

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 867 of 2021

&

I.A. No. 2315 of 2021

(Arising out of the Order dated 05th April, 2021 passed by National Company Law Tribunal, New Delhi, Principal Bench, in I.A. 1380(PB)/2021 in (IB)-272(PB)/2019)

IN THE MATTER OF:

Greater Noida Industrial Development Authority

Through Chief Executive Officer

Plot No. 01, Knowledge Part-04

Greater Noida, Gautam Budh Nagar,

Uttar Pradesh – 201308.

...Appellant

Versus

1. Mr. Prabhjit Singh Soni

Resolution Professional,

M/s. JNC Construction Private Limited

Regn. No. IBBI/PA-002/IP-N00065/2017-18/0143,

GG-1/144/C, Third Floor,

Near – PVR Cinema,

Vikas Puri, Delhi – 110018.

E-mail: rpjnccons@gmail.com

...Respondent No. 1

2. Gautam Builder in Consortium

with Rapid Contracts Pvt. Ltd. Resolution

Applicant

For M/s. JNC Construction Pvt. Ltd.

Corp. Office: B-07. Sector 63,

Noida – 201301 (UP)

E-mail: gautamrapidconsortium@gmail.com

...Respondent No. 2

Present

For Appellant:

**Mr. P. Nagesh, Sr. Advocate with Mr. U.N. Singh,
Advocates.**

For Respondent No. 1:

**Mr. Aditya Madaan & Mr. G.P. Madaan,
Advocates for R-1.**

**For Respondent No. 2: Mr. Alok Dhir, Ms. Varsha Banerjee &
Mr. Kanishk Khetan, Advocates for R-2.**

(J U D G E M E N T)

[Per; Shreesha Merla, Member (T)]

1. Aggrieved by the Order dated 05.04.2021 passed in I.A.1380/2021 and in I.A.344/2021, in (IB)-272(PB)/2019 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Principal Bench), Greater Noida Industrial Development Authority preferred this Appeal. By the Impugned Order, the Adjudicating Authority has dismissed I.A.1380/2021 preferred by the Appellant/Greater Noida Industrial Development Authority ('G. Noida') on the ground that Noida has not taken any action for seven long months when it is their case that the RP had not taken any decision over the 'Claim Application' filed by them and that the CoC had already approved the Plan and only subsequent to the approval, G. Noida has approached the Adjudicating Authority belatedly on 06.10.2020, whereas the CIRP had been initiated way back on 30.01.2020.

2. **Submissions of the Learned Sr. Counsel, Mr P. Nagesh appearing on behalf of the Appellant:**

- Learned Sr. Counsel strenuously argued that the Appellant had submitted their proof of claim as the 'Financial Creditor' but the RP has treated their claim as an 'Operational Creditor', aggrieved by which G. Noida filed I.A.344/2021, challenging the decision of the RP for converting the claims

of the Appellant as an ‘Operational Creditor’ and also for not informing them regarding the main Meetings of the CoC. The Appellant also preferred I.A.1330/2021, seeking to set aside the Order dated 04.08.2020, passed in I.A.2201/2020 on the ground that they have not been heard and that it was an Ex-Parte Order against the rights and interests of G. Noida. Vide Impugned Order dated 05.04.2021, the Adjudicating Authority disposed of both the Applications without taking into consideration the objections raised by the Appellant herein.

- It is submitted by the Learned Sr. Counsel that the Lease in question ought to be classified as a ‘Financial Lease’ as the land has been allotted to the ‘Corporate Debtor’ with a right of mortgage of the said Leasehold Property to raise buildings and subsequently to execute Sale Deeds in favour of the Homebuyers vide Tripartite Transfer Deeds. Under the Lease Deed, the consideration by which in lieu of grant of Leasehold Rights consist of two components i.e., premium to be paid by the Lessee either in instalments along with interest or as an annual Lease Rent to be paid every year or to pay Lease Rent equivalent to 11 years at 1% per year equivalent to the 11% of the total premium of the plot has One Time Lease Rent. The premium payable by the Lessee is equivalent to the fair value of the Leasehold Rights. Therefore, the claim made by the Appellant ought to be treated as a ‘Financial Debt’. As per the Lease Deed dated 28.10.2020, the total consideration of proportionate premium paid is Rs.2,06,05,820/-. The

balance amount is to be paid with interest at 12% p.a. in 16 half-yearly instalments spread in eight years. The ‘Corporate Debtor’ failed to pay the instalments under the Lease Deed and hence recovery notices dated 08.09.2016, 13.07.2018, 26.09.2018, 26.12.2018 and 13.02.2019 were issued demanding the default amount. On 07.06.2019, a cancellation Notice of the Lease Deed was also issued and sent to the ‘Corporate Debtor’. It was argued that the whole project has come into existence only on account of development of the land and Leasehold Rights and therefore the Lease Rentals ought to be treated as a ‘Financial Debt’.

- The Learned Counsel placed reliance on the definition of ‘Financial Debt’, as defined by the Hon’ble Supreme Court in **‘Anuj Jain, IRP for Jaypee Infratech Ltd.’ Vs. ‘Axis Bank Ltd.’**¹, wherein it was held as follows:

“Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not iota of doubt that a debt to become ‘financial debt’ for purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money.....”

- Reliance was also placed on **‘Pioneer Urban Land and Infrastructure Ltd. & Anr.’ Vs. ‘Union Bank of India & Ors.’**² in which the Hon’ble Supreme Court has defined the ‘Financial Debt’ as follows:

“The definition of ‘Financial Debt’ in section 5(8) of IB Code then goes on to state that a debt must be disbursed against the consideration for the time value of money....”

¹ (2020) 8 SCC 401

² (2019) 8 SCC 416

“The definition of ‘financial debt’ in section 5(8) of the Code then goes on to state that a “debt” must be “disbursed” against the consideration for time value of money.”

- It is submitted that the RP did not include the claim of G. Noida in the Information Memorandum despite the fact that the Appellant is owner of the said land.

3. Submissions of the Learned Counsel for the Resolution Professional (‘RP’):

- It is submitted by the Resolution Professional that though Noida was put to notice with respect to the claims to be filed and CRP was initiated on 30.01.2020, and the Plan was approved on 04.08.2020, Noida has chosen to file their claim belatedly only on 24.09.2020.

Assessment:

4. A perusal of the material on record shows that there was an email which was sent by the Resolution Professional on 06.02.2020 informing the Appellant that they had been treated as an ‘Operational Creditor’ and to send their claim in Form-‘B’ and calculate their interest after the date of Admission of the CRP. There are no reasons given regarding the delay by G. Noida in filing the ‘Claim Application’ as a ‘Financial Creditor’. On a query from the Bench, it was submitted that because the matter **‘New Okhla Industrial Development Authority’ Vs. ‘Anand Sonbhadra’** was pending before the Hon’ble Supreme Court wherein the issue was whether Lease Deeds executed by Noida are

‘Operational Leases’ under the Indian Accounting Standards, the Appellant herein had waited for the result of the Appeal.

5. The Hon’ble Supreme Court in **‘New Okhla Industrial Development Authority’ Vs. ‘Anand Sonbhadra’ and ‘New Okhla Industrial Development Authority’ Vs. ‘Manish Gupta & Anr.’**³, has observed as follows:

“153. As far as the case of the respondents that the appellant is a Local Authority goes, the case of the respondent was largely premised on the Judgment of this Court in *Union of India v. R.C. Jain*. In short, the case of the respondent was that the appellant is a Local Authority and the rental and premium in question, claimed by the appellant, constitutes amount due to the appellant under a law, viz., the UPIAD, read with Section 40 of the UP Act of 1973, made applicable to the UPIAD. Upon this Court pointing out the decision of this Court reported in *New Okhla Industrial Development Authority v. Chief Commissioner of Income Tax*, wherein this Court has taken the view in the case of the appellant itself, that it is not a Local Authority. The parties would point out that the said Judgment, may not apply, as it was rendered in the context of the Income Tax Act. It is also pointed out that Judgments, which have been rendered after *R.C. Jain* (supra), which includes *Housing Board of Haryana v. Haryana Housing Board Employees’ Union and Commissioner of Income Tax, Lucknow v. U.P. Forest Corporation*, are also distinguishable. It is contended that of the five tests propounded in *R.C. Jain* (supra), there is substantial fulfilment of the same qua the appellant.

154. It was pointed out that under Section 3(r) of the UP Act of 2010, a cognate law, the appellant is treated as a Local Authority. It is also pointed out that the appellant does provide civic amenities to the local inhabitants and, for the purpose of the IBC, it is, indeed, a Local Authority. It is also pointed out that the appellant is

³ 2022 SCC OnLine SC 631

treated as a Local Authority under the Goods and Services Act. Prima facie the decision in Noida (supra) may not detract from the appellant being found to be a local authority for the purpose at hand. No doubt, we do notice that in the context of the proviso to Article 131 of the Constitution of India, this Court did notice the distinction between the words 'arising out of' and the words 'arising under' and held that the words 'arising under' bears a narrower meaning (See also the discussion of the meaning of the word 'arises' as meaning 'coming into existence', in a Judgment of this Court by Justice Mukherji in Re : Rogers Pyatt Shellac Co. v. The Secretary of State for India in Council , which stands approved in The Commissioner of Income Tax, Bombay v. Ahmedbhai Umarbhai and Co., Bombay.

155. The appellant would, in fact, point out that it is not necessary to probe the matter further, in view of the concurrent findings that the appellant is an operational creditor. No doubt, Smt. Madhavi Divan does point out that the words 'arising under any law', may not be the same as amounts being made recoverable under a law. Of course, she would point out that as far as the rental part of the claim, it may be relatable to the first limb of an operational debt. When questioned further, as to what her position is, if this Court found that the appellant is not a financial creditor, the appellant may be entitled, at least, to be treated as an operational creditor. We would think that, having regard to the fact that both the NCLT and NCLAT have proceeded on the basis that the appellant is an operational creditor, we need not stretch the exploration further and pronounce on the questions, which may otherwise arise. We must not be oblivious to the following prospect, should we find that the appellant is not an operational creditor, even under the IBC Regulations apart from claims by financial creditors and operational creditors, claims can be made by other creditors. However, there are, undoubtedly, certain advantages, which an operational creditor enjoys over the other creditors. We would proceed on the basis that, while the appellant is not a financial creditor, it would constitute an operational creditor.

156. The upshot of the above discussion is that the appeals must fail. The appeals are, accordingly, dismissed. Parties to bear their own costs.”

6. Keeping in view the ratio of the aforementioned Judgement, it is clear that the amount due to Noida be treated as an ‘Operational Debt’ and therefore the Noida is an ‘Operational Creditor’ and not a ‘Financial Creditor’. This issue has since attained finality.

7. It is the case of the Resolution Applicant that the Appellant filed their claim as a ‘Financial Creditor’ on 30.01.2020 for an amount of Rs.40,31,951/- and the RP sent an email dated 04.02.2020 requesting the Appellant to file their Claim as an ‘Operational Creditor’, the Appellant did not choose to modify their claim nor replied to the email. A perusal of the material on record does not evidence that Noida had responded to this email nor have they taken any precautions/shown any diligence in filing their claim as an ‘Operational Creditor’. It is a fact that the Plan was approved by the Adjudicating Authority on 04.08.2020 and the SRA sent a letter dated 24.09.2020 seeking implementation of the Plan. Subsequently, only on 06.10.2020 the Appellant filed IA 344/2021 seeking relief *Qua* the rejection of claims and preferred I.A. 1380/2021 on 15.03.2021 seeking recall of the Order. We are of the considered view that Noida did not exercise its right in filing its ‘Claim’ on time and has belatedly challenged the rejection *after* the approval of the Resolution Plan. On a query from the Bench, as to whether any provision was made in the Resolution Plan for the dues of Noida, the Counsel for the SRA submitted that the outstanding amount is reflected in the Books of

Accounts of the ‘Corporate Debtor’ and shown in the Information Memorandum and were dealt with as per the provisions of the Code. It is also significant to mention that the cancellation Notice sent by Noida is dated 07.06.2019 which is subsequent to the commencement of the CIRP date 31.05.2019.

8. Learned Counsel for the Appellant contended that the Claims of the other ‘Operational Creditors’, who consist of Suppliers of Goods and Services, Employees and Government and Statutory Dues were all treated as per the provisions of the Code. The Hon’ble Supreme Court in **‘Committee of Creditors of Essar Steel India Limited’ Vs. ‘Satish Kumar Gupta’**⁴ has observed that similarly situated Creditors are to be treated equally. This Tribunal in **‘Gail India Limited’ Vs. ‘Ajay Joshi RP of Alok Industries & Ors.’**⁵, has held that there is no embargo on creating subclasses between the ‘Operational Creditors’ for deciding the manner in which the ‘Resolution Amount’ is to be distributed.

9. The Hon’ble Supreme Court in **‘K. Sashidhar’ Vs. ‘Indian Overseas Bank & Anr.’**⁶, **‘Maharashtra Seamless Ltd.’ Vs. ‘Padmanabhan Venkatesh & Ors.’**⁷, and **‘Kalparaj Dharamshi & Anr.’ Vs. ‘Kotak Investment Advisors Limited’**⁸, has laid down that the Commercial Wisdom of the CoC is not justiciable unless there is any material irregularity specified under the provisions of Section 30(2) of the Code. In the instant case, we do not see any material irregularity in the

⁴ (2020) 8 SCC 531

⁵ Comp. App. (AT) (Ins.) No. 492/2019

⁶ (2019) 12 SCC 150

⁷ (2020) 11 SCC 467

⁸ Civil Appeal Nos. 2943-2944/2020

approval of the provisions of the Resolution Plan and hence find no legal or substantial grounds to interfere with the decision of the CoC.

10. For all the aforementioned reasons, this Appeal fails and is dismissed accordingly. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

**Principal Bench,
New Delhi
24th November, 2022**

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