the Adjudicating Authority in CA No. 12/2020 on 3.2.2020, for admission and consideration of his claim. The appellants have further stated that while Vishal Saxena's claim and other claims that were filed after delay were admitted/accepted by the RP, the resolution plan approved by the CoC and the Adjudicating Authority the Impugned Order has created two separate categories of financial creditors in class - one of 'claimants who filed their claims in time', and the other of 'non-claimants' who could not file their claims in time. The two categories have received different shares in the approved resolution plan, and so while the 'claimants' have received possession of the booked properties, the 'non-claimants' have got just 10% of their booked amount after verification of their claims within one month, and thereafter all such claims would stand extinguished."

In the above case, the Resolution Plan contemplated a provision that those Homebuyers, who are non-claimants, they shall be paid 10% of their booked amount after verification of their claims. In the above case, hundreds of Homebuyers could not file their claims, final Resolution Plan contained the following as extracted in paragraph 8 of the judgment is as follows:

Company Appeal (AT) (Insolvency) Nos. 390, 391, "8. The Appellant-Harjeet Kaur in Company Appeal (AT) (INS) No. 761 of 2021, is an allottee in the project of the Corporate Debtor. Similarly, the Appellant in Company Appeal (AT) (Ins) No. 925 of 2021, Shri Bala Pareek and others are also allottees of the Corporate Debtor. The Learned Counsels for Appellants in CA 761 of 2021 and CA 925 of 2021 have claimed that the approved resolution plan gives unequal treatment to the same category of financial creditors thus discriminating between financial creditors of the same class. The final resolution plan provides as follows in its Para V(7) (at Pg. 153 of the Appeal Paperbook in Company Appeal No. 700 of 2021):-

"The allottees with MOU, who have not filed their claim till the last date of filing resolution plan, shall not be entitled for any relief or claim for possession over the property, whether paid in full or part. However, resolution applicant make an offer for them to take 10% of the verified amount within a period of one month and thereafter their claim shall be treated as abandoned.""

This Tribunal allowed the Appeal(s) by observing in paragraph 27 and 28:

"27. We now turn our attention to the allegation of the Appellants that due to inadequate publicity regarding the initiation of CIRP of the Corporate Debtor, they were not aware of the public announcement, and hence could not file their claims with Resolution Professional in time. The replies on behalf of Resolution Professional submitted in CA No. 700 of 2021 at page 26, para 30 mentions that, Company Appeal (AT) (Insolvency) Nos. 390, 391, "That it is respectfully submitted, that, the erstwhile resolution professional did not get any cooperation from the Appellant as was statutorily required from him for discharge of duties by the resolution professional during the CIRP of Corporate Debtor, further, the registered office of the Corporate Debtor at Meerut was closed and the only principal place of business at Faridabad as per MCA records -Piyush Global situated at Plot 5, YMCA Chowk, Delhi Mathura Road, Faridabad (HR) which was sealed by the secured financial creditor - HDB Financial Services Limited (HDBFS) under SARFAESI Act, 2002 and Municipal Corporation of Faridabad (MCF) since prior to start of CIRP on 3rd December, 2018. Further, all the employees of the Corporate Debtor had left and no employees of the Corporate Debtor were on the rolls of the corporate debtor as on insolvency commencement date on 3rd December 2018. All the business operation of the Corporate Debtor was also closed."

28. Thus we see that the homebuyers/allottees could not have had access to either the registered office of the corporate debtor or the principal place of business at Faridabad since both were closed. Moreover, without the meeting/getting together by the homebuyers/allottees, it was not easy for them to discuss and convey their views to the Authorized Representative who would then represent their views in the CoC. When we see that out of a total of 473 home buyers/allottees only 222 allottees could file claims in time before the Resolution Professional and 251 allottees could either not do so or did so belatedly, we feel Company Appeal (AT) (Insolvency) Nos. 390, 391, that exclusion of more than 251 i.e. about 53% of total homebuyers/allottees cannot lead to a fair and just resolution of the Corporate Debtor. We also feel that the providing 10% of the claimed amounts to homebuyers/allottees who could not file their claims in the circumstances of this case is an unfair and inadequate treatment of the financial creditors."

This Tribunal in the above case has held that when 251 of allottees could not file their claims or filed their claims belatedly, the exclusion of 251 Homebuyers cannot lead to a fair and just resolution of the Corporate Debtor and provisions of providing 10% also held to be unfair and inadequate treatment to the Financial Creditors. The appeal was allowed by issuing following direction in paragraph 39:

"39. In light of the aforementioned discussion, we set aside the impugned order dated 14.7.2021 and direct that the process be started afresh with claims of homebuyers/allottees accepted by the Resolution Professional by giving them realistic time limit for submission of claims, in keeping with the order of the Adjudicating Authority in CA 12/2020, leading to a revised information memorandum, which should then be used for inviting Expressions of Interest. In the CIRP, the views of the financial creditors in class should be elicited by the Authorized

Representative prior to CoC meetings in letter and spirit of section 25A of IBC. Thereafter, the CoC shall consider the resolution plans so received in accordance with the provisions laid down in law. For this entire Company Appeal (AT) (Insolvency) Nos. 390, 391, exercise, we allow a period of 90 days to the CoC from the date of this order to complete the entire exercise."

27. In the present case there is no denial that details of the Appellant(s) and other Homebuyers, who could not file their claims has not been reflected in the Information Memorandum. There being no detail of claims of the Appellant(s), the Resolution Applicant could not have been taken any consideration of the claim of the Appellant(s), hence, Resolution Plan as submitted by Resolution Applicant cannot be faulted. However, we are of the view that the claim of those Homebuyers, who could not file their claims, but whose claims were reflected in the record of the Corporate Debtor, ought to have been included in the Information Memorandum and Resolution Applicant, ought to have been taken note of the said liabilities and should have appropriately dealt with them in the Resolution Plan. Non-consideration of such claims, which are reflected from the record, leads to inequitable and unfair resolution as is seen in the present case. To mitigate the hardship of the Appellant, we thus, are of the view that ends of justice would be met, if direction is issued to Resolution Professional to submit the details of Homebuyers, whose details are reflected in the records of the Corporate Debtor including their claims, to the Resolution Applicant, on the basis of which Resolution Applicant shall prepare an addendum to the Resolution Plan, which may be placed before the CoC for consideration. The above exercise be completed within a period of three months from today and the addendum along with minutes of the CoC be placed before the Company Appeal (AT) (Insolvency) Nos. 390, 391, Adjudicating Authority at the time of approval of Resolution Plan, which is pending consideration before the Adjudicating Authority. The Resolution Applicant may also bring into the notice of the Adjudicating Authority the order of this date, so that the Adjudicating Authority may await the addendum and minutes of the CoC, which may be considered along with approval of the Resolution Plan. We thus, dispose of these Appeal(s) with following directions:

- (1) The Resolution Professional shall provide all details of Homebuyers along with their claims as reflected from the record of the Corporate Debtor, who had not filed their claims, including the Appellant(s) to the Resolution Applicant within a period of one month from today.
- (2) The Resolution Applicant shall prepare an addendum on the basis of information as submitted by Resolution Professional and place the same before the CoC within a further period of one month.
- (3) The CoC shall consider the addendum in its meeting and decision of the CoC on the Information Memorandum and addendum be placed before the Adjudicating Authority. The CoC shall take decision in its meeting within a period of one month from the date of submission of addendum by the Resolution Applicant.

(4) The Adjudicating Authority while considering approval of the Resolution Plan, which is pending consideration in Company Appeal (AT) (Insolvency) Nos. 390, 391, IA No.3447 of 2021 shall consider the addendum and the minutes of the CoC at the time of finalizing the Resolution Plan.

28. The Resolution Professional shall bring into the notice of the Adjudicating Authority, the order of this date, so as to enable the Adjudicating Authority to await the filing of addendum along with the minutes of the CoC.

29. The Appeal(s) are disposed of in view of the above terms. Parties shall bear their own costs.

[Justice Ashok Bhushan] Chairperson [Ms. Shreesha Merla] Member (Technical) [Naresh Salecha] Member (Technical) NEW DELHI 1st June, 2022 Ash/NN Company Appeal (AT) (Insolvency) Nos. 390, 391,