

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-V**

(IB) 1896 (ND) /2019
IA/4460/2021

IN THE MATTER OF:

M/S INTEC CAPITAL LIMITED

...FINANCIAL CREDITOR

VERSUS

GSS PROCON

...CORPORATE DEBTOR

AND IN THE MATTER OF:

**NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY
MAIN ADMINISTRATIVE BUILDING
SECTOR 6, NOIDA**

...APPLICANT

VERSUS

MR. SUNIL KUMAR AGGARWAL

RESOLUTION PROFESSIONAL

904, GF, SECTOR - 7C, FARIDABAD - 121006

.... RESOLUTION PROFESSIONAL/ RESPONDENT

SECTION: U/S 60(5)(c) OF IBC, 2016

Order delivered on: 12.04.2022

CORAM:

MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

MR. AVINASH K. SRIVASTAVA, MEMBER (TECHNICAL)

Present: Adv. Rachit Mittal, Adv. Ritika Dawalia, for the Applicant
Mr. Sunil Kumar Agarwal, RP
Adv. Rakesh Kumar, Adv. Preeti Kashyap, Adv. Ankit Sharma for
the Resolution Professional

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present application has been filed U/S 60(5)(c) of the IBC, 2016 (Code) & Regulation specified under Insolvency & Bankruptcy Board of India



(Insolvency Resolution Process for Corporate Persons) Regulation, 2016 read (herein after referred to as Regulation) with Rule 11 of the NCLT rules, 2016, on behalf of the Applicant i.e. New Okhla Industrial Development Authority against Resolution Professional ("IRP/ RP") Mr. Sunil Kumar Agarwal praying therein for the following reliefs:

- a) Allow the present application;
- b) Direct the Respondent- Resolution Professional to make the payment of amounts due and payable towards the outstanding dues which have become due during CIRP;
- c) Pass such other order/directions as this Hon'ble Bench may deem fit and proper in the facts and circumstances of the case.

2. The facts mentioned in the application in brief are as follows:

- i. That the Applicant allotted Plot No.GH-01/C, Sector 143B Noida to the Corporate Debtor vide allotment letter being letter no. Noida/ GHP/GH-2010-(IV)/2011/2193 dated 25.02.2011.
- ii. That a lease deed was executed between the Applicant and the Corporate Debtor on 19.08.2011 and the aforesaid plot was transferred on lease for a term of 90 years. The total consideration of the premium of the plot of Rs.24,29,66,779.00, out of which 10% i.e. Rs. 2,42,96,677.90 was paid by the corporate debtor at the time of execution and thereafter the balance 90% premium of the plot along with interest was to be paid within next 8 years. In case of default in depositing installment or any payment, interest at the rate 14% compounded half yearly was require to be paid.
- iii. That the Corporate Debtor, vide letters dated 06.07.2015 and 07.08.2015, had made a request for rescheduling of overdue payment. Against the said request, the Applicant vide letter dt. 31.12.2015, sent a reply stating therein that in case, re-schedulement needs to be approved, sum of Rs. 2,40,19,885.00 needs to be deposited. Further, 15% of the total due along with up to date lease rent with interest has to be paid by the

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corporate debtor.

- iv. That the Corporate Debtor had again made a request for rescheduling vide letters dt. 28.01.2016 and 09.11.2016. The Applicant again vide letter dt. 02.12.2016 sent a reply stating therein that in case, the Corporate Debtor wishes to avail the re-schedulement of the total dues of Rs. 18,18,11,200.00 then total amount of Rs. 3,65,81,580.00 is required to be deposited upfront by the Corporate Debtor.
- v. That in terms of the aforesaid, the upfront amount was deposited by the Corporate Debtor on 26.12.2016. The Applicant issued re-schedulement letter dated 01.05.2017 mentioning half yearly installments starting from 30.06.2017 till 30.06.2021.
- vi. That the CIRP was initiated against the Corporate Debtor vide order dated 10.10.2019.
- vii. That the IRP had made the public announcement and the applicant had filed its claim before the respondent on 31.12.2019 for the dues upto 10.10.2019, i.e. date of commencement of CIRP.
- viii. That the Respondent has failed to make the payments of the amounts due. The Applicant has raised this issue, in various CoC meetings and thereafter also wrote a letter dated 04.06.2021, and had made a request to make the payment of the due amount within the period of 15 days. Further, the letters were again sent on 09.06.2021 and 29.06.2021.
- ix. That the dues towards the four rescheduled instalments and the lease rent for 2 years is still unpaid, amounting to a total of Rs. 16,15,26,597/-.

3. The Respondent has filed its reply and has asserted the following contentions:

- i. That the Applicant has revised the payment schedule on the request made by the erstwhile management of the Corporate Debtor. The Corporate Debtor has sought to reschedule the

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- payment of the Noida Authority, whereas it has taken the payment from the Homebuyers towards the cost of the land.
- ii. That the Noida Authority has submitted claim of Rs. 3296.19 lacs on 03.12.2019, which includes instalments with interest, lease rent alongwith interest, farmer's compensation and time extension charges.
 - iii. That the Noida Authority has further submitted claim on 01.10.2021 of Rs. 1375.99 lacs towards the compounding charges for issue of Occupation and Completion Certificate.
 - iv. That the RP has advised for submission of a consolidated outstanding amount vide email dated 07.10.2021. However, it has not been submitted.
 - v. That a Resolution Plan from Resolution Applicant-Crossroad Welfare Society has been approved by CoC with 93.43% vote in the meeting held, on 04.12.2020.
 - vi. That the Resolution Plan Chapter VIII-Repayment Plan para 8.3. SI. No. 8 covered claim of Noida Authority, which is being offered by the Resolution Applicant for Rs. 50 lacs in full and final settlement of their claim.

4. The Applicant has filed its written submissions and has stated almost same statement as stated in the application. It is further submitted that the Resolution Professional has been managing the affairs of the Corporate Debtor as a going concern.

5. That in the course of arguments, it is submitted on behalf of the Respondent that in view of the moratorium imposed in terms of Section 14 of the Code, the said amount is not payable. It is submitted that as per Regulation 31 (b) of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 ("Regulations"), the said amount even do not form part of the CIRP cost, which is to be paid.

6. The Respondent has filed written submissions and has stated almost same statement as stated in the reply except the following: -

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- i. The present application is not maintainable in view of Section 14 of the Code. No proceedings can be instituted against the Corporate Debtor during the moratorium period. Further, reliance has been placed upon the decision of the Hon'ble Supreme Court in the matter of ***P. Mohanraj & Ors. vs M/s Shah Brothers Ispat Pvt. Ltd. in Civil Appeal No. 10355 of 2018.***
- ii. That in terms of regulation 31, 32, and 34 of the Regulations, the Resolution Professional can discharge the payment to any third party, which is part of the CIRP cost, as defined under Regulation 31. Further contented that the said cost shall also be ratified by the CoC as stated in Regulation 34, but in the present case, no such cost has been approved by the CoC as claimed by the Applicant. Moreover, the dues which have been referred to in letter dated 04.06.2021, are related to period of quarters 30.12.2019, 30.06.2020, 30.12.2020 and 30.06.2021. The CIRP order in the present matter was passed on 10.10.2019 and the letter has been issued on 04.06.2021. Prior to that, the Applicant has already filed the claim on 31.12.2019 before the Respondent.
- iii. That the Applicant is trying to make out its case that this due comes under the category of essential supply of goods and services, but as per Regulation 32 of the Regulation 2016, the lease rentals do not fall under the definition of supply of goods

7. We have heard the Ld. Counsel appearing for the Applicant as well as Respondent/RP and perused the averments made in the application, reply and written submissions filed by the respective parties.

8. On the basis of the averments made in the application, reply and written submissions filed on behalf of the respective parties, we observe that the only issue needs to be considered, **whether the claim of the applicant regarding the payment of dues after the commencement of the CIRP, in pursuance of the letter dated 04.06.2021 from the period 11.10.2019 to 30.06.2021 and for the Financial Year 2021-22 are liable to be paid**



by the Respondent to the Applicant or not?

9. The contention of the respondent is that the amount claimed by the Applicant in terms of letter dated 04.06.2021 is barred under Section 14 of the IBC because during the moratorium no amount is liable to be recovered as the lease rent does not come under the essential supplies as referred to in Regulation 32 Regulation 2016.

10. Before considering the submissions of the parties, we would like to refer to the said letter dated 04.06.2021 sent by the Applicant to the Resolution Professional and a scanned copy of the same is reproduced below:-

नवीन औखला औद्योगिक विकास प्राधिकरण
पूजा इलाक़ा नगर, सैक्टर ७, फ़ैदाबाद, ज़िला-फ़ैजाबाद, राज्य-उत्तर प्रदेश

एच नो नंबर / लेटर / प्रकल्प(नं)/2019 / 1110
दिनांक 04/6/21

Mr. Sunil Kumar Aggarwal
Resolution Professional
Add: 904, Ground Floor,
Sector-7C, Faridabad-121006

विषय: भूखण्ड संख्या जी एच/01सी, सैक्टर 143बी, मैसर्स जी एच एच परेकोम प्रा) लिड नौरहा के सम्बन्ध में।
महोदय

कृपया उपरोक्त विषयक प्रकरण में दर्जित दायित्व किये जाने की तिथि के उपरान्त प्राधिकरण की रोष देयता दिनांक 11.10.2019 से 30.06.2021 तक का विवरण निम्न प्रकार है-

तुर्नियर्धारण किस्मे	देय तिथि	प्रिमियम की राशि
6 th	30.12.19	₹ 4,23,35,978.00
7 th	30.06.20	₹ 4,00,20,733.00
8 th	30.12.20	₹ 3,77,05,483.00
9 th	30.06.21	₹ 3,53,90,233.00
	योग (₹)	₹ 15,54,52,427.00
वर्ष		भू-भाटक की राशि
2020-21		₹ 20,29,668.00
2021-22		₹ 36,44,502.00
	योग (बी)	₹ 60,74,170.00
	योग (ए+बी)	₹ 16,15,26,597.00

उपरोक्त देय राशि के अतिरिक्त च्याज भी देय होगा।

आतः आपसे अनुरोध है कि प्राधिकरण की देयता ₹ 16,15,26,597.00 का भुगतान 15 दिन के अन्दर कराने का कष्ट करें।

प्रतिक्रिया:
श्री नरदेव सिंह, सहायक विधि अधिकारी, को सूचनाार्थ।

वित्त एवं लेखाधिकारी
(दुप हारसिंग)

वित्त एवं लेखाधिकारी
(दुप हारसिंग)

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NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY

Main Administrative Building, Sector 6, Noida, District Gautam Budh Nagar, U.P.

Letter No. Noida/Accounts/ Gr. Hou. (Accounts)/ 2021/1110

Date: 04.06.21

Mr. Sunil Kumar Aggarwal
Resolution Professional
Add: 904, Ground Floor,
Sector 7C, Faridabad 121006

Subject: With regard to the Plot No. GH/01C, Sector 143B,
Noida M/s. GSS Procon Private Limited

Sir,

It is in regard to the aforementioned subject, the details of the dues from 11.10.2019 to 30.06.2021 i.e. pursuant to the filing of the claim are as under:

Re-scheduled Instalments	Payable date	Premium amount
6 th	30.12.19	Rs. 4,23,35,978.00
7 th	30.06.20	Rs. 4,00,20,733.00
8 th	30.12.20	Rs. 3,77,05,483.00
9 th	30.06.21	Rs. 3,53,90,233.00
	Total (A)	Rs. 15,54,52,427.00

Year	Amount of Lease Rent
2020-21	Rs. 20,29,668.00
2021-22	Rs. 36,44,502.00
Total (B)	Rs. 60,74,170.00

11. On perusal of the letter referred to supra, we notice that the Applicant has claimed the amount towards premium amount which was rescheduled and due and payable in terms of the rescheduled agreement and the lease rent for the Financial Year 2021-22. The contention of the Respondent is that the said amounts do not come under the essential supplies. Therefore, at this juncture, we would like to refer to the relevant regulations 31, 32, 33, 34 and 34A.

INSOLVENCY RESOLUTION PROCESS COSTS

31. Insolvency resolution process costs.

“Insolvency resolution process costs” under Section 5(13)(e) shall mean-

- (a) amounts due to suppliers of essential goods and services under Regulation 32;
- ⁵¹[(aa) fee payable to authorised representative under ⁵²[sub-regulation (8)] of regulation 16A;
- (ab) out of pocket expenses of authorised representative for discharge of his functions under ⁵³[section 25A];]
- (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);
- (c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;
- (d) expenses incurred on or by the resolution professional fixed under Regulation 34; and
- (e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.

32. Essential supplies.

The essential goods and services referred to in section 14(2) shall mean-

- (1) electricity;
- (2) water;
- (3) telecommunication services; and
- (4) information technology services,

to the extent these are not a direct input to the output produced or supplied by the corporate debtor.

Illustration-Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.

33. Costs of the interim resolution professional.

- (1) The applicant shall fix the expenses to be incurred on or by the interim resolution professional.
- (2) The Adjudicating Authority shall fix expenses where the applicant has not fixed expenses under sub-regulation (1).
- (3) The applicant shall bear the expenses which shall be reimbursed by the committee to the extent it ratifies.
- (4) The amount of expenses ratified by the committee shall be treated as insolvency resolution process costs.

⁵⁴[*Explanation.* - For the purposes of this regulation, “expenses” include the fee to be paid to the interim resolution professional, fee to be paid to insolvency professional entity, if any, and fee to be paid to professionals, if any, and other expenses to be incurred by the interim resolution professional.]

34. Resolution professional costs.

The committee shall fix the expenses to be incurred on or by the resolution professional and the expenses shall constitute insolvency resolution process costs.

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⁵⁶[34 A. Disclosure of Costs.

The interim resolution professional or the resolution professional, as the case may be, shall disclose item wise insolvency resolution process costs in such manner as may be required by the Board.]

12. On conjoint reading of the said regulations, it is seen that as per Regulation 31, the Insolvency Resolution Process Cost under Section 5(3)(e) includes the item referred to from (a) to € of Regulation 31. We further notice that as per Regulation 31(a), the amount due to supplies of essential goods and services under Regulation 32 would be included as Insolvency Resolution Process Cost and according to Regulation 32, only Electricity, Water, Telecommunication Services and Information Technology Services, comes under the category of essential supplies and the IRP or the RP is under obligation to disclose the itemwise Resolution Process Cost. That is the reason, the Applicant has claimed the amount which is referred to in the letters shall be treated as service rendered under Regulation 32, and include that amount as Insolvency Resolution Process Cost,

13. At this juncture, we would also like to refer Section 25 of the IBC and the same is reproduced below:-

Section 25: Duties of resolution professional.

(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—

(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;

(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;

(c) raise interim finances subject to the approval of the committee of creditors under section 28;

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(d) appoint accountants, legal or other professionals in the manner as specified by Board;

(e) maintain an updated list of claims;

(f) convene and attend all meetings of the committee of creditors;

(g) prepare the information memorandum in accordance with section 29;

[(h) invite prospective resolution applicants, who fulfil such criteria as may be laid down by him with the approval of committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.]

(i) present all resolution plans at the meetings of the committee of creditors;

(j) file application for avoidance of transactions in accordance with Chapter III, if any; and

(k) such other actions as may be specified by the Board.

14. A bare perusal of Section 25(1) shows that it is the duty of the Resolution Professional to preserve and protect the assets of the Corporate Debtor including to continue the operation of the Corporate Debtor. Admittedly it is a Real Estate Project and for the construction of the buildings a lease was granted to the Corporate Debtor under terms and conditions, which includes the payment of premium and lease rent. The claim of the Applicant that so far the amount due and payable prior to the institution of the CIRP is concerned, same has already been submitted before the Resolution Professional but so far dues which are due and payable after the initiation of CIRP in terms of the rescheduled agreement, the Applicant is entitled to get it. Whereas as the Respondent claimed protection under Section 14 of the IBC, therefore, we would also like to refer to Section 14 of the IBC and the same is reproduced below:-

Section 14: Moratorium.

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(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.



[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

(3) The provisions of sub-section (1) shall not apply to —

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.]

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

15. A bare perusal of Section 14 (2) of IBC, 2016 shows that during the moratorium, the supply of essential goods or services to the Corporate Debtor as may be specified shall not be terminated or suspended or interrupted.

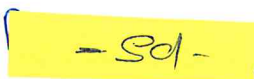
16. At this juncture, we would also like to refer to Section 14 (1)(d) which restrain the owner or lessor from recovery of any property where such property is occupied or is in possession of the Corporate Debtor. **But as per Explanation of Section 14(1) of the IBC, this provision is subject to the condition that there is no default in payment of current dues arising**

for the use or continuation of the license, permit, registration, quota, concession, clearance or a similar grant or right during the moratorium period.

17. Admittedly, to enjoy the lease granted by NOIDA Authority to the corporate debtor, lease premium and lease rent are to be paid for during the period 11.10. 2019 to 30.06. 2021 as per the letter dt. 04.06.2021, sent by the Applicant to the Resolution Professional. Therefore, even if we accept the contention of the Resolution Professional that the lease rent does not fall under the categories of supplies to the essential goods and services, but in terms of Explanation of Section 14(1) of the IBC 2016 added w.e.f 28/12/2019, the applicant is entitled to get lease premium amount as well as lease rent arising for the use or continuation of the lease during the moratorium period, failing which the moratorium will not apply for the suspension or termination of lease. In view of the above, as the Resolution Professional has failed to pay the lease premium and lease rent due to the NOIDA Authority, therefore, the respondent is directed to make the payment of the current amount, which is due and payable within 6 months or include the said amount as Insolvency Resolution Process Cost under Regulation 31 of the IBBI (Insolvency Resolution Process of Corporate Persons).

18. However, the Resolution Professional is at liberty to negotiate with NOIDA for the re-schedulement in payment of installments.

19. In sequel to the above, we find, merits in the application. Accordingly, the application is allowed.

 - Sol -
(AVINASH K. SRIVASTAVA)
Member (T)

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(ABNI RANJAN KUMAR SINHA)
Member (J)