



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT III**

IA-4445/2023

In

IB-2130(ND)/2019

IN THE MATTER OF IB-2130(ND)/2019:

M/s. Dynacon Projects Private Limited

..... **Operational Creditor**

Versus

M/s. Today Homes & Infrastructure Private Limited

..... **Corporate Debtor**

AND IN THE MATTER OF IA-4445/2023:

Greater Noida Industrial Development Authority

Through its Manager (Builder)

..... **Applicant**

Versus

Mr. Nilesh Sharma

Resolution Professional of the Corporate Debtor

..... **Respondent**

Pronounced On: 05.12.2023

CORAM:

**SHRI ATUL CHATURVEDI
MEMBER (TECHNICAL)**

**SHRI BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)**

PRESENT:

For the Applicant : Mr. U. N. Singh, Adv.

For the Respondent : Mr. Saurabh Kirpal, Sr. Adv., Mr. Kanishk Khetan,
Mr. Shivam Jaiwal, Ms. Anushka Sarkar, Adv.

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. The instant application has been filed by the Applicant/GNIDA under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 against the decision of the Resolution Professional for not considering the claim of the GNIDA.

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IA-4445/2023 In IB-2130(ND)/2019

Date of Order: 05.12.2023



2. (i) Before proceeding further, it is pertinent to mention herewith that the Applicant filed IA-372/2021 praying therein to pass the following orders:

“(a) *****

(b) *Pass appropriate orders against the impugned orders/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 the all actions/ decisions/ plan taken by the Resolution Professional and Committee of Creditors against the applicant/ GNIDA and allow the applicant to participate in all the proceedings as Financial Creditor.*

(d) *****

(e) *****”

- ii. The Resolution Professional filed a reply to the said IA categorically denying that the RP received any claim from the Applicant/GNIDA despite public announcement being made on 01.11.2019. The Resolution Professional submitted that the 90th day from the Insolvency Commencement Date upto which belated claims could be filed in terms of Regulation 12(2) of the CIRP Regulations was 29.01.2020. However, the Applicant filed the claim after the last date and the said claim was sent to the wrong e-mail id of the Resolution Professional. It was also contended by the RP that the Applicant submitted two claim Forms, one was towards the lease rentals in the capacity of an “Operational Debt” and the second claim was towards the unpaid premium which was claimed in the category of “Financial Debt”. The RP could not have collated/verified or admitted the Operational debt part of the claim, because no claim was received by him.



- iii. The RP contended the claim towards the financial debt is no longer res integra, in view of the judgment passed by the Hon'ble Supreme Court of India in the case of **New Okhla Industrial Development Authority Vs. Anand Sonbhadra** reported in 2023 1 SCC 724, wherein it has been held that New Okhla Industrial Development Authority is not a Financial Creditor and the claim of the Authority is to be considered as an "Operational Debt."
- iv. On 10.08.2023, the Applicant/GNIDA sought liberty to withdraw the said application (IA-372/2021) seeking liberty to file a fresh application. For ready reference, the order dated 10.08.2023 is reproduced below:

"IA/372/2021

This application has been filed seeking the following reliefs:

- a) *Call for the record of the case.*
- b) *Pass appropriate orders against the impugned orders/decision/action of the Resolution Professional for converting and considering the applicant/GNIDA as Operational Creditor and not informing for participating in a meeting 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 creditors.*
- c) *Quash and set aside the all actions/decisions/plan taken by the Resolution Professional and Committee of Creditors against the applicant/GNIDA and allow 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 replacement of the present Resolution Professional Mr. Nilesh Sharma and direct further action against the said Resolution Professional for his misconduct in not informing and allowing to participate in CoC and allegedly for not considering the status of the Applicant GNIDA as a financial creditor,*



without adjudication, reasons and justification, resulting in financial loss to a Govt. 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 creditor at the expenses of the Applicant.

- e) *Any other relief or order(s) which this Hon'ble Tribunal may deems fit and proper be also passed in favour of the Applicant/ GNIDA.*

*The Applicant/GNIDA in this application is seeking a direction to be given to the Resolution Professional to treat it as "Financial Creditor". Ld. Counsel for the Resolution Professional has submitted that the issue as to whether GNIDA is to be treated as a "Financial Creditor" or an "Operational Creditor" has been decided by the Hon'ble Supreme Court in its Judgement in **"Civil Appeal No. 2222 of 2021" titled as "New Okhla Industrial Develepment Authority Vs. Anand Sonbhadra"** which has been held that GNIDA will be treated as an "Operational Creditor".*

In view of the law laid down by the Hon'ble Supreme Court we do not find any merit in this application.

At the stage, Mr. U.N. Singh Ld. Counsel appearing for the GNIDA sought to withdraw the present application liberty to file a fresh application. Liberty granted.

IA dismissed as withdrawn."

- v. Subsequent to the order dated 10.08.2023, the Applicant filed the present application i.e. IA-4445/2023, seeking following reliefs:
- a) *"Direct the respondent-resolution professional to collate and verify the claim of applicant-GNIDA as secure creditor within the meaning of section 3(30) and 3(31) of the Insolvency and Bankruptcy Code, 2016 and section 13A of the Uttar Pradesh Industrial Area Development Act, 1976.*
- b) *Direct the respondent-resolution professional to treat the applicant-GNIDA as secure creditor for CIRP against the corporate debtor.*



- c) *Quash and set aside the all actions/decisions taken by the Resolution Professional and Committee of Creditors against the applicant/ GNIDA without treating the applicant/ GNIDA as secure creditor.*
- d) *Direct the IBBI to examine the work and conduct of Respondent-Resolution Professional and take such action as it may deem fit and proper.*
- e) *Any other relief or order(s) which this Hon'ble Tribunal may deems fit and proper be also passed in favour of the applicant/ GNIDA.”*

3. Submission of the Applicant

- i. It is the case of the Applicant that the Greater Noida Industrial Development Authority (GNIDA) is the owner of the land in respect of Plot bearing No. BRS-07, Sector-OMEGA-1/P-2, Greater Noida, District- Gautam Budh Nagar, U.P. admeasuring 20944.73 Sq. mtrs, having acquired the said land under the provisions of the Land Acquisition Act, 1894 and developed the said land for the purpose of setting up an Urban and Industrial Township.
- ii. The Applicant/Greater Noida Authority executed a lease deed dated 17.06.2009 in favour of M/s. Today Homes & Infrastructure Private Limited, the lessee, to develop a residential plot on Plot bearing No. BRS-07, Sector- OMEGA-1/P-2, Greater Noida, Disrtrict-Gautam Budh Nagar, U.P. admeasuring 20944.73 Sq. Meter. The Applicant handed over the possession of the said plot to the Corporate Debtor on 17.06.2009. According to the said lease deed, the Corporate Debtor is liable to pay an amount to the Applicant/GNIDA towards allotment/premium, additional compensation, lease rent and time extension penalties for completion of the construction etc. The Corporate Debtor/lessee failed to make the payment to the GNIDA.
- iii. The Applicant/GNIDA submitted a claim with the Resolution Professional on 20.02.2020 for an amount of Rs. 24,51,79,491/- (Rs.



- Twenty Four Crores One Lakhs Seventy Nine Thousand Four Hundered Ninety One Rupees Only) which was due upto 31.01.2020.
- iv. The Applicant/GNIDA being a statutory Authority is a Secured Creditor within the meaning of Section 3(30) and Section 3(31) of the Code and Section 13A of the Uttar Pradesh Industrial Area Development Act, 1976 (in short U.P. Act). By virtue of Section 13 and 13A of the Uttar Pradesh Industrial Area Development Act, security interest is created which makes the Applicant/GNIDA a Secured Creditor.

It is submitted that in the judgment passed by Hon'ble NCLAT on 31.07.2019 in Company Appeal (AT) (Insolvency) No. 775/2019 in the case of **Sunil Kumar Aggarwal vs. New Okhla Industrial Development Authority & others.**, the Appellate Authority has noted the submission that Noida has been considered as a Financial Creditor.

The relevant paragraph of the said judgment is reproduced below:

"Learned Senior Counsel appearing on behalf of the Appellant submitted that the "New Okhla Industrial Development Authority" (NOIDA) has already been considered as a Financial Creditor' and the "Resolution Professional' has already submitted the report. Now it is not open to any of the Authority to change the status of NOIDA from the Financial Creditor' to any other type of 'Creditors'. However, we find that the Interim Resolution Professional' is already directed to examine the claim of the NOIDA, who is the applicant before the Adjudicating Authority and no final decision has been taken and the Adjudicating Authority has made it clear that the claim of the NOIDA cannot be rejected on the ground that it is time barred or the claim is by an entity other than the financial Creditor. However, we are not inclined to express any opinion.



In case, if any contrary decision is taken by the Adjudicating Authority, it will be open to the aggrieved person including NOIDA or the Appellant to move before the appropriate Forum/ Appellate Tribunal."

- v. The Applicant has also submitted that in the judgment dated 06.09.2022 passed by Hon'ble Supreme Court in Civil Appeal No. 1661 of 2020 in the case of **State Tax Officer (1) vs. Rainbow Paper Limited**, wherein the Hon'ble Supreme Court has held that the State is a Secured Creditor under the GVAT Act.

The relevant paragraph of the said judgment is reproduced hereunder:-

"24. In this case, claims were invited well before the 5th October, 2017 which was the last date for submission of claims. Under the unamended provisions of Regulation 12(1), the Appellant was not required to file any claim. Read with Regulation 10, the appellant would only be required to substantiate the claim by production of such materials as might be called for. The time stipulations are not mandatory as is obvious from Sub-Regulation (2) of Regulation 14 which enables the Interim Resolution Professional or the Resolution Professional, as the case may be, to revise the amounts of claims admitted, including the estimates of claims made under sub-Regulation(1) of the said Regulation as soon as might be practicable, when he came across additional information warranting such revision.

57. As observed above, the state is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secure creditor to mean a creditor in favour of whom security interest is created. Such security interest could be created by operation of law. The



definition of secured creditor in the IBC does not exclude any Government or Government Authority..."

- vi. The Applicant on the basis of the above mentioned decisions has prayed that the GNIDA be treated as a Secured Creditor and prayed for directing the Resolution Professional to collate and verify the claim of the Application/GNIDA as a Secured Creditor within the meaning of Section 3(30) and Section 3(31) of the IBC, 2016 and Section 13(A) of the Uttar Pradesh Industrial Area Development Act, 1976.

4. Submission of the Respondent

The Respondent/Resolution Professional filed the detailed reply reiterating its stand taken in the reply filed in IA No. 372/2021.

- i. The RP has contended that he never received any claim from the Applicant/GNIDA. The Applicant had filed IA-372/2021 seeking to direct the Resolution Professional to consider the applicant as a Financial Creditor and the said application was dismissed as withdrawn with liberty to file fresh application vide order dated 10.08.2023.
- ii. In the present application, the Applicant/GNIDA has completely changed its stand and seeking to consider it as a Secured Creditor which was not the case in the earlier application. Therefore, the Applicant cannot be permitted to change its stand and status, since no fresh cause of action has arisen.
- iii. It is submitted that the Resolution Professional never received any claim filed by the Applicant during the CIRP of the Corporate Debtor. The Resolution Professional came to know about the filing of the claim by the Applicant only when he received a copy of the IA-372/2021.
- iv. The Resolution Professional has submitted that the claim form submitted by the Applicant is dated 19.02.2020. The 90th day from



the Insolvency Commencement Date upto which belated claims could be filed in terms of Regulation 12(2) of the CIRP Regulations was 29.01.2020. However, the claim was filed after the last date and was sent to a wrong e-mail ID of the Resolution Professional and therefore the Resolution Professional was not aware of any such claim submitted by the Applicant.

- v. Further, the Applicant had annexed 2 Claim Forms in IA-372/2021, one towards the Lease Rentals claiming the same to be “Operational Debt” whereas the unpaid premium was claimed as “Financial Debt”. As the claims were never received by the Respondent/Resolution Professional, the RP could not collate, verify/admit the Operational Debt part of the claim.
- vi. It is further submitted by the RP that the Applicants in IA No. 372/2021 did not raise any plea for declaring the Applicants as a Secured Creditor/ Secured Financial Creditor. Therefore, in the absence of any alteration made by the Respondents herein in the status of the Applicant as a Creditor of the Corporate Debtor, no fresh cause of action arises in favour of the Applicant to file the present application seeking alteration in the admitted category of claim, even though no claim of the Applicant has been admitted by the Resolution Professional.

5. Analysis and Findings

- i. We have heard the submissions of Ld. Counsel appearing for the Applicant/GNIDA as well as Ld. Counsel appearing for the Resolution Professional/Respondent.
- ii. It is an admitted case that the Applicant/GNIDA filed its claim in Form-C, dated 19.02.2020 under the category of a Financial Creditor claiming an amount of Rs. 23,57,87,312/-. Thereafter, the Applicant had filed IA No. 372/2021 before this Adjudicating Authority seeking



to direct the Resolution Professional to consider his claim as a 'Financial Creditor'. The said IA was dismissed as withdrawn in view of the law laid down by the Hon'ble Supreme Court of India in its judgment in Civil Appeal No. 2222 of 2021 in the matter of **New Okhla Industrial Development Authority Vs. Anand Sonbhadra**, wherein the Hon'ble Supreme Court has held that GNIDA will be treated as "Operational Creditor" and the Applicant was granted liberty to file a fresh application.

- iii. We find that in the present application, the Applicant has prayed for directing the Respondent/Resolution Professional to treat it as a "Secured Creditor".
- iv. Mr. U.N. Singh, Ld. Counsel appearing for the Applicant/GNIDA has relied upon a judgment dated 24.07.2023 passed by the co-ordinate Bench, (Bench-II) of this Adjudicating Authority in IA-4869/2022 in IB-995(ND)/2018 in the case of **M/s. VMS Equipment Vs. M/s. Primerose Infratech Private Limited**. The Adjudicating Authority (Bench-II) while considering the Application filed by GNIDA/Applicant seeking rejection of the Resolution Plan had examined the provisions of Section 13 and 13A of Uttar Pradesh Industrial Area Development Act 1976 and held that-

"Hence, we are of the considered view that the "charge" of GNIDA in the instant case has been created by virtue of law i.e., in terms of Sections 13 and 13A of the Uttar Pradesh Industrial Area Development Act 1976 well before the Moratorium period and Section 14 (1) of BC 2016 will not create an escape route for the Corporate Debtor to get an exemption from the charge created by virtue of law under Section 13A of the Uttar Pradesh Industrial Area Development Act, 1976. Since, in the instant case, the security interest of GNIDA was created by virtue of the operation of law prior to the



commencement of CIRP/Moratorium, we see no inconsistency between the provision of Sections 13 and 13A of the Uttar Pradesh Industrial Area Development Act, 1976 and IBC 2016, hence the provisions of Section 238 of IBC, 2016 do not get attracted to.

In view of the aforesaid discussion and findings, the Applicant herein shall be treated as “Secured Operational Creditor.”

- v. Mr. U.N. Singh, Ld. Counsel appearing for the Applicant has also relied upon the judgment dated 06.09.2022 passed by Hon’ble Supreme Court in the case of **Rainbow Paper Limited Case (supra)**, wherein it has been held that the State Government having first charge over the property is a ‘Secured Creditor’ under the Gujarat Value Added Tax, 1974, thus it shall also be classified as a ‘Secured Creditor’ under Section 53(1)(b)(ii) of the IBC.
- vi. Mr. Saurabh Kirpal, Ld. Sr. Counsel appearing for the Resolution Professional, on the contrary has submitted that in the **Rainbow Paper Limited Case (supra)**, the Hon’ble Supreme Court considered the provision of Section 48 of the Gujarat Value Added Tax, 2003, which stipulates that the tax to be first charge on the property. Mr. Saurabh Kirpal, Ld. Sr. Counsel has submitted that Section 48 of Gujarat Act expressly uses the expression “first charge” whereas Section 13 and 13A of Uttar Pradesh Industrial Area Development Act, 1976 uses the expression “charge” and not “first charge”.
- vii. He, therefore, submitted that the ratio laid down in the **Rainbow Paper Limited Case (supra)**, will not be applicable to the present case. He further submitted that the provisions of IBC, by the virtue of Section 238 have an overriding effect over the provisions of the UP Act 1976, therefore, the effect of Section 53 of IBC would prevail over the effect of Section 13 and 13A of UP Act 1976, if any. Thus, the treatment being provided to the Applicant under the Resolution Plan,



being an Operational Creditor, is correct and in line with the provisions of IBC.

- viii. Mr. Saurabh Kirpal has also relied upon the judgment of the Hon'ble Supreme Court in the case of ***Paschimanchal Vidyut Vitran Nigam Ltd., vs. Raman Ispat Private Limited and Ors.***, in Civil Appeal No. 7976 of 2019 in support of his contention.
- ix. He further submitted that charge if any has to be registered as per the provisions of Section 77 of Companies Act, 2013. The alleged charge in the instant case stated to have been created in favour of the Applicant in terms of Section 13 and 13A of the U.P. Act has not been registered in terms of Section 77 of Companies Act, 2013. Mr. Saurabh Kirpal relied upon the judgment of the Hon'ble NCLAT in the matter of ***Indiabulls Housing Private Limited vs. Mr. Samir Kumar Bhattacharya & Ors.***, in Company Appeal (AT) (Ins.) No. 830/2019 dated 18.12.2019, ***Volkswagen Finance Private Limited Vs. Shri Balaji Printopack Pvt. Ltd. and Anr.***, dated 19.10.2020 and ***Axis Bank Limited Vs. Value Infratech India Private Limited and another dated 20.12.2021***, wherein it has been held that the registration of charge with the Registrar of Companies is mandatory in order to establish the security interest.
- x. On the contrary, Mr. Singh, Ld. Counsel for the Applicant/GNIDA has argued that the Applicant should be considered as a Secured Creditor in view of the provisions of Section 13 and 13(A) of the UP Act and also in view of the judgment passed by Bench-II of this Adjudication Authority in the case of ***VMS Equipment (supra)***.
- xi. In view of the rival contentions, it will be appropriate to refer to the provisions of UP Act as well as Gujarat Act.

Section 13 and 13A of UP Act.

“13. Where any transferee makes any default in the payment of any consideration money or installment thereof or any other amount due



on account of the transfer of any site or building by the Authority or any rent due to the Authority in respect of any lease, or where any transferee or 1st Occupier makes any default in payment of any amount of in the payment of any fee or tax levied under this Act, the Chief Executive Officer may direct that in addition to the amount of arrears, a further sum not exceeding that amount shall be recovered from the transferee or occupier, as the case may be, by way of penalty.

13-A. Any amount payable to the Authority under section 13 shall constitute a charge over the property and may be recovered as arrears of land revenue or by attachment and sale of property in the manner provided under sections 503, 504, 505, 506, 507, 508, 509, 510, 512, 513 and 514 of the Uttar Pradesh Municipal Corporations Act, 1959 (Act no. 2 of 1959) and such provisions of the said Act shall mutatis mutandis apply to the recovery of dues of an authority as they apply to the recovery of a tax due to a Municipal Corporation, so however, that references in the aforesaid sections of the said Act to Municipal Commissioner', Corporation Officer' and 'Corporation' shall be construed as references to Chief Executive Officer" and 'Authority' respectively :

Provided that more than one modes of recovery shall not be commenced or continued simultancously.]”

Section 48 of Gujarat Act.

“48. Tax to be first charge on property.— Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person on account of tax, interest or penalty for which he is liable to pay to the Government shall be a first charge on the property of such dealer, or as the case maybe, such person.”



- xii. On a perusal of the provisions of UP Act as well as Gujarat Act, we find that Section 48 of the Gujarat Act expressly uses the expression of “First charge” whereas Section 13 and 13A of the UP Act uses the expression “Charge.” Section 13A says that any amount payable to the Authority under Section 13 shall constitute a “charge” over the property.
- xiii. We find force in the submissions made by Mr. Saurabh Kirpal, Ld. Sr. Counsel appearing for the Resolution Professional. There is a clear distinction in the provisions of the Gujarat Act as well as in the U.P. Act. Section 13 and 13A of the U.P. Act only uses the expression “charge” and not “first charge”. We are therefore of the considered view that the expression “first charge” cannot be read into the said provisions to give a meaning to say that the said provision deals with “first charge”. According to our considered view that is not the intention of the legislation.
- xiv. We are therefore of the considered view that the judgment of Bench-II in **VMS Equipment (supra)** will not apply to the present case. The Hon’ble Supreme Court of India in the case of **Anand Sonbhadra (supra)** has categorically held that the Noida Authority will be treated as an Operational Creditor. We are therefore of the considered view that the Applicant/GNIDA has to be considered as an Operational Creditor as laid down by the Hon’ble Supreme Court of India in the case of **Anand Sonbhadra (supra)**. We therefore do not see any merits in this application which is accordingly rejected.
- xv. Accordingly, IA-4445/2023 stands **dismissed** and **disposed of**.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**



**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI (COURT III)**

IA-3356/2020, IA-3629/2020 & IA-5001/2021

In

IB-2130(ND)/2019

IN THE MATTER OF IB-2130(ND)/2019:

M/s. Dynacon Projects Private Limited **Operational Creditor**

Versus

M/s. Today Homes & Infrastructure Private Limited
..... **Corporate Debtor**

AND IN THE MATTER OF IA-3356/2020:

Mr. Nilesh Sharma
Resolution Professional of the Corporate Debtor **Applicant**

Versus

Mr. Mordhwaj Singh & Ors. **Respondents**

AND IN THE MATTER OF IA-3629/2020:

Mr. Mordhwaj Singh & Ors. **Applicants**

AND IN THE MATTER OF IA-5001/2021:

Mr. Mordhwaj Singh & Ors. **Applicants**

Pronounced On: 05.12.2023

CORAM:

**SHRI ATUL CHATURVEDI
MEMBER (TECHNICAL)**

**SHRI BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)**

PRESENT:

For the RP : Mr. Saurabh Kripal, Sr. Adv., Mr. Humray Bir
Singh, Ms. Vatsala C. Chaturvedi,
Mr. Puneet Rathi, Ms. Sehr Chopra, Adv.
For the Respondent : Mr. Rajesh Kr. Gautam, Mr. Anant Gautam,
Mr. Sumit Sharma, Mr. Dinesh Sharma, Adv.

COMMON ORDER



PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. These applications i.e. **IA-3356/2020, IA-3629/2020** and **IA-5001/2021** were heard together because of the similarity in the facts and issues involved therein and being disposed of by this common order.

IA-3356/2020:

2. This application has been filed by Mr. Nilesh Sharma, Resolution Professional of M/s. Today Homes & Infrastructure Private Limited, the Corporate Debtor under Section 14 and 25 of the IBC, 2016 read with Regulation 30 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 seeking directions to the Respondents Nos. 1 to 4, (the erstwhile land owners) to restore the peaceful, vacant and physical possession of the land admeasuring 10.81 acres at Sector 73, Sohna Road, Gurgram, wherein the Corporate Debtor is constructing a group housing project in the name and style of “Canary Greens” to the Applicant/Resolution Professional. The Applicant is also seeking a direction to the local district administration of Gurugram (Respondent Nos. 5 & 6) to assist the Applicant in securing the vacant, physical and peaceful possession of the said land and action against Respondent Nos. 1 to 4 in terms of Section 74 for violating Section 14 of the Code.

3. IA-3629/2020:

The Applicants herein are the erstwhile land owners and Respondent No. 1 to 4 in IA-3356/2020, have filed this application seeking directions from this Adjudicating Authority to modify the ad interim Ex-parte order dated 24.08.2020 passed in IA-3356/2020 in IB-2130/ND/2019.



4. IA-5001/2021:

The Applicants herein, who are claiming to be the land owners of the land ad-measuring 10.81 acres situated in Village Behrampur, Tehsil & District Gurugram in the State of Haryana seeking a direction to the Resolution Professional to exclude the project land ad-measuring 10.81 acres situated in Village Behrampur, from the proposed Resolution Plan.

Factual Matrix of the Case:

5. The facts which are relevant and common for the purposes of determination of the issues involved in these applications are stated as under:
6. M/s. Dynacon Projects Private Limited, the Operational Creditor filed an application under Section 9 of the IBC, 2016 seeking initiation of Corporate Insolvency Process (CIRP) against M/s. Today Homes & Infrastructure Private Limited, the Corporate Debtor. The Corporate Debtor is engaged in the business of construction and erection of houses and building.

This Adjudicating Authority vide order dated 31.10.2019 admitted the said application and initiated CIRP of the Corporate Debtor. Moratorium in terms of Section 14 of IBC was declared with respect to the Corporate Debtor after initiation of CIRP vide order dated 31.10.2019 which is still in force.

7. IA-3356/2020:

Mr. Nilesh Sharma, the Applicant in IA-3356/2020 was appointed as the Resolution Professional of the Corporate Debtor vide order dated 09.01.2020 in terms of Section 22 of IBC.

8. The Respondent Nos. 1 to 4 are the erstwhile owners of the land admeasuring 35.2062 acres situated in village Behrampur,



Gurgram, Haryana ("land"), development rights of which were duly transferred by the said owners in favour of a company namely M/s. New India City Developers Pvt. Ltd. (New India') by way of execution of a Development Agreement dated 03.03.2007 New India by way of an agreement dated 30.07.2010, transferred 8,00,000 sq. ft. of Floor Space Index (FSI) (residential) in favour of the Corporate Debtor out of total land ad-measuring 35.2062 acre for developing/ erecting a housing project on the said land on the consideration mentioned in the said project.

9. Before proceeding further, it is pertinent to mention the brief background of the case for better appreciation of the case:-

a) In the year 2007, Shri Mordhwaj Singh, Shri Vikramjit Singh, Shri Ram Narayna Singh and Shri Bhim Singh, the Respondent No. 1-4 herein, owners of the land admeasuring 35.2062 acres situated in village Behrampur, Gurgram, Haryana ("land") entered into an irrevocable and exclusive Development Agreement ("Development Agreement") with New India, thereby entrusting the development of said land in favour of New India as per the terms and conditions of the Agreement. As per the said Agreement, the Owners had entrusted irrevocable rights in favour of New India for development of the said property for Group Housing and Industrial IT Park/Cyber Park. Further, as per the said Agreement, 45% share of duly sanctioned FAR in the Group Housing project was allocated to the owners and the remaining 55% share of FAR was allocated to New India.

b) Subsequently, certain disputes arose between the land owners and New India, which culminated into initiation of arbitration proceedings. During the arbitration proceedings, the land owners and New India entered into a Settlement Agreement and a Consent Award dated 05.09.2009 was passed, wherein it was



- recorded that the land owners would execute a Power of Attorney in favour of New India conferring rights for obtaining license in respect of the said project and New India will complete the development of the entire project as per the agreement dated 03.03.2007 entered into between the parties and shares of owner increased from 45% to 50%.
- c) A license bearing No. 03/2009 was issued by the Directorate Town & Country Planning, Haryana on 12.02.2009 in favour of the land owners and New India, whereby permission for setting up of a Group Housing Colony on a part of the land (21.637 acres) was granted.
- d) Further, in terms of the Consent Award dated 05.09.2009, the land owners on 19.01.2010 executed an irrevocable special Power of Attorney in favour of New India, to represent the owners, apply and obtain all requisite license, permission, NOC from respective Departments for the development of the land.
- e) Simultaneously, on 19.01.2010, the said land owners executed another irrevocable Power of Attorney in favour of the (Corporate Debtor) to sell, transfer, lease, license, construct, mortgage with respect to the land which is to be developed for the project in question. The said Power of Attorney was registered on 20.01.2010. Pursuant to the execution of the Power of Attorney dated 19.01.2010, New India entered into an agreement with the Corporate Debtor on 30.07.2010 whereby New India assigned all the rights, obligations/responsibilities and interests in the entire Floor Space Index ('FSI') totaling to 8,00,000 sq. ft. approximately against a consideration of Rs. 40,00,00,000/-. Additionally, New India also transferred its rights, obligations/responsibilities in favour of the Corporate Debtor as the per the Development



- Agreement dated 03.03.2007 and Consent Award dated 05.09.2009 in favour of the Corporate Debtor.
- f) Subsequently, addendum agreements dated 16.09.2010 and 29.03.2011 were executed where under the total consideration of the purchase of the said FSI was enhanced from Rs. 40 Crores to Rs. 120 Crores.
- g) On 11.10.2010, the Town and Country Planning Department, Haryana Government issued a License No. 77/2010 to the owners for development of the IT Park on an area admeasuring 12.55 acres in village Behrampur, Sector-74, Gurugram-Manesar Urban Complex and the Power of Attorney executed by the owners became operative.
- h) The License bearing No. 03/2009 dated 12.02.2009 was renewed by the Directorate Town and Country Planning, Haryana upto 11.02.2021, vide renewal letter dated 26.08.2019.
- i) The original land owners, the Respondent No. 1 to 4 in IA-3356/2020 have filed a reply affidavit, wherein at the outset it has been submitted that the Applicant (Resolution Professional) obtained an ad interim Ex-parte order on 24.08.2020 in the present IA without placing the correct facts on record, wherein this Adjudicating Authority passed an order directing Respondent No. 5 & 6 to ensure that the Respondent No. 1 to 4 do not interfere with the peaceful possession of the Resolution Professional on the land in question. The Respondent No. 5 & 6 were also directed to provide protection and assistance to the Resolution Professional.

10. The Respondents herein have contended that the Development Agreement dated 03.03.2007 was signed by M/s. New India City Developers Private Limited and the present Respondents whereas the Corporate Debtor i.e., M/s. Today Homes & Infrastructure



Private Limited was not a party to the said Development Agreement. As per the said Development Agreement dated 03.03.2007, the rights of ownership of the part of the land of the present Respondents was to accrue in favor of M/s. New India City Developers Private Limited only upon fulfilling the obligations casted upon it. However, M/s. New India city Developers did not fulfil its obligations and breached the terms of Development Agreement dated 03.03.2007, and therefore the Arbitral Tribunal passed an award on 09.12.2017 in favour of the Respondents wherein the liability of M/s. New India City Developers towards the Respondents herein was fixed approximately to the tune of Rs. 160 Crores including statutory dues to be paid to the Directorate of Town and Country Planning Haryana. This award was passed much prior to the initiation of the present CIRP. Further, the Respondents herein also initiated execution proceedings bearing CIS No. EXE 312/2019 against M/s. New India City Developers Private Limited on the basis of the Arbitration Award dated 09.12.2017 much prior to the initiation of the present CIRP proceedings which are pending before Ld. Additional District Judge-Cum-Presiding Judge Special Commercial Court Gurugram.

11. M/s. New India City Developers Private Limited, challenged the said award dated 09.12.2017 by filing objections under Section 34 of the Arbitration and Conciliation Act, 1996 which were rejected by the Special Commercial Court, Gurugram, vide order dated 06.02.2020. The Respondents herein submitted that they were not parties to the Agreement dated 30.07.2010 executed between M/s. New India City Developers and M/s. Today Homes & Infrastructure Private Limited and therefore, it is not binding upon them.

12. It is submitted that the said Power of Attorney dated 19.01.2010 was revoked by these Respondents vide Registered Deed No. 489



dated 30.08.2019 and the said revocation was published in newspapers on 28.09.2019.

13. The said revocation of Power of Attorney was challenged by the Corporate Debtor i.e. M/s. Today Homes & Infrastructure Private Limited before the Civil Judge, Gurugram vide Civil Suit No. 3694/2019 which was dismissed for default on 17.03.2020 and the application for restoration of the suit is still pending before the Civil Court.

14. The Respondents herein have also denied the fact that the Applicant has taken over the possession (physical or constructive) of the land in question and prayed for dismissal of this application.

15. These applications were listed on 29.08.2023 seeking clarification and the following order was passed:-

“IA/3356/2020 IA/3629/2020 IA- 5001/2021:-

These applications were listed seeking clarification on the following aspects:-

1. Who has the actual physical possession of the land in dispute as on date and from which date, supporting documents in this regard shall be filed.

2. Present status of Civil Suit No. 3694/2019 and the Restoration Application filed before the Civil Judge, Senior Division, Gurugram.

3. Present status of the Execution Proceedings bearing CIS NO. EXE 312/2019 against M/s. New India City Developers Private Limited.

The Development Agreement was executed by the land owners with M/s. New India City Developers Private Limited. The RP to clarify how the development rights flowed from M/s. New India City Developers Private Limited to the Corporate Debtor or to any other stakeholder with supporting documents and with respect to the extent of the land.

The RP shall also give a break-up in a tabular form of the land transferred or given to M/s. New India City Developers Private



Limited, Corporate Debtor and any other stakeholders involved in this matter along with relevant documents, if any.

The Resolution Professional shall file an affidavit clarifying the above aspects within one week.

The Respondent Nos. 1 to 4 (Landowners) are also at liberty to file an affidavit.”

16. In compliance with the said order, the Resolution Professional as well as the land owners filed affidavit clarifying issues raised by this Adjudicating Authority.

17. The issue wise reply given by the Resolution Professional to the queries raised by this Adjudicating Authority is mentioned in brief which is as follows:

First issue:

Who has the actual physical possession of the land in dispute as on date and from which date, supporting documents in this regard shall be filed.

Reply of RP:

With respect to the first issue, the Resolution Professional has submitted that he took physical possession of the Canary Greens Project Land and Mr. Deepak Bansal, IRP after being appointed as RP of the Corporate Debtor. However, he was dispossessed from the project land on 11.08.2020 by the land owners.

Therefore, the RP filed IA No. 3356/2020, wherein this Tribunal vide order dated 24.08.2020 directed the Ld. District Magistrate, Gurugram and Commissioner of Police, Gurugram to ensure that the land owners do not interfere in the peaceful possession of the RP and also directed them to provide protection and assistance to the RP. In compliance with the said directions, the possession of the project land was handed over



back to the RP on 02.09.2020 and a letter dated 02.09.2020 was written by the RP to the Local District Administration/concerned Police Station intimating them about taking over the possession of the said project land. A copy of the said letter dated 02.09.2020 has been placed on record. The RP has also submitted that IA-347/2020 for initiating contempt proceedings against the land owners for violating the directions passed by this Tribunal in its order dated 24.08.2020 and causing hindrance in the possession of the project land which is pending adjudication before this Adjudicating Authority.

Second Issue:

Present status of Civil Suit No. 3694/2019 and the Restoration Application filed before the Civil Judge, Senior Division, Gurugram.

Reply of RP:

With respect to the second issue, the RP has submitted that Civil Suit No. 3694 of 2019 filed before the Civil Judge, Senior Division Gurugram was dismissed for default on 17.03.2020 and thereafter the RP filed an application bearing APP. No. 20/2020 seeking restoration of the suit which is pending.

Third Issue:

Present status of the Execution Proceedings bearing CIS No. EXE 312/2019 against M/s. New India City Developers Private Limited.

Reply of RP:

With respect to the third issue, the RP has submitted that Execution Petition No. 312/2019 filed by the land owners before the District Court Gurugram, seeking execution of the Arbitral Award dated



09.12.2017 titled as M/s. New India City Developers Private Limited vs. Shri Mordhwaj Singh and Ors., is pending .

Fourth Issue:

The Development Agreement was executed by the land owners with M/s. New India City Developers Private Limited. The RP to clarify how the development rights flowed from M/s. New India City Developers Private Limited to the Corporate Debtor or to any other stakeholder with supporting documents and with respect to the extent of the land.

Reply of RP:

With respect to the fourth issue, the RP has submitted that the Development Rights as obtained by New India vide Agreement dated. 03.03.2007 and Consent Award dated. 05.09.2009 were duly transferred by New India in favour of the Corporate Debtor herein in respect of 8,00,000 sq. ft. (arising out of 10.81 acres of land approximately) vide Agreement dated 30.07.2010, Addendum to Agreement dated 16.09.2010 and second Addendum to Agreement dated 29.03.2011 for a consideration of Rs. 120 Crores discharged by the Corporate Debtor by issuance of its equity shares. As per the said Agreements all the liabilities were to be borne by New India only.

The Corporate Debtor in terms of the Development Agreement duly advertised its Housing Projects consisting of 583 units in 8 towers. In terms of the Development Agreement, the Corporate Debtor paid consideration of Rs. 120,00,00,000/- (Rupees One Hundred and Twenty Crores Only) to New India in the form of its equity shares. The same is duly corroborated by Agreement dated 30.07.2010, addendums to agreement dated 16.09.2010 and 29.03.2011



between the Corporate Debtor and New India. The said Agreements are attached with the IA No. 3356/2020.

Fifth Issue:

The RP shall also give a break-up in a tabular form of the land transferred or given to M/s. New India City Developers Private Limited, Corporate Debtor and any other stakeholders involved in this matter along with relevant documents, if any.

Reply of RP:

With respect to the fifth issue, the Erstwhile owners of the land transferred development rights in total land admeasuring 35.2062 acres situated in village Behrampur, Gurugram, Haryana (Land') in favour of New India City Developers Pvt. Ltd. by way of a Development Agreement dated 03.03.2007 and a registered Power of Attorney dated 19.01.2010.

- I. As per notification No. CCP(NCR)/FDP(G)/2007/359 dated 05.02.2007 issued by DTCP, Haryana, out of the said land area fell in Residential Zone.
- II. As per notification No. CCP(NCR)/FDP(G)/2007/359 dated 05.02.2007 issued by DTCP, Haryana, out of the said land area fell in Industrial Zone.
- III. Undivided land area between the owner and the license to be taken into the consideration after actual division takes place.
- IV. Integral Development Area for which the Landowner and the New India took the License from DTCP, Haryana.
- V. Area belongs to Land Owner - 45% of FAR as per Agreement dated 03.03.2007, the said FAR was however subsequently changed to 50% in light of the consent award dated 05.09.2009.



- VI. Area belongs to Developer/New India - 55% of FAR as per Agreement dated 03.03.2007, the said FAR was however subsequently changed to 50% in light of the consent award dated 05.09.2009.
 - VII. Corporate Debtor in terms of the Agreement with New India dated 30.07.2010/16.09.2010/29.03.2011 was transferred entire FSI totaling to 8,00,000 sq. ft. area (residential) for developing/ erecting a housing project on the said Land.
 - VIII. Corporate Debtor launched instant residential project on the licensed portion of the land i.e. 10.8185 acres of land out of total 35.2062 acre by the name of 'Canary Greens'.
- 18.** The Respondent Nos. 1 to 4 i.e., the land owners also filed an affidavit with respect to the queries raised by this Adjudicating Authority vide order dated 29.08.2023.
- I. With respect to the query No. 1 which relates to the actual physical possession of the land in dispute, the land owners have submitted that the possession of the land in question is with the land owners w.e.f., 30.08.2019 i.e., date on which the Power of Attorney dated 9.01.2010, registered on 20.01.2010, executed by the land owners in favour of the Corporate Debtor was revoked by a registered deed dated 30.08.2019 by the land owners, which is prior to the passing of the CIRP order dated 31.10.2019. The land owners further submitted that the fact that the Resolution Professional has filed an IA-3356/2020 on 18.08.2020 praying for restoration of the physical possession of the land shows that the Resolution Professional does not have the possession with him and the actual possession of the land is with the land owners. The land owners have also responded to the other issues raised by this Adjudicating Authority which are not being adverted to at this stage.



19. In view of the clarifications given by the Resolution Professional and the Respondent Nos. 1 to 4, the land owners and the various contentions raised by the parties, the following issues emerged for consideration by this Adjudicating Authority.

20. In the above backdrop of facts and debates, the following issues emerge for consideration by this Adjudicating Authority.

1. Whether the Development Agreement entered into between the land owners and New India gives right to the New India to develop the land without having any right title over the disputed land.
2. Whether the alleged irrevocable Power of Attorney executed by Respondent No. 1 to 4 in favour of New India & M/s. Today Homes & Infrastructure Private Limited can be acted upon and considered to be valid despite the fact that the land owners i.e. (Respondent No. 1 to 4) have revoked the said Power of Attorney vide Registered Deed No. 489 dated 30.08.2019.
3. Whether the Resolution Professional has the actual possession of the land in question.

21. Mr. Saurabh Kripal, Learned Senior Counsel submitted that the landowners (Respondent Nos. 1 to 4) executed Development Agreement in favour of the New India City Developers Private Limited on 03.03.2007 for developing the said land in question giving absolute right to New India to develop, sell/transfer etc. on the said land of 10.81 acres. Thus, the landowners were left with no right in the land after entering into the said Development Agreement.

Mr. Kripal, Learned Senior Counsel referred to various clauses of the Development Agreement which are:

Clause-e of the Development Agreement reads as follows:



“The owners being desirous of developing the scheduled property has decided to entrust the development of the scheduled property to the Developer exclusively and irrevocably on the terms and conditions hereinafter contained.”

Clause-1 of the said agreement reads as follows:

“The Owners hereby entrust to the Developer exclusive and revocable rights for development of the scheduled property for group housing and/or Industrial IT Park /Cyber Park and or and as may be permissible under law along with any other land.”

Clause-7 of the Development Agreement provides for right to sub-contract, the said clause is extracted below:

“The Developer shall be entitled to carry on the development on, the scheduled property either independently or by appointing partners contractors, sub- contractors or other agencies. The Developer shall alone be responsible for the payment of the cost of Development or labour and other charges payable to such contractors, sub-contractors and the owners shall in no way be responsible for any failure or default of the developer. The owners shall only be entitled to sub-contract, development/construction in favour of contractors/sub-contractors as it deems fit with regard to the Owner's allocation. However any dispute or liability arising out of or in connection with the said development of the owner's allocation, the owner shall be exclusively liable for the same and shall indemnify and keep harmless the developer. The developer shall be bound to promote and develop the project as a Today Group Project.”

22. Mr. Saurabh Kripal, Learned Senior Counsel appearing for the Resolution Professional has submitted that the said development rights were duly transferred by New India in favour of the Corporate Debtor for the land admeasuring 10.81 acres approximately vide agreement dated 30.07.2010, Addendum to agreement dated 29.03.2011 for a consideration of Rs. 120 crores discharged by the Corporate Debtor by issuance of its equity shares. The right to develop the abovementioned 10.81 acres of land by the Corporate Debtor wherein the project Canary Greens is being developed was



coupled with a duly executed irrevocable Power of Attorney dated 19.01.2010 as entered between the Land Owners and the Corporate Debtor.

23. Mr. Kripal, Learned Senior Counsel has also submitted that, the Corporate Debtor in terms of the Development Agreement duly advertised its housing projects consisting of 583 units in 8 towers. By virtue of the said Development Agreement, right to develop the said subject land including right to transfer the said development including proportionate share in the land was transferred to the Corporate Debtor due to which, the said right is now a “property” of the Corporate Debtor as per Section 3(27) of the Code.

24. Mr. Kripal, Learned Senior Counsel relied upon a judgment passed by the Hon’ble Supreme Court of India in the matter of **Victory Iron Works Limited versus Jitendra Lohia and Another**, 2023 SCC Online SC 260 and submitted that the Hon’ble Supreme Court has recognized the development rights created in favour of the Corporate Debtor and under Development Agreement. The relevant observations of the Hon’ble Supreme Court are as follows:

“The creation of these bundle of rights and interests was actually for a valid consideration. But for the payment of such consideration, Energy Properties would not even have become the owner of the property in dispute. Therefore, the development rights created in favour of the Corporate Debtor constitute “Property” within the meaning of the expression “property” under Section 3(27) includes “every description of interest, including present or future or vested or contingent interest arising out of or incidental to property”. Since the expression “asset’ in common parlance denotes “property of any kind”, the bundle of rights that the Corporate Debtor has over the property in question would constitute “asset” within the meaning of Section 180 and Section 52(a) of IBC.”



“It must be mentioned here that the explanation was originally limited to “the sub-section” but by Act 26 of 2018, the word “sub-section” was substituted by the word “section”. Therefore, the explanation under Section 18 will not provide an escape route for the Appellants. In any case, the bundle of rights and interests created in favour of the Corporate Debtor may even tantamount to creation of an implied agency under Chapter-X of the Indian Contract, 1872 and such agency may not even be amenable to termination in view of Section 202 of the said Act, since the creation of the same in favour of the Corporate Debtor was coupled with flow of consideration.”

- 25.** He, therefore, submitted that the rights and interest thus created are liable to be protected and such rights are not amenable to termination in terms of Section 202 of the Contract Act.
- 26.** Mr. Kripal, Learned Senior Counsel also submitted that the Resolution Plan is in consonance with the development rights vested with the Corporate Debtor by virtue of the Power of Attorney dated 19.01.2010 executed by the land owners in favour of the Corporate Debtor which constitute the intangible assets of the Corporate Debtor. Mr. Kripal, Learned Senior Counsel relied upon a judgment passed by NCLAT in the matter of ***New Okhla Industrial Development Authority versus Amit Agarwal, RP of Boulevard Projects Pvt. Ltd.*** (Company Appeal (AT) (Ins) No. 305/ 2021 in support of said contention.
- 27.** He further submitted that the revocation of Power of Attorney dated 19.01.2010 is non-est and bad in-law. Further, Civil Suit bearing No. 3694-209 has been filed before the Civil Judge Senior Judge, Gurugram seeking a decree for declaring that the Power of Attorney dated 19.01.2019 be valid. He further submitted that the Registered Deed executed between two parties cannot be revoked by unilateral registration of deed of revocation by one of the parties.



28. Be that as it may, the Resolution Applicant/Applicant, in this application has prayed for directing the Respondent No. 1 to 4 (land owners) to restore the peaceful vacant and physical possession of Canary Greens admeasuring 10.81 acres that is the land in question. The Resolution Professional has also prayed for directing the Respondent No. 5 and 6 to assist the Applicant in restoring the peaceful vacant and physical possession of the land in question. We are therefore, required to examine as to whether the Resolution Professional has the possession of the land in question. The Resolution Professional in the present application as well as in the affidavit filed by him pursuant to the order dated 29.08.2020 has submitted that he has got the possession of the land by virtue of the order dated 24.08.2020 passed in IA-3356/2020. However, the Resolution Professional could not place on record any evidence to show that the physical possession of the land in question was handed over to him. Furthermore, the Resolution Professional has filed the present application seeking a direction to Respondent No. 1 to 4 to hand over the possession of the land in question, the Respondent No. 1 to 4, the land owners have also disputed the fact that the possession of the land is with the Resolution Professional. In view of the said position, we are unable to convince ourselves that the possession of the land was handed over to the Resolution Professional and that the Resolution Professional is in possession of the land in question. Furthermore, we feel that the issue of possession has to be decided by a Civil Court having jurisdiction on the basis of oral and documentary evidence and this Adjudicating Authority is not competent to decide the same. We, therefore, cannot grant any relief as prayed for by the Resolution Professional in this application. Since, we are deciding the issue of possession only at this stage, we do not feel it appropriate to decide the other



questions with respect to rights of the Corporate Debtor under the Development Agreement, etc.

29. The present application i.e. IA-3356/2020 is **disposed of** accordingly.

30. IA-3629/2020:

This application has been filed by the erstwhile land owners and Respondent No. 1 to 4 in IA-3356/2020, seeking directions from this Adjudicating Authority to modify the ad interim Ex-parte order dated 24.08.2020 passed in IA-3356/2020 in IB-2130/ND/2019 on the ground that the said order was obtained by the Respondents without disclosing complete and correct facts of the case and without affording an opportunity for hearing of the Applicant herein.

In view of the order passed in IA-3356/2020, we do not deem it appropriate to pass any order in this application.

IA-3629/2020 is **disposed of** accordingly.

31. IA-5001/2021:

This application has been filed by the Applicants herein, who are claiming to be the land owners of the land ad-measuring 10.81 acres situated in Village Behrampur, Tehsil & District Gurugram in the State of Haryana seeking a direction to the Resolution Professional to exclude the project land ad-measuring 10.81 acres from the proposed Resolution Plan.

In view of the order passed in IA-3356/2020, we do not deem it appropriate to pass any order in this application.

IA-5001/2021 is **disposed of** accordingly.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**

**IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI, COURT III**

IA-4096/2022

In

IB-2130(ND)/2019

IN THE MATTER OF IB-2130(ND)/2019:

M/s. Dynacon Project Pvt. Ltd.

..... **Operational Creditor**

Versus

M/s. Today Homes & Infrastructure Pvt. Ltd.

..... **Corporate Debtor**

AND IN THE MATTER OF IA-4096/2022:

M.S. Batra & Sons (HUF) & Ors.

..... **Applicants**

Versus

Mr. Pradeep Kumar Diwan & Ors.

..... **Respondents**

Pronounced On: 05.12.2023

CORAM:

**SHRI ATUL CHATURVEDI
MEMBER (TECHNICAL)**

**SHRI BACHU VENKAT BALARAM DAS
MEMBER (JUDICIAL)**

PRESENT:

For the Applicants

:Mr. Sudhir Kr. Makkar, Sr. Adv, Ms. Anjali Chauhan, Mr. Rishabh Sharma, Ms. Shraddha Deshmukh, Advs.

For the Respondents

:Mr Shailendra Singh, & Mr. Abhyuday Dhasmana, Mr. Aman Leekha, Advs. for R-9.
Mr. Piyush Singh, Mr. Akshay Srivastava, Mr. Vivek Kr., Advs. for R-1 to 7.
Mr. Om Prakash Sharma, Adv. for R-8

ORDER

PER: BACHU VENKAT BALARAM DAS, MEMBER (JUDICIAL)

1. This application has been filed by the Applicants namely M.K Batra (HUF), S.S Batra and Sons (HUF), Sunder Sham Batra and Mohinder Batra (dissenting Financial Creditors) under Section 60(5) of the IBC, 2016 seeking rejection of the Resolution Plan submitted by Consortium

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of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegencia Apartment Buyers Association.

2. It is submitted that the Applicants are Unsecured Financial Creditors of the Corporate Debtor. It is further submitted that the status of the Applicants as dissenting Financial Creditors has been recognized in Form H filed by the Resolution Professional along with IA-4766/2021, which is an application seeking approval of the Resolution Plan. The Applicants by way of the present application are raising certain issues/objections pertaining to the Resolution Plan which has been filed through IA-4766/2021 under Sections 30 & 31 of the Code, 2016 submitted by the Consortium of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegencia Apartment Buyers Association.

3. Factual Background Of The Case

It is submitted that this Adjudicating Authority vide order dated 31.10.2019 admitted an application filed under Section 7 of the Code by M/s. Dynacon Projects Private Limited seeking initiation of CIRP against the Corporate Debtor, and declared moratorium. Subsequent thereto, the Resolution Professional was appointed and CoC was constituted. Thereafter several CoC meetings were held and the Resolution Professional took various steps as required under the Code and duly published Form G. It is submitted that Form G was amended due to the change in eligibility criteria of the Prospective Resolution Applicants and final Form G was published on 06.11.2020 by the Resolution Professional. The invitation for EoI of the Corporate Debtor gave concessions to the Registered Welfare Associations pertaining to the requisite amount of the Earnest Money Deposit (EMD) wherein the Association was liable to pay Rs. 10 Lakhs while the other Applicants had to submit Rs. 3 Crores as EMD. It is submitted that the CoC has acted in its own interest since the majority voting share was in the hands of the Associations.



4. The Resolution Professional received certain EoIs and after evaluation, a provisional list of eligible PRAs was published on 19.12.2020. Thereafter, the Resolution Professional issued the Request for Resolution Plan (RFRP) dated 29.12.2020. It is pertinent to mention that the RFRP had similar relaxations pertaining to the amount of EMD and Performance Bank Guarantee (PBG) wherein the Association was only liable to submit Rs. 10 Lakhs as compared to Rs. 15 Crores of PBG to be submitted by other Applicants.
5. Subsequently, the Resolution Professional issued the final list of PRAs dated 31.12.2020 which encompassed a total of 9 eligible entities. Out of the total 9 eligible PRAs, four PRAs submitted their Resolution Plan, out of which the Resolution Plans submitted by two PRAs were rejected on account of non-submission of Earnest Money Deposit Amount, as was mandated in the RFRP. The remaining two Resolution Plans, after carrying out the necessary modifications, as per the observations made by the Resolution Professional were placed before the CoC in its 12th meeting dated 10.08.2021, wherein the Resolution Professional certified that the Resolution Plans complies with all the provisions of the Code and its Regulations. The Resolution Plans were put to vote and the Resolution Plan submitted by the Consortium of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegencia Apartment Buyers Association was approved by the CoC with 96.93% voting in its 12th CoC meeting held on 10.08.2021.
6. The Applicants having a voting right of 0.24% abstained from voting and therefore, is a dissenting Financial Creditor to the Resolution Plan. It is submitted that the Applicants did not vote in favour of the Resolution Plan as the said Resolution Plan was not in compliance with Section 30(2)(b) of the Code and Regulation 38(1) of CIRP Regulations. Further, the Resolution Plan did not provided for the payment of debts of Financial Creditors, who did not vote in favour of the Resolution Plan.
7. It is further submitted that as per Section 30(2)(b) of the Code read with the Regulations, the Applicant is entitled to such payment as would be



due to it in terms of Section 53 of the Code and also that such payment has to be paid in priority.

8. It is also submitted that the Resolution Plan so passed, does not provide for priority payments to the Financial Creditors who are dissenting but shall be paid in priority over the Financial Creditors who voted in favour of the Plan in view of Regulation 38 of the CIRP Regulations as such the Resolution Plan is not in conformity with the Section 30(2)(b) of the Code and is liable to be rejected being non-compliant with the provisions of the Code.
9. The Applicants are also objecting to the Successful Resolution Applicant i.e., the Consortium of the Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegencia Apartment Buyers Association to submit the Resolution Plan. It is stated that the Successful Resolution Applicant is not entitled in law to undertake commercial and economic projects by virtue of its statutory bounds as under the Haryana Registration and Regulation of Societies Act, 2012 (the Act) and therefore, it was not eligible to submit the Resolution Plan and on this ground, alone the Resolution Plan is liable to be rejected.
10. The Applicants have contended that the Consortium of the Welfare Association, constituting the Successful Resolution Applicant does not have the requisite funds to finance the entire project of the Corporate Debtor. It is pertinent to mention herein that Clause 8 of the Plan states that the Resolution Applicant proposes to infuse a sum of Rs. 60 Crores into the Corporate Debtor, out of which Rs. 40 Crores shall be given by a third party, namely, Green City Developers, a Real Estate Developer.
11. It is further stated that the Resolution Plan is not compliant with Regulation 38 of the CIRP Regulations because of the ongoing disputes of the Corporate Debtor with the landowners. The Applicants have raised objections to the Resolution Plan which are as follows:

A. Applicant ought to be paid Liquidation value in priority over other Financial Creditors.



It is stated that the Applicants being dissenting Financial Creditors had filed its claim for an amount of Rs. 5,32,07,008/- and the same was also verified by the Resolution Professional. The Resolution Professional admitted an amount of Rs. 2,51,36,442/-.

It is also stated that in terms of Section 30(2)(b) of the Code, the Financial Creditors, who do not vote in favour of the Resolution Plan, shall be paid in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of Section 53 in the event of a liquidation of the Corporate Debtor. The Applicants, therefore, submitted that since the Liquidation value of the Corporate Debtor is Rs. 773,46,91,673/- (Rupees Seven Hundred Seventy Three Crores Forty Six Lakh Ninety One Thousand Six Hundred and Seventy Three Only), the Applicant is entitled to an amount which is much greater than what is proposed under the Plan.

B. Resolution Plan is liable to be rejected on account of fraud committed by the Successful Resolution Applicant.

It is submitted by the Applicants that the Resolution Plan includes a commitment letter from M/s. Green City Developer and a letter dated 16.06.2021 from HDFC Bank stating that the Bank would fund Green City Developers upto Rs. 50 Crores in order to facilitate the implementation of the Resolution Plan.

It is stated that upon enquiry with HDFC Bank by some of the Homebuyers, the Bank has issued a letter dated 10.01.2022 signed by the Branch Manager denying the issuance of any such letter dated 16.06.2021 to the Resolution Applicant. The Applicant therefore contended that the Resolution Applicant has committed fraud and the Resolution Plan is based on forged and fabricated documents.



C. Successful Resolution Applicant not eligible to submit a Resolution Plan.

D. Concessions/Relaxations given to the successful Resolution Applicant for payment of EMD and PBG have vast ramifications.

E. The Plan does not specify the names of the persons constituting the new management.

F. Resolution Plan is silent on the Proposed Resolution Mechanism to resolve the ongoing dispute with the land owners.

12. The Resolution Professional (Respondent No. 11) has filed a reply affidavit denying the allegations made by the Applicant in the present application. It is submitted that the Resolution Plan has been approved by the CoC through e-voting concluded on 16.08.2021 with 96.23% and is now pending for approval before this Adjudicating Authority.

13. It is therefore stated that the CoC in its commercial wisdom has approved the Resolution Plan which cannot be subject to frivolous objections by a minority CoC member having a negligible voting share of 0.24%.

14. It is further submitted that the Applicants being unsecured Financial Creditors of the Corporate Debtor were also part of the CoC but they did not attend even one CoC meeting and have failed to exercise their right to vote on any of the agendas placed for voting through e-voting in these CoC meetings. It is submitted that the Applicants were absent in the 8th, 9th 10th 11th & 12th CoC meetings and also did not vote.

15. Further, in terms of the Implementation Schedule along with timelines provided under Clause 13 of the Resolution Plan, the payments proposed to be made to the dissenting Financial Creditor is “T+120”, i.e., within 180 days from the approval of the Resolution Plan by this Adjudicating Authority. As per the said table, the payments proposed to be made to Financial Creditor and also to Financial Creditors in a class whose bookings are cancelled or refund orders have been passed is “T+730”,



i.e., within 730 days from the approval of the Resolution Plan by this Adjudicating Authority. It is hence evident that no payments have been proposed to be made to assenting Financial Creditors prior to the payments proposed to be made to dissenting Financial Creditors. The Resolution Plan is therefore compliant to Section 30(2)(b) of the Code read with Regulation 38(1)(b) of the CIRP Regulations.

- 16.** The reply on behalf of the Respondent Nos. 1, 3, 7 and 10 are the office bearers of the Callidaor Flat Owners Welfare Association and the Respondent No. 10 i.e., the Consortium of Canary Greens Buyers Welfare Association have filed the reply affidavit opposing the application filed by the dissenting Financial Creditors and supporting the Resolution Plan.
- 17.** The Respondent No. 8, the Green City Developers filed a reply affidavit denying the allegations made by the Applicant that the Green City Developers submitted a forged and fabricated letter dated 16.06.2021 from the HDFC Bank.
- 18.** The HDFC Bank i.e. Respondent No. 9 has also filed a reply affidavit denying the allegations made by the Applicant that the Successful Resolution Applicant has played fraud upon this Tribunal by relying upon a letter issued by Respondent No. 9 that HDFC Bank fund Green City Developer an amount of Rs. 50 Crores to implement the Resolution Plan.
- 19.** Mr. Rishi Verma (Respondent No. 4) and Mr. Shivam Khaneja (Respondent No. 6) who are the office bearers of the Callidaor Flat Owners Welfare Association have also filed a reply affidavit to the present application and supported the Resolution Plan.
- 20.** We have heard the submissions made by Mr. Sudhir Makkar, Learned Senior Counsel appearing for the Applicant and Mr. Sourabh Kripal, Learned Senior Counsel appearing for the Resolution Professional and also perused the records.
- 21.** Mr. Makkar, Learned Senior Counsel vehemently argued that the Resolution Plan has various infirmities and is not compliant with the Section 30(2)(b) of the Code and Regulation 38 the CIRP Regulations.



22. Mr. Kripal, Learned Senior Counsel while opposing the submissions made by Mr. Makkar, Learned Senior Counsel has submitted that the present application has been filed by the Applicants who merely have 0.24% voting share in the CoC and therefore do not have any locus to raise any objection to the Resolution Plan. On perusal of the records, we have found that the Resolution Plan has been approved by 96.23% votes by the CoC. It is also evident from the records that the Applicants who are the dissenting Financial Creditors have abstained from attending the meetings on several occasions and not voted in the said meetings. The Resolution Professional has placed on record the attendance sheets and summary of voting of the 8th, 9th, 10th, 11th & 12th CoC meetings. The Applicants never raised any objections on the CIRP and the Resolution Plan during the CIRP to the Resolution Professional. The Resolution Professional has further contended that as per Note to Clause 13 of the Resolution Plan, the Resolution Applicant has undertaken to provide for the payments to dissenting Financial Creditors in priority over Financial Creditors who voted in favour. The Relevant Clause is reproduced hereunder: -

“Also the Resolution Applicant undertakes to provide for the payment of debts of dissenting Financial Creditors which shall not be less than the amount to be paid to such creditors in accordance with Section 53(1) of the IBC, 2016 in the event of liquidation of the Corporate Debtor. Such amount will be paid in priority over Financial Creditors who voted in favour of the Resolution Plan.”

23. The Hon’ble Supreme Court in the matter of **K. Sashidhar Versus Indian Overseas Bank & Ors.** in Civil Appeal No. 10673 of 2018 has held that the commercial decision of CoC is non-justiciable.

24. In light of the above-quoted judgement, it is clear that the “Commercial wisdom of CoC” is given paramount status. This Adjudicating Authority is not endowed with the powers of jurisdiction or authority to analyse or evaluate the commercial decision of the CoC. The Resolution Plan was



submitted by the Successful Resolution Applicant namely Consortium of Canary Greens Buyers Welfare Association, Callidora Flat Owners Welfare Association and Royal Elegencia Apartment Buyers Association which was approved by the CoC in its 12th CoC dated 10.08.2021 under Section 30(4) of the IBC by 96.93% voting share, this Adjudicating Authority cannot interfere in the same.

- 25.** Further, the Applicants had never raised any objections on the Resolution Plan to the Resolution Professional in this regard. The law is very well-settled that the Resolution Plan approved by the majority of the CoC members cannot be called into question. In the instant case, the Resolution Plan provides the treatment to the dissenting Financial Creditors. Furthermore, the present application has been filed by a minority group of dissenting Financial Creditors having 0.24% votes which in our considered view is not maintainable.
- 26.** In view of the above-mentioned ground, we are of the opinion that the Applicants have no locus to file this application and, therefore, the same is not maintainable.
- 27.** Accordingly, IA-4096/2022 stands **dismissed** and **disposed of**.

Sd/-

**(ATUL CHATURVEDI)
MEMBER (TECHNICAL)**

Sd/-

**(BACHU VENKAT BALARAM DAS)
MEMBER (JUDICIAL)**