

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT NO. IV)**

IN THE MATTER OF: -

CA No. 257/ND/2019

IN

Company Petition No. IB-1059/ND/2018

(Under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016)

M/s. Concord Infrastructure Pvt. Ltd.

...Operational Creditor

Versus

M/s. Shubhkamna Buildtech Pvt. Ltd.

...Corporate Debtor

AND IN THE MATTER OF:

Greater Noida Industrial Development Authority **...Applicant.**

Versus

**Mr. Anand Sonbhadra
Resolution Professional**

...Respondent.

Pronounced on: 30.09.2019

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**DR. DEEPTI MUKESH,
HON'BLE MEMBER (J)**

**SHRI HEMANT KUMAR SARANGI,
HON'BLE MEMBER (T)**



For the Applicant

: Mr. P. Nagesh, Adv.
: Mr. Rachi Mittal, Adv.
: Harshal Kumar, Adv.
: Tanvi Aggarwal, Adv.

For the Respondent/RP

: Mr. Gaurav Mitra, Adv.
: Mr. Simran Jyot Singh, Adv.
: Mr. Akshay Goel, Adv.
: Rashmita Roy Choudhary, Adv.
: Anand Sonbhadra.

MEMO OF PARTIES

M/s. Concord Infrastructure Pvt. Ltd.

Having its registered office at:

184, Saini Enclave,

East Delhi- 110092

Through its Authorized Representative /Director

Shri. Pankaj Agarwal

...Operational Creditor

Versus

M/s. Shubhkamna Buildtch Pvt. Ltd.

Having its registered office at:

197-E, Pocket- IV, Mayur Vihar,

Phase- I, Delhi- 110091.

Also at:

Plot No. GH-02/A,

Sector-1, Greater Noida (West)

U.P. 201301

...Corporate Debtor

AND IN THE MATTER OF:

New Okhla Industrial Development Authority

Main Administrative Building, Sector-6,

Noida, Gautam Budh Nagar,

Uttar Pradesh 201308

...Applicant

Vs.

Mr. Anand Sonbhadra



Having its registered office at
AAA Insolvency Professionals LLP
E-10A, Kailash Colony,
New Delhi-11004

...Respondent/Resolution Professional

ORDER

Per Dr. Deepti Mukesh, Member (Judicial)

1. The present application is being filed by the Applicant, New Okhla Industrial Development Authority(for brevity NOIDA) under Rule 11 of the National Company Law Tribunal Rules, 2016 read with Section 60(5) of the Insolvency and Bankruptcy Code, 2016 seeking issuance of necessary/ appropriate directions by this Hon'ble Tribunal to the Resolution professional(RP) to admit the claim of the applicant as a Financial Creditor and permit the applicant to participate in committee of creditors as Financial Creditor and exercise its voting rights.

2. The factual matrix leading to filing of the present application is as under:

- (i) The Applicant, NOIDA is a statutory authority constituted vide Notification No. 4157-H1/XVIII-11 dated 17.04.1976.
- (ii) The Applicant allotted Plot No. GH-05B Sector 137, NOIDA having an area of 22,565.77 Sq. Mtr. to M/s Shubhkamna Buildtech Pvt. Ltd. (hereinafter referred to as "Corporate Debtor").

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- (iii) A registered Lease Deed dated 30.07.2010 (at Bahi No.01, Zild No.1918) was executed between NOIDA and Corporate Debtor by which said plot was transferred on lease for a period of 90 years commencing from 30.07.2010 in favour of Corporate debtor.
- (iv) The captioned IB application has been filed by M/s Concord Infrastructure Pvt. Ltd, under Section 9 of the IBC, 2016 initiating CIRP on account of defaults committed by the M/s. Subhkamna Buildtech Pvt. Ltd.
- (v) This applicant filed its claim on 22.02.2019 but inadvertently it was filed under Form B as Operational Creditor instead of Form C as Financial Creditor. The total dues with regard to said plot of land are Rs.99,32,55,183/- (Rupees Ninety- Nine Crores Thirty-Two Lacs Fifty- Five Thousand One Hundred and Eighty- Three only). The said debt emanates from the lease deed being unpaid lease premium as per the terms of lease deed dated 30.07.2010.
- (vi) The applicant was invited for the Committee of Creditors meeting which was held on 11.03.2019 as Operational Creditor.
- (vii) Thereafter the amended claim form was filed in Form C, on 18.03.2019 which was duly received by the RP. Since no intimation was received from RP rejecting the amended proof of claim, from NOIDA, it was construed that the claim was accepted as a Financial Creditor, by Resolution Professional.

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(viii) In Committee of Creditors meeting on 18.05.2019 the applicant was treated as the Operational Creditor, hence, vide letter dated 21.05.2019, applicant NOIDA sought clarification from the RP with regard to amended proof of claim filed in Form C and status of NOIDA as Financial Creditor. Since no reply was received on behalf of the RP, the applicant issued another reminder through email on 21.06.2019.

x) There was no response from RP to the said email dated 21.06.2019, as a consequence the present applicant filed this application on 05.07.2019 with the prayers as reproduced:

- a) Take cognizance of willful disobedience by the Resolution Professional of the orders passed by this Hon'ble Tribunal;
- b) Issue necessary directions to the Interim Resolution Professional to admit the claim of the applicant as a Financial Creditor and permit the applicant to participate in Committee of Creditors and exercise its voting rights;
- c) Till the time the payer (b) is granted by this Hon'ble Tribunal, direct the Resolution Professional/Committee of Creditors not to convene any meeting of the Committee of Creditors.
- d) Pass such other order/directions as this Hon'ble Bench may deem fit and proper in the facts and circumstances of the case.

All copies of letters above mentioned are annexed.

(x) On 26.07.2019, this Hon'ble Tribunal passed the following order:

"In view of the above, we direct the RP to examine the claim of the applicant- Noida and shall not reject on the ground that it is a claim made by an entity other than the Financial Creditor. The needful shall be done before the next CoC meeting which is stated to be on 29.07.2019. Application stands disposed of".

(xi) The CoC was convened on 29.07.2019. The applicant was again treated as Operational Creditor. Therefore, the applicant gave a representation that the status of the claim of the applicant in the light of the order dated 26.07.2019 was not provided to the applicant and further requested to provide the status of the applicant for the present CoC meeting, the NOIDA claimed that in terms of Section 5 (8)(d) of the Insolvency and Bankruptcy Code, 2016, the definition of the finance lease as classified under Indian Accounting Standard reads as below:

"A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership."

and lease dated 30.07.2019 is a financial lease leading to the debt being financial debt.

(xii) It is submitted by applicant that even after the said order passed by this Tribunal and directions given to RP the order was not complied by RP in its letter and spirit



and on 29.07.2019 in the next COC meeting the applicant was treated as Operational Creditor. On being shocked by the vindictive attitude of RP, the applicant made a representation to the RP for complying the order of the Tribunal dated 26.07.2019. It is further stated that till date the RP has not admitted applicant's claim as Financial Creditor and has willfully disobeyed the order dated 26.07.2019.

3. That the amount of dues towards the Corporate debtor is the liability arising out of the financial lease which were executed between the applicant and the corporate debtor and the amount tantamount to the financial debt which corporate debtor owes to the applicant. The dues of the applicant which arise out of the lease deeds are not statutory dues but are contractual dues which arise out of a finance lease and hence all dues which arises out of the said lease have financial bearing. Therefore, the submission of the RP that the said debt is operational in nature is baseless and cannot be sustained in the eyes of law.

4. Even if lessee M/s Shubhkamna Buildtech Private Limited is to create a mortgage for availing financial assistance from a

bank/financial institution, such mortgage remains subservient to the 1st charge of applicant. For the same, on application by the allottee, the mortgage permission is issued by the applicant and it is clearly mentioned that such mortgage remains subservient to the 1st charge of applicant.

5. That as per the lease deed, certain percentage of the premium was already paid by the Corporate Debtor to the applicant at the time of the execution of the Deed. The balance premium, along with interest was payable in instalments and in case of default the penal interest is also levied on defaulted amount.

6. The applicant relied on the 'Indian Accounting Standard Norms'; Ind AS 116, copy of which is annexed. It is the case of the applicant that the lease deed dated 30.07.2010 executed between NOIDA and the CD is a financial lease in terms of Indian Accounting Standards and the following clauses of said lease deed dated 30.07.2010 encompasses and fulfils requirements for it to be classified as financial lease u/s. 5(8)(d) of Insolvency and Bankruptcy Code. The relevant clause of the

lease-deed dated 30.07.2010 are reproduced for ready reference.

- To Hold the said plot (hereinafter referred to as the demised premises with their appurtenances up to lessee for the terms of 90(ninety) years commencing from 30, JULY, 2010 except and always reserving to Lessor.

III. AND THE LEASE DOTH HEREBY DECLARE AND COVEMAMTS WITH THE LESSOR IN THE MANNER FOLLOWING:

- iii) The permission for part transfer of plot shall not be granted under any circumstances. The Lessee shall not be entitled to complete transaction for sale, transfer, assign or otherwise part with possession of the hole or any part of the building constructed thereon before making payment according to the schedule specified in the lease deed of the plot to the Lessor. However, after making payment of premium of the plot to the lessor as per schedule specified in the lease deed permission for transfer of built up flats or to part with possession of the whole or any part of the building constructed on the Group Housing Plot, shall be

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granted and subject to payment of transfer charges as per policy prevailing at the time of granting such permission of transfer.

COVENANTS:

- 5. There shall be total liberty at the part of allottee/lessee to decide the size of the flats/plots (in case of plotted development) or to decide the ratio of the area for flatted/plotted development. The FAR earmarked for commercial/institutional use would be admissible but the allottee/lessee may utilize the same for residential use as per their convenience.

- **MORTGAGE**

The Lessee may with prior permission of the Lessor, mortgage the land to any Financial Institution(s)/ Bank(s) for raising loan for the purpose of financing g his investment in the project on receipt of payment by allottee.

- **TRANSFER OF PLOT**



Without obtaining the completion certificate the lessee shall have right to sub-divide the allotted plot into suitable smaller plots as per planning norms.

- *(vii) No transfer charges will be payable IN CASE OF FIRST SALE, INCLUDING BUILT UP PREMISES...*

- **MAINTENANCE**

2. That the lessee shall have a plan to maintenance programme whereby the entire demised premises and building shall be kept:

(a) In a state of good and substantial repairs and in good sanitary condition.

- **CANCELLATION OF LEASE DEED.**

3. Default on the part of the lessee for breach/violation of terms and conditions of registration/allotment/lease and/or non-deposit of allotment amount.

- *1.3. The lessor in larger public interest may take back*

7. The Resolution Professional has filed reply raising preliminary objections that present lease is not 'financial lease' as per applicability of Indian Accounting Standards i.e. Ind AS 116. The relevant provisions of Ind AS 116 clearly specify the terms, which form part of lease deed and are satisfied then only said lease can be treated as financial lease. Some of the terms relevant to classify a lease as financial lease are reproduced from Ind AS 116:

"62 A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an underlying assets. A lease is classified as an operating lease if it does not transfer substantially all the risks and rewards incidental to ownership of an underlying asset.

63. Whether a lease is a finance lease or an operating lease depends on the substance of the transaction rather than the form of the contract. Examples of situations that individually or in combination would normally lead to a lease being classified as a finance lease are:

- a) the lease transfers ownership of the underlying asset to the leasee by the end of the lease term;
- b) the lessee has the option to purchase the underlying asset at a price that is expected to be sufficiently lower than the fair value at the date the option becomes exercisable for it to be

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reasonably certain, at the inception date, that the option will be exercised.

- c) *the lease term is for the major part of the economic life of the underlying asset even if title is not transferred;*
 - d) *at the inception date, the present value of the lease payments amounts to at least substantially all of the fair value of the underlying asset; and*
 - e) *the underlying asset is of such a specialized nature that only the lessee can use it without major modifications.*
64. *Indicators of situations that individually or in combination could also lead to a lease being classified as a finance lease are:*
- a) *if the lessee can cancel the lease. The lessor's losses associated with the cancellation are borne by the lessee;*
 - b) *gains or losses from the fluctuation in the fair value of the residual accrue to the lessee (for example, in the form of a rent rebate equaling most of the sales proceeds at the end of the lease); and*
 - c) *the lessee has the ability to continue the lease for a secondary period at a rent that is substantially lower than the market rent.*
 - d) *The examples and indicators in paragraphs 63-64 are not always conclusive. If it is clear from the other features that the lease does not transfer substantially all the risks and rewards incidental to ownership of an underlying asset, the lease is classified as an operating lease.*

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The Respondent further contends that the terms of present lease deed dated 30.07.2010, in question is compared with terms of financial lease as mentioned in Ind AS 116, it does not qualify to be treated as financial lease which after examination will not satisfy the test of it being a financial lease. The relevant clause of lease deed dated 30.07.2010 were reproduced and compared being clauses.

MORTGAGE.

“Provided that in the event of sale or foreclosure of the mortgaged/charged property, the Lessor shall be entitled to claim and recover such percentage as decided by the LESSOR, of the unearned increase in values of properties in respect of the market value of the said land as first charge, having priority over the said mortgage charge, the decision of the LESSOR in respect of the market value of the said land shall be final and binding on all the parties concerned.”

a) *“The lessee shall use the allotted plot for construction of Group Housing. However, the lessee shall be entitled to allot the dwelling units on sublease basis to its allottee and*

also provide space for facilities like Roads, Parks, etc. as per their requirements, convenience with the allotted plot, fulfilling requirements or building bye laws and prevailing and under mentioned terms and conditions to the lessor.

However, the Lessor, reserves the right to reject any transfer application without assigning any reason. The lessee will also be required to pay transfer charges as per the policy prevailing at the time of such permission of transfer.

CONSTRUCTION

"The lessee is required to submit building plan together with the master plan showing the phases for execution of the project for approval within 6 months from the date of possession and shall start construction within 12 months from the date of possession.

The Lessee will not make, any alteration or additions to the said building or other elections for the time being on the demised premises, erect or permit to erect any new building on the demised premises without prior written consent of the Lessor and

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in case of deviation from such terms of the plan, shall immediately upon receipt of notice from the Lessor requiring him to do so, correct such deviation as aforesaid.

CANCELLATION OF LEASE DEED

"In addition to the other specific clauses relating to cancellation, the Lessor, as the case may be, will be free to exercise its right of cancellation of lease in the case of...."

OTHER CLAUSES:

"The Lessor reserves the right to make such additions/alterations or modifications in the terms and conditions of allotment/lease deed/sub lease deed from time to time, as may be considered just and expedient."

9. It is further stated that since the principles of treating the lease as financial lease are not met with the subject lease, hence the said lease is not financial lease leading to conclusion that NOIDA is not a financial creditor as the debt is not financial debt u/s. 5(8)(d)

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10. The Resolution Professional relied on the judgement of the Hon'ble NCLAT in the matter of Pr. Director General of Income Tax (Admn. & TPS) & Ors. Vs. Synergies Dooray Automobiles Ltd. & Ors. CA(AT) (Insolvency) 205/2017 & 309, 559, 671 & 759 of 2019 dated March, 20,2019, where the Appellate Tribunal interpreted the operational creditors to be creditors essential for the operations of the corporate debtor. The relevant extracts of the said order have been reproduced hereunder for the case of reference this Hon'ble Tribunal:

"Operational Debt' in normal course means a debt arising during the operation of the Company ('Corporate Debtor'). The 'goods' and 'services' including employment are required to keep the Company ('Corporate Debtor') operational as a going concern."

11. An additional reply was filed by Resolution Professional further reiterating that application fails on two preliminary grounds and hence not maintainable that a) it has nowhere been averred by the Applicant, that Mr. Ashok Kumar Verma, the Deputy Manager in the Applicant has any authority to prefer the present Application on behalf of the Applicant. b) Prayer (b) of the Applicant Authority has already been heard and disposed

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by this Hon'ble Tribunal vide their order dated July 26,2019, and hence, the same is squarely covered within the purview of the natural justice principle of Res Judicata. For comparison, the prayers of the Applicant Authority in their Application bearing CA No. 209 of 2019 are reproduced hereunder for the case of reference of this Hon'ble Tribunal:

"(a) Issue necessary directions to the Resolution Professional to admit the claim of the applicant as a Financial Creditor and permit the applicant to participate in Committee of Creditors as Financial Creditor and exercise its voting rights;

(b) Pass such other order/directions as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

13. The RP in written submissions has further relied on various terms of lease dated 30.07.2010 to be relied upon to classify the present lease as operational lease. The terms are referred and reproduced herein:

a) The lessee transfers ownership of the underlying assets to the lessee by the end of the lease term.

It is pointed out that no such clause for transfer of ownership has been stipulated in the Lease Deed.

b) The lease has the option to purchase the underlying asset at a price that the expected to be sufficiently lower than the fair

value at the date the option becomes exercisable for it to be reasonably certain, at the inception date, that the option will be exercised. It is humbly submitted that the Lease Deed not only does not provide for an option to purchase at a significantly lower price, but in fact does not provide any option for purchase at all.

- c) The lease term is for the major part of the economic life of the underlying asset even if title is not transferred.

It is pointed out that the economic life of a bare land is perpetuity, and cannot be said to be limited to the term of the Lease Deed i.e. 90 years.

- d) At the inception date, the present value of the lease payments amounts to a lease substantially all of the fair value of the underlying asset.

It is submitted that the burden for establishing the above said lies on the Applicant, no such averment has been made in their pleadings.

- e) The underlying asset is of such specialised nature that only the lessee can use it without major modifications.

It is submitted that any real estate developer can use the leased premises for the same development, and hence, this clause is also not applicable in this case.

- f) If the lessor can cancel the lease, the lessor's losses associated with the cancellation are borne by the lessee.

It is pointed out that in the present case, the rights to cancel the Lease Deed lie exclusively with the lessor.

- g) Gains and losses in the fluctuation in the fair value of the residual accrue to the lessee.

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It is submitted that, in fact, it has specifically been provided in the Lease Deed that the unearned increase in the value of the Leased Premise shall be at the disposal of the Lessor/Applicant. The relevant clause has been reproduced hereunder for the ease of reference of the Hon'ble Tribunal. Provided that in the event of sale or foreclosure of the mortgaged/charged property the LESSOR shall be entitled to claim and recover such percentage as decided by the LESSOR, of the unearned increase in values of properties in respect of the market value of the said land as first charge, having priority over the said mortgage charge, the decision of the LESSOR in respect of the market value of the said land shall be final and binding on all the parties concerned."

) The lessee has the ability to continue the lease for a secondary period at a rent that is substantially lower than market rent.

It is submitted that no such clause allowing a secondary period of lease has been included in the present Lease Deed.

TO HOLD the said plot (hereinafter referred to as the demised premises with their appurtenances up to the lessee for the term of 90 (ninety) years commencing from 30 JULY, 2010 except and always reserving to the Lessor.

a) A right to lay water mains, drains, sewers or electrical wires under or above the demised premises, if deemed necessary by the lessor in developing the area.

b) The Lessor reserves the right to all mine and minerals, claims, washing goods, earth oil, quarries, in over & under the allotted plot and full right and power at the time to do all acts and things which may be necessary, or expedient for the purpose of searching for working and obtaining removing and enjoy the same without providing or leaving any vertical support for the surface of residential plot or for any building for the time being standing thereon provided always that the lessor shall make reasonable compensation to the Lessee for all damages directly occasioned by the exercise of such rights. To decide the amount of reasonable compensation the decision of the Lessor will be final and binding on the Lessee

- c) *The Lessee shall use the allotted plot for construction of Group Housing. However, the lessee shall be entitled to allot the dwelling units on sublease basis to its allottee and also provide space for facilities like Roads, Parks, etc. as per heir requirements, convenience with the allotted plot, fulfilling requirements or building bye-laws and preparing and under mentioned terms & conditions o the lessor. Further transfer/sub-lease shall be governed by the transfer policy of the Lessor...*
- d) *The lessee may with prior permission of the Lessor, mortgage the land to any Financial Institution(s)/Banks) for raising loan. As regards the case of mortgaging the land to any Financial Institution(s)/Bank(s) to mortgage the said land to facilitate the housing loans of the final purchasers. NOC may be issued subject to such terms and conditions as may be decided by the lessor at the time of granting the permission.*
- e) *The Lessee will not make any alterations or additions to the said building or other structures for the time being on the demised premises, erect or permit to erect any new building on the demised premises without prior written consent of the Lessor.*

15. Both sides have filed their written submissions after the arguments were heard as the liberty was sought and granted to file the same.

16. It is observed that the only document which needs to be examined, is the lease deed dated 30.07.2010, in the light of terms of "India Accounting Standards" for classification of this lease as one being financial lease or operational lease. Whether the terms of lease deed dated 30.07.2010 manifests the nature

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of lease as one of financial lease making eligible to claim the status of financial creditor and exercise voting rights on COC.

17. The points of determination before us are:

- a) Whether there is any willful disobedience of the order dated 26.07.2019 by RP
- b) Whether the lease deed dated 30.07.2010 is a financial lease or operational lease.

18. After hearing the ld. counsel for both sides and perusing the documents on record, it is observed that the order dated 26.07.2019 directs the RP to examine the claim of the applicant and shall not reject on the ground that claim is filed by entity other than financial creditor. In our view this does not by stretch of imagination mean that RP was directed to admit the claim of applicant as financial creditor.

The words 'examine the claim' would mean the RP, in its discretion, verify the documents/records of claim filed by applicant in order to consider it as financial creditor/operational creditor.

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) Further the submission is made by the ld. counsel by RP that, after verification of documents at first instance, the claim was admitted as operational creditor when the revised form was filed by applicant, no additional documents or any proofs were submitted to RP except the change of form from Form B (for that of OC) to Form C (that of FC). Hence, in absence of any new/additional documents in support, the claim admitted as of operational creditor could not have been revised or changed to financial creditor otherwise also. This argument has force of convincing us that there is no non-compliance of order dated 26.07.2019; hence no willful disobedience.

b) After considering various terms of the types of financial lease versus operational lease, we are of an undoubtable view that present lease deed dated 30.07.2010 is not a financial lease as per the terms laid down under guidelines of 'Indian Accounting Standards' and the applicant cannot be granted the status of financial creditor and cannot exercise voting rights on COC.

The applicant failed in establishing grant of the prayers. As a consequence of above discussions, application is rejected and dismissed. The copy of order be supplied to both the applicant and respondent.

Sd-

(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)

Sd-

(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)