

CIRP ordered on a specific project basis by the NCLAT

In the case of *Ram Kishor Arora v. Union Bank of India & Anr.*,¹ the National Company Law Appellate Tribunal, New Delhi (“NCLAT”) recently permitted the interim resolution professional (“IRP”) of M/s Supertech Limited as the corporate debtor (“Supertech”) to constitute a committee of creditors (“CoC”) for only one project i.e., ‘Eco Village II Project’. The NCLAT also held that all other projects of Supertech apart from Eco Village II Project should be continued as ongoing projects and the construction of these projects should continue with overall supervision of the IRP with the assistance of the ex-management and employees of Supertech.

Background

Supertech is a real estate company which is involved in the construction of various projects in the National Capital Region. In 2013, Union Bank of India (“UBI”) had granted credit facilities of INR 150 crores to Supertech for the development of ‘Eco Village II Project’. Additional credit facilities of INR 200 crores were also sanctioned by UBI and Bank of Baroda to Supertech in the year 2015.

Supertech defaulted on repayment of the loans to UBI and the account was declared as a non-performing asset by UBI on June 20, 2018. Subsequently, UBI filed an application on March 20, 2021 for initiating the corporate insolvency resolution process (“CIRP”) of Supertech under Section 7 of the Insolvency and Bankruptcy Code, 2016 (“IBC”). The application was admitted and the CIRP of Supertech was commenced by the National Company Law Tribunal, New Delhi (“NCLT”) by its order dated March 25, 2022.

Mr. Ram Kishor Arora (“Appellant”), being a suspended director of Supertech, filed an appeal against the order of NCLT with the NCLAT. The NCLAT, by its order dated April 12, 2022, directed the IRP to not to constitute the CoC. Various intervention applications were filed by home buyers which were divided into two groups. One group comprised applications filed by home buyers with a prayer that the CIRP should not continue, and several applicants requested that the Eco Village II Project be kept outside CIRP. Another group included applications filed by home buyers praying that the CIRP of Supertech should continue.

The Appellant submitted that (a) UBI had extended credit facilities only for certain projects, namely Eco Village II Phase I & Phase II, Eco Village III and the Romano Project, (b) Supertech was constructing a large number of projects, some were already completed and several projects were under construction but mostly completed; (c) Supertech had sufficient receivables with a positive net worth and required only last mile funding for completing construction, which will result in generation of adequate cash-flows to meet out all obligations of Supertech; and (d) certain investors had already agreed to infuse funds into the company to complete a stalled project. He also submitted a resolution cum settlement proposal for completion of the projects.

¹ Company Appeal (AT) (Insolvency) No. 406 of 2022

UBI contented that as there is default by Supertech in loan repayment, the application under section 7 of IBC was rightly admitted and CIRP should be allowed to proceed by constitution of the CoC.

Key Issue

The key issue that was before the NCLAT was whether the CIRP under Section 7 of IBC should be proceeded against Supertech and accordingly, whether the CoC be constituted for the entire company or whether a project wise resolution should be initiated for various projects of Supertech.

Findings of the NCLAT

The NCLAT referred to the judgments of the Hon'ble Supreme Court in *Swiss Ribbon Pvt. Ltd. vs. Union of India*² and *Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Others*³, wherein the Hon'ble Supreme Court had upheld experimentation in economic laws such as the IBC. It also relied on its own judgement in the case of *Flat Buyers Association Winter Hills – 77, Gurgaon vs. Umang Realtech Pvt. Ltd. through IRP & Others*⁴, wherein a reverse CIRP was ordered by the NCLAT for a real estate project company in the interest of the allottees, survival of the real estate project company and for ensuring completion of projects which provides employment to several unorganized workmen.

The NCLAT examined the status report submitted by the IRP and noted that a large number of units were sold in the 20 on-going projects of Supertech. It also noted that UBI had filed the Section 7 application for a default on the loans it had provided for the Eco Village II Project, but also noted that UBI had also provided loans for certain other projects of Supertech. IDBI Bank had also intervened in the application since it had also provided loans for the Eco Village II Project. The NCLAT also noted that several homebuyers had filed intervention applications and requested that the CIRP should be limited only to the Eco Village II Project.

It acknowledged that the CIRP had commenced against Supertech and the IRP had taken control over the assets of Supertech. It also acknowledged that the promoters and the staff were willing to co-operate with the IRP and therefore, the IRP could continue with the construction of various ongoing projects of Supertech.

Given the facts and circumstances of the case, the NCLAT ultimately ordered that rather than a CIRP for all the ongoing projects of Supertech, only a project-wise resolution should be started as a test to find out the success of such resolution. Amongst others, it passed the following directions:

- (a) It directed that CoC be constituted only for the Eco Village II Project with all financial creditors including home buyers.
- (b) Further, the IRP should carry the Eco Village II Project as ongoing project by taking all assistance from the ex-management, employees and workmen of Supertech.
- (c) No voting should take place on any resolution plans received for the Eco Village II Project without leave of the NCLAT.
- (d) The IRP has to obtain approval of the CoC which is directed to be constituted for the Eco Village II Project to incur all the expenses regarding the said project and further incur the expenses accordingly.
- (e) All receivables with regard to the Eco Village II Project have to be kept in the separate earmarked account and detailed accounts of inflow and outflow have to be maintained by the IRP.

² (2019) 4 SCC 17

³ (2018) 8 SCC 531

⁴ Company Appeal (AT) Ins. No. 926 of 2019

- (f) All other projects of Supertech (apart from Eco Village II Project) must also be kept as ongoing projects. The construction of all other projects shall continue with overall supervision of the IRP with the assistance of the ex-management and its employees and workmen.
- (g) With regard to the expenses for such other projects for which no CoC has been constituted, the IRP is at liberty to submit a proposal for payment of various expenses including 'CIRP' expenses to the NCLAT.
- (h) The promoters of Supertech are at liberty to bear any expenses as requested by the IRP without in any manner utilizing any of the funds of Supertech.
- (i) The promoters shall infuse the funds as arranged by it in different projects which shall be treated as "Interim Finance" and the IRP must maintain a detailed account in relation to the same.
- (j) No account of Supertech can be operated without the counter signature of the IRP. All expenses and payments in different projects can be only with the approval of the IRP. All receivables in different projects must be deposited in the account as per 'RERA' guidelines and 70% of the amount must be utilized for construction purposes only. With regard to the disbursement of rest of the 30%, the NCLAT will issue appropriate directions subsequently after receiving the status report and after hearing all concerned parties.

Conclusion

While the NCLAT has given control over all assets of the corporate debtor to the IRP (as is contemplated in the IBC), it has only constituted a CoC for one project (which is not a concept technically recognised in the IBC). Even though UBI had provided loans for four projects, the key considerations based on which NCLAT ordered the constitution of the CoC for only one project appear to be that (a) UBI had filed the Section 7 application only for default under the Eco Village II Project, (b) IDBI Bank, being the second lender for that project had also intervened to protect its rights, (c) several home allottees had filed intervention applications and requested for a CIRP of only the Eco village II Project, and (d) the promoters have agreed to co-operate in the construction of all other ongoing projects and also submitted a settlement and resolution plan.

In the current case, even though the CoC has been constituted for one project, the NCLAT has given operational control to the IRP over all other projects by giving it control on withdrawals from different project accounts. It has also permitted withdrawals of 70% of the funds only for construction expenses (presumably for the relevant projects) and will provide appropriate directions on how to use the balance 30% of the funds. Therefore, this arrangement will supersede any escrow arrangements that specific lenders to the other projects have. Such lenders may intervene in the matter to ensure that their interests remain protected.

Another interesting element is that the NCLAT has stated that any funds infused by the promoters in different projects will be treated as "interim finance". Under the IBC, interim finance is treated as part of the CIRP costs and enjoys priority in payment compared to the dues of other creditors. The question that will need to be addressed eventually is whether any funds infused by (or on the behest of) the promoters for completion of any project other than the Eco Village II Project will also have to be paid out in priority to the lenders of the Eco Village II Project from any resolution plan received for the same.

While there are still some interpretational concerns, given the facts and circumstances, the NCLAT has played a balancing act in this judgement – on one hand to protect the interests of allottees of several ongoing projects which were near completion and, on the other hand to protect the interests of financial creditors that had lent to a specific project and suffered defaults.

Given the number of such instances, especially in the real estate sector, it is imperative that the Government and IBBI seriously deliberate on the concept of project-wise CIRPs and amend the law to put in place rules on how such project-wise CIRPs or reverse CIRPs can function.

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