IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI
PRINCIPAL BENCH

C.A. No. 380/2021 In CP (IB) 1567 (PB)/2018

In the matter of:

M/s National Products

.....Operational Creditor

Vs.

M/s. Delhi Control Devices Private limited

....Corporate Debtor

In the matter of I.A. No. 380/2021:

Under Section 60 (5) of IBC, 2016

M/s. Greater Noida Industrial Development Authority

...Applicant

Vs.

Mr. Ashok Kumar Gupta
Resolution Professional
For the Corporate Debtor

Order delivered on: 21 .02.2022

CORAM

SH. BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)
SH. HEMANT KUMAR SARANGI
MEMBER (TECHNICAL)

PRESENT
For the Applicant: Mr. U. N Singh, Advocate
For the Respondent: Mr. Abhishek Anand, Advocate

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ORDER

Per- BhaskaraPantula Mohan, Member (Judicial)

1. This is an application filed by the Applicant viz., M/s. Greater Noida Industrial Development Authority (GNIDA/Applicant), a statutory Authority constituted under the provisions of the U.P Industrial Area Development Act, 1976, for performing the function as set out in the said enactment. The prayers made are as under:

a) Call for the record of the case

b) Pass appropriate Orders against the impugned Order/decision/action of the Resolution Professional for converting and considering the applicant/ GNIDA as Operational Creditor and not informing for participating in a meeting of committee of Creditors and necessary orders/directions be issued for upholding and continuing the applicant /GNIDA as 'Financial Creditor' and for participation in a meeting of Committee of Creditors.

c) Quash and set aside all the actions/decisions/plan taken by the Resolution Professional and Committee of Creditors against the applicant/GNIDA and aloe the applicant to participate in all the proceedings as Financial Creditor.

d) In exercise of the powers under Section 98, 204 and 208 and all other applicable provisions of the IBC, 2016, direct

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replacement of the present Resolution Professional Mr. Ashok Kumar Gupta and direct further action against the said Resolution Professional for his misconduct in not informing and allowing the applicant to participate in CoC and allegedly converting and considering the status of the applicant, GNIDA, fromfinancial creditor to operational creditor, without adjudication, reasons and justification, resulting in financial loss to a Government Authority GNIDA and dealing with the owner of the land to its detriment and resulting in unlawful financial gain to the Corporate Debtor and other Creditors at the expenses of the Applicant.

e) Any other relief or Order (s) which this Tribunal may deem fit and proper be also passed in favour of the Applicant/GNIDA.

Factual Matrix: -

2. The Corporate Resolution Process (CIRP) of the Corporate Debtor viz., M/s. Delhi Control Devices Private Limited (Corporate Debtor) was initiated vide Order dated 15.02.2019. The public announcement in Form-A was published on 21.02.2019 and the last date for submission of claims was 06.03.2019,however the Application was allowed to be withdrawn on 07.03.2019, upon mutual settlement between M/s National Products (Operational Creditor)and the Corporate Debtor.

3. The Corporate Debtor defaulted the terms of the settlement and therefore, an application for revival of the Company Petition

(IB) 1567 (PB)/2018 was filed by the Operational Creditor. This Authority, vide Order dated 05.07.2019, allowed the revival of CIRP, and redirected Interim Resolution Professional (IRP) viz., Ashok Kumar (Respondent) to commence CIRP from where it was left. The IRP issued another public announcement for inviting claim on 10.07.2019. The Applicant filed its proof of claim in Form-C on 03.07.2020.

4. The Applicant is the owner of the land in respect of the land Plot No. 45, MahilaUdyami Park-I Ecotech-III, Greater Noida Sector, District Gautam Budh Nagar, U.P. (Plot). The Applicant acquired the land under the Land Acquisition Act, 1894 and developed the same for the purpose of setting up anUrban and Industrial Township. The Applicant had agreed to demise the plot, on the terms and conditions, for the purpose of constructing industrial building (s), according to building plan approved by it. The Applicant handed over to the Corporate Debtor, through a Lease Deed, for constructing its industrial building over the said Plot.

Submissions of the Applicant

5. It is submitted that the Applicant cannot be deprived of its rights as owner and lessor of the land as it has transferred only the lease hold rights, either by way of lease or sub-lease, on deferred payment basis to be made in installments. The Applicant is the Financial Creditor and has a higher charge/ preference in relation to any otherCreditors. The Applicant not

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being acknowledged, sub-leased plot nor any plot owned or standing in the name of the Corporate Debtor can be the subject matter of any resolution and no resolution plan can be proposed,let alone finalized, without the consent of the Applicant.

6. The Applicant provided the necessary information about the outstanding dues/debts, alongwith the calculation sheet/description, however, the Resolution Professional through its email dated 10.07.2020, directed the Applicant for refiling its claim again in the capacity of 'operational creditor' without understanding the provisions of IBC, 2016. Further, the Resolution Professional/Respondent never communicated regarding constitution or reconstitution of the Committee of Creditors (CoC), list of creditors, and participation of Applicant in the CoC Meetings. The Respondent made false submissions/observations that the claim of the Applicant, in respect of premium payment dues, are not the Financial Debt as per the provisions of IBC, 2016 and are purely operational expenditures. The Respondent has neither properly adjudicated the claim of the Applicant, nor communicated to participate in the CoC. The legal title and rights over the plot till date subsists and is registered in the name of the Applicant, therefore, the Applicant has first charge, lien, absolute title and right over the plot and the same was allotted to the Corporate Debtor only on lease basis. The term lease is defined under Section 105 of the Transfer of Property Act, 1882 and there is breach and violation of the terms and conditions of the registered Lease Deed by the Corporate Debtor being the Lessee. The IBC, 2016 provides for

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the definition of the word 'Operational Creditor' and 'Operational Debt' and an Operational Creditor can only be in relation to an Operational Debt which is limited to claims in respect of Goods and Services supplied to the Corporate Debtor. Allotment of land has been made by the Applicant, against payment, part of which is paid and part of which is deferred, thus, when the terms of the lease mandate payment of interest in the event of delay in payment of the dues, then the allotment does not constitute supply of any service and services can only be in relation to rendition of some employment of professional services. As far as the word 'goods' is concerned, immovable property can never fall in the definition of goods which can only be movable goods. Further, Operational Debts are in the nature of payment of dues to the government or the local Authority, which is in the nature of Tax or Charges and not payment of premium towards grant of leasehold rights, on the basis of which buildings are to be constructed and sold away.

7. The Section 5 (8) of IBC, 2016 defines the word 'Financial Debt' and the Applicant falls within the ambit of the said definition therefore, Applicant is a Financial Creditor. The Lease Deed executed in favor of the Corporate Debtor is a signed and registered document. Payment of all installments, as part of the consideration towards allotment of the Plot, is a condition precedent to enjoyment of the rights as Lessee on lease basis and non-payment of any of the dues to the Applicant constitutes breach of the condition entitling the Applicant to cancel the Lease Deed and to re-enter the possession. It is on the basis of this

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allotment that the Corporate Debtor would deal with the Real Estate in the matter of construction of flats and allotment thereof on sub-lease basis. The Applicant is a secured Financial Creditor in respect of the premium i.e., cost of the land allotted on lease basis and all other dues. The clauses in the Lease Deed specifically provide that the Lessor shall have the first charge on the Plot, towards payment of all dues of Lessor and with prior permission of this Authority, with a condition that the Applicant would have first charge, priority over the mortgaged property in the event the Corporate Debtor mortgages or charge the Plot therefore, the stipulations contained in the Lease Deed clearly establish that for payment of the dues of the Authority the leased Plot stands as a security in favor of the Authority. Further, the dues of the Applicant may also be reflected in the balance sheet of the Corporate Debtor thus the Applicant is a Financial Creditor and not an Operational Creditor.

8. The Applicant submitted its proof of claim for an amount of Rs 35, 65,150 as a Financial Creditor with the Respondent in the month of July, 2020 and the decision of the Respondent is in contrast to the correct factual position and it would constitute an attempt to defeat the rightful dues of the land owner i.e., Applicant and extend undue favor to the Corporate Debtor.

Reply of the Respondent: -

9. The Respondent/Resolution Professional has filed its reply to the Application and submitted that the Applicant filed it Proof of Claim in Form-C on 3rdJuly 2020, much after the last date

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specified in the public announcement. Regulation 12 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 categorically provides that a Creditor shall submit claim, with proof, on or before last date mentioned in the public announcement and a creditor, who fails to submit claim, with proof, within the time stipulated in the public announcement, can submit the claim with proof to the IRP or the RP, on or before the ninetieth day of the insolvency commencement date and in case is a financial creditor, it shall be included in the CoC from the date of admission of such claim.

10. The Applicant has filed its claim under Form-C which is prescribed under Voluntary Liquidation; however, the Applicant had to file its claim in the prescribed form and in an e-mail dated 10.07.2020, the same was informed to the Applicant. Further, a Resolution Plan was approved by the CoC in the 22nd Meeting held on 27.08.2020 by e-voting and an application bearing number I.A. No 3814/2020 seeking approval of the Resolution Plan is reserved for Orders by this Authority.

11. The Applicant has failed to show sufficient cause of filing its claim with delay and therefore, if it is entertained, at such belated stage, the same would jeopardize the CIRP. The Applicant relied upon the Lease Deed dated 23.10.2002, which is not submitted either with the Form-C or with the instant application, however, it is apparent from the Supplementary /Correction Deed dated 23.04.2004, that the same was parimateria to the lease deed in the matter of New Okhla Industrial Development

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Authority Vs. Mr. Anand Sonbhara, Resolution Professional Company Appeal (AT) (Ins) No. 1183/2019 decided on 16.04.2021 and there was no transfer of ownership of the underlying land of the Corporate Debtor, as contemplated under the Lease and hence, the same cannot be held as a 'Financial Lease'. The issue qua the Applicant being an 'Operational Creditor' is not res integra, as in the identical matter New Okhla Industrial Development Authority (Supra), the issue that was considered was whether Noida was an Operational Creditor or a Financial Creditor, on the basis of the lease that was entered into therein and would squarely apply to the facts of instant application and the Applicant would be a Operational Creditor and not a Financial Creditor.

12. Further, the Respondent has relied on the Order of Hon'ble NCLAT in the matter of Harish Polymer Product Vs. Mr. George Samuel & Anr. Company Appeal (AT) (Insolvency) No. 420/2021 decided on 18.06.2021, wherein it was observed that if new claims keep popping up and are entertained atbelated stage, when the Resolution Applicants are already before the CoC with their Resolution Plan(s), the CIRP would be jeopardized. Keeping in view the object of the Code, which is resolution in a time bound manner to maximize value of the assets of the Corporate Debtor, it dismissed the Appeal.

Conclusion: -

13. The issue whether the Applicant can be considered as a Financial Creditor instead of Operational Creditor, in case when

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the Resolution Plan provides for the claim in proportion to other Financial Creditors, does not arise at this stage as the the claim of the Applicant has already been considered by the Resolution Applicant viz., M/s Statcon Electronics India Limited (Resolution Applicant), in addition to this, the Resolution Applicant issued a letter dated 05.02.2021, through which the Resolution Applicant gave an undertaking affidavit to pay the Applicant 'as per the proportionate ratio given to other financial creditors' in the Resolution Plan. The said letter further stated that such payments had been taken under contingencies fund therefore, no prejudice will be caused to the Applicant in case the claim is admitted as either Operational Creditor or Financial Debt, as the amounts that would be paid to it under the Resolution Plan will be as per the proportion ratio given to other Financial Creditors.

14. Accordingly, application C.A. No. 380/2021 in CP (IB) 1567 (PB)/2018 is **dismissed** as infructuous and stands **disposed of**.

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HEMANT KUMAR SARANGI
MEMBER (TECHNICAL)

BHASKAR PANTULA MOHAN
MEMBER (JUDICIAL)