NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

IA. NO. 1592/ND/2019
IN
Company Petition No. (IB)-470(ND)/2017

IN THE MATTER OF:

Sh. Amit Kumar Malik **... Applicant/Financial Creditor**

Versus

M/s Kindle Developers Private Limited **... Respondent**

AND IN THE MATTER OF IA. NO. 1592/ND/2019:

New Okhla Industrial Development Authority
Main Administrative Building
Sector 6, Noida **... Applicant**

Versus

Kashi Viswanathan Sivaraman
Resolution Professional
AAA Insolvency Professionals LLP
E-10A, Kailash Colony,
Greater Kailash-I
New Delhi- 110048 **... Respondent**

Order Delivered on: 11.01.2024

SECTION: **Section 60(5) of IBC 2016**

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Adv. Rachit Mittal
For the RP/Respondent : Adv. Amar Vivek and Adv. Abhinav Tyagi

ORDER

PER: SH. L. N. GUPTA, MEMBER (T)

The present IA No. 1592 of 2019 is filed by the New Okhla Industrial Development Authority (hereinafter referred to as the '**Applicant'/or 'Noida Authority'**) under Section 60(5) of IBC, 2016, seeking the following reliefs:

"i) Allow the present application;

ii) Direct to the Respondent/Resolution Professional for exclusion of Plot No. SC-01/D1, Sector 79, Noida from the resolution plan in view of the cancellation dated 13.08.2015

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

2. To put the facts succinctly, the underlying main Petition CP (IB)-470/ND/2017 was filed by Sh. Amit Kumar Malik against the Corporate Debtor namely, M/s Kindle Developers Private Limited under Section 7 of IBC, 2016, which was admitted vide Order dated 09.03.2018 of this Adjudicating Authority and the Corporate Insolvency Resolution Process (CIRP) in respect of the Corporate Debtor (CD) was initiated. The Corporate Debtor at present is represented by Mr. Kashi Viswanathan Sivaraman, Resolution Professional.

3. The main grievance espoused by the Applicant / Noida Authority is that the Respondent/RP has included the property namely, Plot No. SC-01/D1, Sector 79 in the Resolution Plan (hereinafter referred to as the **"Project Land"**), the lease of which was cancelled by the Applicant on 13.08.2015 i.e., before the initiation of the CIR Process of the CD.

4. Ld. Counsel for the applicant/ Noida Authority through its pleadings as well as during the hearing brought the Order dated 20.02.2020 passed in the present IA No. 1592 of 2019 by this Adjudicating Authority to the attention of the Bench emphasizing the highlighted portion, which reads thus:

> *"CA. 1592/2019 has been filed by the Noida Authority. Ld. Counsel has apprised this Bench that the lease of the land, being the substratum of the Corporate Debtor's project has been cancelled vide this letter dated 31.03.2015 for want of deposit of necessary lease rent/charges in terms of the allotment. It is also pointed out that the resolution plan has been approved by the CoC on the basis that the land belongs to the Corporate Debtor.*
>
> ***We fail to understand how a resolution plan can be considered by this bench when the lease of the allotted land has already been cancelled by Noida Authority way back in 2015 itself.*** *Notwithstanding fact that a resolution plan cannot be considered for want of having a stratum, Ld. Counsel for the shareholders has submitted that the entire adjudication has to be considered de novo in the light of Pioneer Judgment.*
>
> ***We are constrained to observe that despite knowing that the lease had been cancelled by Noida Authority, the Directors/Shareholder continued to accumulate money thereafter by duping several investors who nurtured the fond hope of getting a roof over their head and invested their lifetime's money.*** *The Corporate Debtor knew that no project could be implemented or flats constructed and delivered when there was no land. This is considered cheating the unsuspecting allottees. The R.P is directed to look into this matter and file a proper complaint with the EOW Cell of the Delhi Police............"*

(Emphasis added)

5. It was further informed that the aforesaid order was challenged by the Respondent/RP by filing a **Company Appeal (AT) (Insolvency) No. 605 of 2020** in which, the relevant extracts of the order dated 27.07.2020 passed by the Hon'ble NCLAT's reads thus:

> *"2. On bare perusal of the impugned order, it emerges that the Adjudicating Authority declined to consider the Resolution Plan as the Noida Authority alleged that it had cancelled the lease for want of deposit of lease rent/ charges in terms of the allotment. Learned counsel for the Appellant referred to reply provided in response to a RTI query which shows that the amount of rent was outstanding* ***. But there is nothing in the letter to show that the lease was subsisting or had been cancelled. Thus, on the strength of this reply alone it cannot be held that the lease was subsisting.***
>
> ***......***
>
> *5. In the given circumstances, we find that the instant appeal is not maintainable as no final decision has been taken by the Adjudicating Authority in regard to approval of the Resolution Plan and matter has been adjourned for further consideration. We dispose of this appeal with direction that the Adjudicating Authority shall accord consideration to the matter in the light of the application filed before it which is pending consideration and after taking interests of all stakeholders into consideration.* ***The Adjudicating Authority will record a clear finding in regard to cancellation/ subsistence of the lease after providing opportunity and hearing all concerned parties before passing order in regard to approval or otherwise of the Resolution Plan****. It is expected that the Adjudicating Authority will accord top priority to the matter keeping in view the timelines and decide the matter expeditiously. The Appeal is disposed off with aforesaid direction."*

(Emphasis added)

6. On perusal of the order (ibid), it is observed that the Hon'ble NCLAT had directed this Adjudicating Authority to give a clear finding regarding the cancellation/ subsistence of the lease after providing an opportunity and hearing all concerned parties. Accordingly, this Tribunal granted various opportunities to all concerned and heard the matter on a regular basis.

7. The Applicant/Noida Authority through its application, written submissions, and its Counsel during the course of the hearing submitted the following in support of its contentions:

7.1 Lease Deed for the property namely, Plot No. SC-01/D1, Sector 79 included in the Resolution Plan was executed between Applicant and Corporate Debtor on 24.10.2011. Since the area and premium of the plot were wrongly mentioned in the Lease Deed, a "Correction Deed" was executed between the Applicant and CD on 19.10.2012. However, due to non-payment of dues, the allotment of the said plot was cancelled vide letter of the Applicant/Noida dated 13.08.2015.

7.2 Thereafter, a request for restoration of the said plot was made after more than 300 days (Ld. Counsel clarified that as per the policy of Noida Authority, a cancelled plot can only be restored in cases where the application for restoration is made within 90 days from the date of cancellation) by the CD vide letter dated 14.06.2016, which was rejected on 10.11.2020, in pursuance to the order dated 12.10.2020 passed by this Tribunal.

7.3 CIRP qua CD commenced vide order dated 09.03.2018. Ld. Counsel for the Applicant/Noida Authority during the course of the hearing pointed out that the said order categorically noted that ….“*However, as no construction commenced on site, the Noida Authority cancelled the project*”….

7.4 Ld. Counsel for the Applicant/Noida further pointed out that the Respondent/RP in CA No. 479/ND/2019 filed on 30.01.2019 in the present C.P. No. (IB)- 470(ND)/2017, while seeking certain reliefs against third parties, itself admitted the fact of cancellation of the allotment of Project land/plot in Para 22 of the said CA.

7.5 Further, this Tribunal vide order dated 08.11.2019, while issuing notice to the Noida Authority/Applicant, directed the Noida Authority to conduct an on-the-spot inspection of the Project and file a report. It was then, the applicant came to know about the involvement of the cancelled plot in the present matter and therefore, filed the present application on 02.12.2019.

7.6 While narrating the sequence, the Applicant/Noida Authority submitted that the Resolution Plan was approved by the Committee of Creditors (‘CoC’) on 04.12.2019. The present application was listed on 20.02.2020, wherein this Tribunal recorded the finding about the cancellation of the land and the matter was adjourned at the request of the allottees, Resolution Professional, and Resolution Applicant to take appropriate steps. Challenging the order dated 20.02.2020, the RP preferred a Company Appeal (AT) (Insolvency) No. 605 of 2020 before the Hon’ble NCLAT, which was disposed of vide order dated 27.07.2020 with a direction to this Adjudicating Authority to record a clear finding in regard to the cancellation/ subsistence of the lease after providing an opportunity and hearing all concerned parties before passing order in regard to approval or otherwise of the Resolution Plan. Accordingly, this

Tribunal vide order dated 19.03.2021, directed the RP and the Flat Buyer's Association to approach the Noida Authority to resolve the dispute amicably.

7.7 Pursuant to the direction of this Tribunal dated 19.03.2021, an affidavit dated 13.07.2021 was filed by the applicant/Noida Authority before this Tribunal mentioning that a meeting of all concerned was held on 09.04.2021, wherein, it was informed that the applicant/Noida Authority was being provided an amount of Rs. 01 Crore only in the Resolution Plan against its total dues of Rs.140,08,93,530/- as on 30.06.2021. It is further indicated that if the said land if allotted at the present rate, the payable amount will be Rs.484,00,00,000/- being the present value of the land.

7.8 In the backdrop, the applicant/Noida is seeking a direction to the Respondent/Resolution Professional not to include the Plot No. SC-01/D1, Sector 79, Noida in the Resolution Plan as the allotment of the said plot was cancelled vide letter dated 13.08.2015, and the Corporate Debtor has no right in the said property anymore as the same stood vested with the applicant since 13.08.2015.

8. The Respondent/RP has filed its Reply dated 03.02.2020 and Written Submissions dated 23.08.2023 stating the following:

8.1 As per the Cancellation Letter dated 13.08.2015, the Project Engineer of Noida Authority did not take back the possession after 30 days from the Corporate Debtor nor did the CEO of Noida Authority take proper steps to resume the land as per the provisions of Section 13 and Section 14 of the UP Industrial Area Development Act, 1976 nor did the Accounts Department issue a Forfeiture Letter due to cancellation of the Lease, but kept on accumulating the Lease Premium and Lease Rental in its books. The Accounts Department was confirming the dues payable on various dates as per the RTI application filed by the Home Buyers.

8.2 Thereafter, the CD vide letter dated 14.06.2016 applied for restoration of Plot No. SC-01/D-1, Sector 79 to Noida Authority. However, there was no response till the commencement of CIRP on 09.03.2018. Finally, Noida Authority rejected the request for restoration of the plot vide letter dated 10.11.2020 when the Moratorium under Section 14 of IBC, 2016 was in place.

8.3 The Corporate Debtor went on to construct the said project even after the cancellation of the Lease Deed/plot dated 13.08.2015 and created third-party rights on the said property by allocating flats to various allottees/ homebuyers, before and after the cancellation of the Lease Deed.

8.4 Further, the said project was also registered with the RERA, UP on 15.08.2017 under Registration Number UPRERAPRJ 10636. Noida Authority did not object to the RERA registration but instead sent a letter to UP RERA on 27.01.2021 to cancel the registration.

8.5 The outstanding amount of Lease rental as of 31.12.2014 was Rs. 16,83,00,983/-, which was not paid by the Corporate Debtor till the date of cancellation on 13.08.2015. Now, the outstanding amount stands at Rs. 140,08,93,530/- as of 30.06.2021, which the Noida Authority is trying to recover from the CD during the CIRP.

8.6 As per the Audited Balance Sheet of CD as of 31.03.2015, the amount collected by the Corporate Debtor from the Home Buyers stood at Rs. 157.03 Crores, which as per the Audited Balance Sheet of 31.03.2017, increased to

Rs. 170.21 Crores. It is submitted by the Respondent that the total number of Home Buyers in the project is 651 as of 31.03.2017.

8.7 Further, post-commencement of CIRP of the Corporate Debtor, the erstwhile IRP sent a letter dated 14.08.2018 to the Applicant/Noida Authority to file its claim before the IRP. However, no steps were taken to file the claim.

8.8 After 05 years of the alleged cancellation, the Applicant at a very belated stage preferred the instant IA to exclude the said plot/Leased Land from the Resolution Plan of the Corporate Debtor that was duly approved by the CoC on 04.12.2019 with a voting percentage of 92.39 %.

8.9 From the initiation of CIRP of the Corporate Debtor, the Moratorium under section 14 of the IBC 2016 has been in force and the CD is prohibited from transferring, encumbering, alienating, or disposing of any legal right or beneficial interest. The Applicant is also prohibited from recovery of any amount from the leased land that is occupied by the Corporate Debtor or in the possession of the Corporate Debtor.

8.10 After the alleged cancellation of the lease deed/plot, the Applicant failed to regain possession of the plot in question to date and has, in fact, given a specific amount due with respect to the same upon an inquiry in the form of an RTI. Such conduct of the Applicant clearly amounts to a tenancy at holding over under the provisions of Section 116 of the Transfer of Property Act, 1882, which reads thus:

> "Effect of holding over: *If a lessee or under lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the*

lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106."

8.11 As regards the possession of the disputed land, the same vests with the CD, and the same has been duly acknowledged by the Applicant in its Affidavit filed in CA 479/ 2019. This Tribunal vide order dated 08.11.2019 directed the Applicant to provide information as regards the status of construction on the disputed property. The Applicant vide its Affidavit had provided the status of construction on the said land.

8.12 The Hon'ble NCLAT in the matter of **Aditi Bezurbha Vs. Mr. Kamalesh Kumar Singhania** & Anr. in CA (AT) (Ins) No. 1468 of 2019 held that the lands that were admittedly in 'possession' of the corporate debtor till the time the CIRP started and moratorium was imposed will continue to remain in the possession of the corporate debtor. Further, the lands that are in 'possession' of the corporate debtor at the time of the beginning of the moratorium remain in the possession of the corporate debtor/ RP through the CIRP period. Moreover, the development agreements which are central to the success of the CIRP are not liable to be terminated.

8.13 Further, in the matter of **TATA Consultancy Services Limited Versus Vishal Ghisulal Jain**, **Resolution Professional**, SK Wheels Private Limited [Civil Appeal 3045 of 2021, the Hon'ble Supreme Court held thus:

"28. While in the present case, the second issue formulated by this Court has no bearing, we would like to issue a note of caution to the NCLT and

NCLAT regarding interference with a party's contractual right to terminate a contract. Even if the contractual dispute arises in relation to the insolvency, a party can be restrained from terminating the contract only if it is central to the success of the CIRP. Crucially, the termination of the contract should result in the corporate death of the Corporate Debtor."

8.14 Inaction on the part of the Applicant after the alleged termination vide letter dated 13.08.2015 and non-enforcement of cancellation in letter and spirit by the officials of Noida Authority resulted in the creation of third-party rights over the said property in favour of the innocent homebuyers. The innocent homebuyers have been paying the installments due to the Corporate Debtor, based on the demand letters made by the Corporate Debtor, which is evident from the balances outstanding against the amount received from the home buyers as per the Audited Balance Sheet dated 31.03.2015 and 31.03.2017.

9. The Applicant/Noida Authority, through its Written Submissions dated 28.08.2023, has given the following rebuttal to the arguments made by the Respondent/RP:

CONTENTIONS RAISED BY RP

S.No.	CONTENTIONS	REPLY/REMARKS
1	RTI response of Applicant does not disclose the cancellation of land by the Applicant instead the outstanding amount was shown on the plot in question	The order dated 27.07.2020 passed by the Hon'ble NCLAT has categorically given a finding which is as under: "…*Learned Counsel for the Appellant referred to reply provided in response to a RTI query which shows that the amount of rent was outstanding. But there is nothing in the letter to show that the lease was subsisting or had been cancelled. Thus, on the strength of this reply alone it cannot be held that the lease was subsisting.*[15]"
2.	Project registered with U.P. RERA post date of issuance of the cancellation letter i.e. on 15.08.2017	Registration done by the Promoters without information to the applicant and wrong affidavit was given to U.P. RERA for getting the project registered, which reads as under: *"1. Kindle Developers Pvt. Ltd. have/has legal title to the land on which the development of the proposed project is to be carried out.*[16]*"* Further, the RP has himself mentioned in that the Registration with U.P. RERA was done without the intimation to the applicant i.e. Noida Authority[17].
3.	The possession is of the CD and therefore attracts Section 116 of Transfer of Property Act, 1882, which amounts to tenancy at holding over	• It is a disputed fact that the possession of the land is with CD. • Further, the said question can only be gone into by the court of competent jurisdiction. The said dispute cannot be brought within the ambit of Section

		60(5), as the termination of the lease deed is prior to the commencement of insolvency and also the cancellation is unrelated to the insolvency of the CD. <ins>Reliance has been placed on the following judgments:</ins> • Embassy Property Developments (P) Ltd Vs. State of Karnataka & Ors. reported in (2020) 13 SCC 308 **[Relevant Para 41]** • Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta & Ors. reported in (2021) 7 SCC 209 **[Relevant Para 69]** • Tata Consultancy Services Limited Vs. SK Wheels Private Limited reported in (2022) 2 SCC 583 **[Relevant Para 28]**
4.	Overriding effect of Section 238 Insolvency and Bankruptcy Code, 2016	Section 238 of the Insolvency and Bankruptcy Code, 2016 does not have overriding effect on powers of the applicant as entrusted to it under the UP Industrial Area Development Act, 1976. <ins>Reliance is placed on the following judgments/ orders:</ins> • Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal & Ors. reported in (2020) 13 SCC 234 **[Relevant Para 47]** • Judgment dated 19.04.2022 passed by the Hon'ble NCLAT in the case of New Okhla Industrial Development Authority Vs. Abhishek Anand, Company Appeal (AT) (Insolvency) No. 998 of 2021. **[Relevant Para 12]**
5.	Treatment to the applicant has already been given in the Resolution Plan as an operational creditor	In view of the cancellation, the applicant is not a creditor of the CD and hence, no claim was filed. Therefore, the neither the applicant, nor any of the properties on which the ownership is of the applicant, can be dealt with in the Resolution Plan of the CD.

10. During the hearing, the SRA also joined the arguments and supported the case of the RP. The contentions raised by the SRA and the Rebuttal given by the Applicant/Noida Authority, through its Written Submissions dated 28.08.2023, are reproduced below:

CONTENTIONS RAISED BY SUCCESSFUL RESOLUTION APPLICANT		
<u>S.No.</u>	<u>CONTENTIONS</u>	<u>REPLY/REMARKS</u>
1.	The list @ S. No. 43 mentions about the recording of name of the CD, meaning thereby, the lease is not cancelled.[18]	The said list is the index register of the registered properties[19] and is only mentioning the deeds which have been registered with the office of the sub-registrar. S. No. 26[20] talks about the lease deed registered between the applicant and CD and date mentioned is 24.10.2011. S.No. 43[21] mentions about the correction deed dated 20.10.2012. Hence, the same cannot be relied upon to say that the allotment of the plot in question has not been cancelled.
2.	The Non-Encumbrance Certificate issued by the Sub-Registrar III, Gautam Budh Nagar mentions that no encumbrance was found.[22]	The said certificate is not regarding the ownership of the property of the subsistence or cancellation of the lease deed. The meaning of a non-encumbrance certificate denotes that as to whether any mortgage has been created on the property or not. The said certificate cannot be relied upon to state that the lease has not been cancelled.
3.	Provision of the lease deed reads as under: *"35. The NOIDA will monitor the implementation of project....[23]"*	• The entire clause is as under: *"35. The NOIDA will monitor the implementation of project. <u>Applicants who do not have a firm commitment to implement the project within the time limits prescribed are advised not to avail the allotment.</u>"* • The applicant has acted in the manner as mentioned in sub-clause (y) of Clause II of the lease deed, which is as under:

"(y) ..., the LESSOR will be free to exercise its right of cancellation of lease/ allotment in the following case:-

...

...

(3) In case of default on the part of lessee or any breach/ violation of the terms and conditions of the tender, allotment, lease deed and/or non-deposit of allotment/premium amount/ instalments, lease rent, etc.

...[24]*"*

In an IGRS [Integrated Grievance Redressal System (Jansunvai)], certain questions were asked pertaining to cancellation and the same were responded. The questions and answers are as under:

Questions[25]	Answers[26]
Had Noida Authority obtained consent of homebuyers prior to cancellation of plot? If yes, please provide a copy of the same.	Information about point no. 1 is that Commercial Sports City No. SC-01/D1, Sector 79, Noida was cancelled om 13.08.2015 due to non-payment of due amount by the allottee. Due to non-creation of third party rights prior consent of homebuyers is not required.
Had Noida Authority published any public notice of cancellation of the plot at its website, notification in newspaper, letter or notice board? If yes please provide copies of such documents.	There is no provision of public notification of cancellation of plot
Has the Noida Authority sent information to this cancellation to the Uttar Pradesh Real Estate Regulatory Authority after implementation of the RERA Act? If yes, please inform the date thereof and provide a copy of such document.	There is no provision of informing U.P. RERA about cancellation
Please provide details of legal action taken for stopping construction on that plot and for taking possession of land after the said cancellation.	Adverse action after cancellation of plot is not legally correct after initiation of case by the builder in NCLT

11. We heard the submissions of the parties and perused the documents placed by them on record. The Applicant/Noida Authority has submitted that-

(a) Due to non-payment of dues by the ex-management, the allotment of the Project land/plot was cancelled, much before commencement of the CIRP, vide letter dated 13.08.2015 of Noida Authority addressed to the CD. Hence, the fact of cancellation of the plot was well within the knowledge of the Corporate Debtor herein.

(b) Further, the Admission (CIRP) order of this Tribunal dated 09.03.2018 itself noted that the Noida Authority cancelled the plot/project land, hence it was well within the knowledge of IRP/RP too.

(c) Moreover, the present RP has been aware of the fact of the cancellation of the Project Land by Noida, as evidenced by Para 22 of C.A. No. 479 of 2019 filed by the RP itself against G.S. Buildwell Pvt. Ltd. & Ors., which reads thus:

> *"22. **It is submitted that the NOIDA Authority cancelled the allotment of the Land vide its notification dated 13.08.2015 for non-payment of the amount due and in accordance with the provisions of the Lease Deed between NOIDA and the Corporate Debtor, the allotment was cancelled and the deposit amount was forfeited. It is submitted that as the land allotment has been cancelled, the Corporate Debtor lost its title as 'lessee' and the ensuing rights thereof and therefore the Respondent Company and/ or the Respondents have no good title over the land on which the constructions/ development work has taken place. A copy of the cancellation notification dated 13.08.2015 is annexed as Annexure 7."***

(Emphasis Supplied)

(d) Further, the Applicant/Noida Authority in its Written Submissions has given the following instances of averments in IA-3202 of 2020 filed by RP, where he himself admitted the fact of cancellation of the lease deed of the Project Land:

> In following Paragraphs of I.A. No. 3202 of 2020, the RP has admitted the cancellation of the lease deed and further has sought quashing of the cancellation letter:
>
> (i) Para 38 @ Page 30:
>
> *"38.... It is to be noted that the said allotment has been done after the cancellation of land by the Noida Authority dated 13.08.2015."*
>
> (ii) Para 83 @ Page 54:
>
> *"83.... The land was cancelled by Noida Authority on 13.08.2015 and the additional loan of Rs. 5 crores provided by RRESPL on 25.08.2015 creates doubt on the transaction entered between the parties."*
>
> (iii) Para 113 & 114 @ Page 72-73:
>
> *"113. The erstwhile management not only collected the monies from the home buyers after the cancellation of land by Noida Authority they have also after a span of two years registered the project with RERA, U.P. vide registration dated 15.08.2017 bearing project ID number UPRERAPRJ10636, by giving false representation and declaration to RERA.*
>
> *114. That the erstwhile management Promoters/ Directors of the Corporate Debtor had concealed the material facts with the U.P. RERA that the land which was allotted to the Corporate Debtor was cancelled by the Noida Authority on account of failure in payments of the lease rentals."*
>
> (iv) Para 158 @ Page 95:
>
> *"158. That it is submitted that the Noida Authority has cancelled the leased land allotted to the Corporate Debtor on 13.08.2015 and since then the Corporate Debtor was not in operation...."*
>
> (iv) Para xv of Prayer Clause @ Page 115:
>
> *"xv. To quash the letter dated 13.08.2015 by which the Respondent No. 16 is allegedly claiming the cancellation of land."*

12. Further, it is observed from the record that the Corporate Debtor, vide their letter dated 14.06.2016 (i.e., before the initiation of CIRP) addressed to AGM (Commercial) Noida, the CD itself through its Director had applied for the restoration of the cancelled Lease/plot. The contents of the said letter dated 14.06.2016 reads thus:

KINDLE DEVELOPERS PRIVATE LIMITED
(A shubhkamna- advert Group Company)

Registered Office : B-9, 2nd Floor, Model Town - II, Delhi - 110009
www.Shubhkamnaadvert.com •info@Shubhkamnaadvert.com • CIN NO - U70100DL2011PTC215632

R-107
15/06/16

June 14, 2016
8130988874
7065030803

The Assistant General Manager (Commercial)
New Okhla Industrial Development Authority
Main Administrative Building, Sector-6,
Noida – 201 301
Distt. Gautam Budh Nagar.

Sub: Restoration in respect of Plot No.GH-SC-01/D-1 Sector 79, Noida

Dear Sir,

This is with reference to your letter No.Noida/Commercial/SC-01/D1-79/2015/1317 dated 13th August 2015 regarding cancellation of our Commercial Plot No.GH-SC-01/D1, Sector-79, Noida.

We shall be grateful if you could kindly restore the plot mentioned above. We are ready to follow the instructions of the Noida Authority in this regard. Kindly let us know the restoration procedure or any other dues which have to be paid by the Company to enable us to restore the above-mentioned plot.

Thanking you,

Yours truly,
For Kindle Developers Pvt. Ltd.

KINDLE DEVELOPERS PVT. LTD.

Director

Director

New Okhla Industrial Development Authority
COMMERCIAL
No. 1288
Dt. 16/06/16

13. Accordingly vide order dated 09.09.2020, this Adjudicating Authority directed the Ld. Counsel for the Applicant/Noida Authority to place on record the decision taken by the Noida Authority on the Representation of the Corporate Debtor dated 14.06.2016. In response,

vide affidavit dated 28.09.2020 filed on behalf of the Applicant/Noida Authority, the following was averred:

4. That due to non-payment of dues, the allotment of Plot No. SC-01/D-1, Sector 79, Noida was cancelled on 13.08.2015. The Corporate Debtor thereafter submitted an application for restoration of the allotment on 14.06.2016.

5. That as per the policies and procedures for commercial property management of the applicant, 'Clause M' prescribes for the cancellation/ restoration of the commercial plot/shop. As per the said clause, the restoration of the allotment can be done only in view of the provisions and payments mentioned under the said clause. As per the said clause, the restoration can be considered only when the application along with the affidavit is submitted within 90 days from the date of issuance of the cancellation letter and on receipt of such application, the same is decided within one month if the same is submitted as per the policy. Since the application for restoration of the allotment was received on 14.06.2016 i.e. after expiry of around 305 days, therefore, as per the policy and procedure and the applicant being bound by the same, the decision on the application for restoration was not taken. As on date the status of the land is that the allotment is cancelled and all the rights with regard to Plot No. SC-01/D-1, Sector 79, Noida are vesting with the applicant. For kind perusal of this Hon'ble Tribunal, the policies and procedures for commercial property management of the applicant is annexed and marked as **"ANNEXURE-A-1"**.

DEPONENT

14. All these pleadings and documents reflect that the lease of Plot No. GH-SC-01/D-1, Sector 79, Noida was cancelled by the Noida Authority vide letter dated 13.08.2015, much before the commencement of CIRP. Though the Corporate debtor, through the then/Ex-management applied after a gap of 305 days to the Noida Authority for the Restoration of the Lease Deed on 14.06.2016, however, there is nothing produced or placed on

record by the Respondent/RP/or anyone else during the hearing that the Lease Deed of the said plot was restored to the CD. Rather, it has ben brought on record by the Noida Authority that the request for restoration of the lease deed was rejected on 10.11.2020.

15. However, in the interest of justice, while hearing the present IA, this Adjudicating Authority vide order dated 12.10.2020 directed the Noida Authority *to place on record within 4 weeks the decision on the Representation dated 14.06.2016* made (by CD through its ex-management) for restoration of the Lease Deed/plot, after giving due opportunity of hearing to the Respondent/RP of the CD and SRA. The order dated 12.10.2020 reads thus:

IA/1592/2019: Counsels for the Applicant/Noida Authority, Resolution Professional, Resolution Applicant and the CoC are present.

As seen from the last Order dated 09.09.2020, a specific direction was given to the Noida Authority to place on record the decision of the Noida Authority on the representation of the Corporate Debtor dated 14.06.2016.

However, it has been brought to our notice by the Counsel for the Noida Authority that the Noida Authority has not taken any decision on the said representation.

It is worthwhile to mention that under consideration is a Resolution Plan that has been moved by an Association of allottees/Home Buyers of the Corporate Debtor Company, M/s. Kindle Developers Pvt. Ltd. But the land allotted by the Noida Authority was cancelled on 13.08.2015 due to non-payment of dues.

In this circumstances, it is deemed fit to direct the Noida Authority to take a decision on the said Representation dated 14.06.2016 by giving due opportunity of hearing to the Resolution Professional for M/s. Kindle Developers Pvt. Ltd., who is managing the CIR Process of the CD and the Resolution Applicant, who has proposed a Resolution Plan for revival of the Company and place the decision so taken before this Authority within 4 weeks of this Order.

List the matter on 20th November, 2020.

16. In compliance with the aforesaid directions, the Applicant/Noida Authority considered the Representation of the CD dated 14.06.2020 seeking restoration of the lease deed/plot, and CEO Noida herself vide letter dated 10.11.2020 communicated the decision of rejection on the representation of the CD dated 14.06.2016 (regarding the restoration of allotment/plot) to the Respondent/RP. We find that the letter dated 10.11.2020 of the CEO Noida Authority placed by the Applicant on record is quite a detailed and self-contained one. The concluding paragraph of the Applicant/Noida's letter reads thus:

> *"In view of the foregoing reasons and taking into consideration the violation of the terms of the lease-deed dated 24.10.2011 and the correction-deed dated 19.10.2012,* ***the representation regarding the restoration of allotment dated 14.06.2016 made by M/s Kindle Developers Pvt. Ltd. is hereby rejected.*** *The present decision is being made in compliance of the order dated 12.10.2020 passed by Hon'ble NCLT, New Delhi."*
>
> *(Emphasis added)*

17. However, during the further hearings of the IA particularly those held on 19.03.2021 and 20.09.2021, it was brought on record that since the project involved 696 allottees/homebuyers in the project, who had invested an amount of Rs. 158 Crore so far, on the collective request of all the parties, a liberty in terms of one more opportunity was granted to the respondent/RP and Flat Buyer's Association to settle the matter with the Noida Authority. Even as late as on 15.05.2023, Ld. Counsel for the SRA sought an

adjournment on the grounds that the SRA, being a group of allottees/homebuyers, is exploring a solution qua the Noida Authority. Accordingly, this Adjudicating authority on request of all the parties including Noida authority, allowed liberty to sit together and resolve the matter amicably. In response, the Applicant/ Noida authority vide affidavit dated 28.10.2021 averred the following:

3. This Hon'ble Tribunal vide order dated 20.09.2021 was pleased to direct as under:-

> *"On request of all the parties including Noida Authority, list the matter on 29th October, 2021. The parties are at liberty to sit together and resolve the matter amicably and are directed to file report by filing separate affidavits."*

A true copy of order dated 20.09.2021 passed by this Hon'ble Tribunal in above captioned matter is annexed and marked as **ANNEXURE-1**

4. Pursuant the said order, a virtual meeting was held on 28.10.2021, wherein the Chief Executive Officer, Additional Chief Executive Officer, OSD along with the Counsel for the applicant were present and representatives on behalf of the resolution professional and resolution applicant were present in the said meeting.

5. In the said meeting, the Resolution Professional and the Resolution Applicant informed that the applicant that nothing more than Rs.1 crore can be provided by the resolution applicant in the resolution plan. No fresh offer, as was submitted before this Hon'ble Tribunal was made on behalf of the Resolution Professional and also Resolution Applicant.

6. That the lease deed of the present allotment was executed on 24.10.2011. The allotment was cancelled on 13.08.2015. If the allotment is restored than the payable amount upto 30.06.2021 would be Rs.140,08,93,530/- and in case the same is allotted at present rates, the payable amount will be Rs. 484,00,00,000/- (the present value of the land).

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18. Thus, what emerged from the Affidavit dated 28.10.2021 (ibid) and submissions made by the Ld. Counsel for the Noida authority during the subsequent hearing is that whereas the Noida Authority maintained that the allotment of the project plot was cancelled on 13.08.2015 and if it is restored, the amount payable by 30.06.2021 came to Rs.140,08,93,530/-, RP and RA maintained that nothing more than Rs. 01 Crore can be provided by the Resolution Applicant in the Resolution Plan. Ld Counsel representing Noida Authority further stated that the present value of the land, if allotted at the current rates, is Rs.484 Crore.

19. Since despite several opportunities, RP, CoC, and the SRA (a group of allottees/homebuyers), failed to reach any settlement qua the Nodia Authority, the matter was finally heard on merits. We heard the Ld. Counsel for the Applicant/Noida Authority, Ld. Counsel appearing for Respondent/RP and Ld. Counsel appearing for the SRA at considerable length.

20. The Respondent/RP as well as the SRA mainly contended that since the Noida Authority did not take possession of the plot/project land back from the Corporate Debtor, the Lease Deed of Plot No. SC-01/D-1, Sector 79, Noida is deemed to have continued. To corroborate their submissions they, in a nutshell, stated the following:

a) The Project Engineer of Noida Authority did not take back possession of the aforementioned plot from the Corporate Debtor after 30 days of the cancellation nor did the CEO of Noida Authority take proper steps to take back land as per the provisions of Section 13 and Section 14 of the UP Industrial Area Development Act, 1976 nor did the

Accounts Department issue a Forfeiture Letter due to cancellation of the Lease, rather kept on accumulating the Lease Premium and Lease Rental in its books and confirmed the dues payable on various dates as per reply to the RTI application filed by the Home Buyers.

b) The project was registered with the RERA, UP on 15.08.2017 with Registration Number UPRERAPRJ10636 and the Noida Authority did not object to the RERA registration, instead sent a letter to UP RERA on 27.01.2021 to cancel the registration to UPRERA.

c) Since even after the alleged cancellation of the lease deed, the Applicant failed to regain the possession of the land in question till date, and has given a specific amount due in response to an RTI enquiry, such conduct of the Applicant amounts to a tenancy at holding under the provisions of Section 116 of the Transfer of Property Act, 1882.

21. We would like to examine each of these objections raised by the Respondent/RP. As regards the "RTI Reply" received by the homebuyers from the Accounts Department of Noida, it is noticed from the record that the Hon'ble NCLAT vide **Judgement dated 27.07.2020 in Company Appeal (AT) (Insolvency) No. 6050 of 2020,** had noted the following finding:

> *"2. On bare perusal of the impugned order, it emerges that the Adjudicating Authority declined to consider the Resolution Plan as the Noida Authority alleged that it had cancelled the lease for want of deposit of lease rent/ charges in terms of the allotment.* ***Learned counsel for the Appellant referred to reply provided in response to a RTI query which shows that the amount of rent was outstanding.*** ***<u>But there is nothing in the letter to show that the lease was subsisting or</u>***

had been cancelled. Thus, on the strength of this reply alone it cannot be held that the lease was subsisting."

(Emphasis Added)

22. Given the aforesaid observation/finding of the Hon'ble NCLAT on the issue of "the reply received under RTI", **we find no merit in the RP's contention that based on the RTI's reply, the lease of the allotted plot was still subsisting with CD.**

23. As regards the contention of the Respondent/RP that Noida Authority did not take back possession of the plot in question from the Corporate Debtor after 30 days of the cancellation, Ld. Counsel for the Applicant/Noida Authority, during the hearing, referred to the last paragraph of the cancellation letter dated 13.08.2015 by which *the Corporate Debtor viz., M/s Kindle Developers Pvt. Ltd. was asked to hand over the possession of the land to the concerned Project Engineer of Noida* and not the vice versa. Moreover, even if we consider the issue in the context of the Limitation Act 1963, the Limitation for obtaining possession of immovable property is 12 years, and the limitation for the Government is 30 years by virtue of Article 112 of the Limitation Act, 1963. **Hence, in our considered view, the Noida Authority is still eligible to take over the possession of the plot in question that was cancelled by them on 13.08.2015.**

24. Further, the RP has relied upon the judgment of Hon'ble NCLAT passed in the matter of "**Aditi Bezurbha Vs. Mr. Kamalesh Kumar Singhania & Anr.**"- CA (AT) (Ins) No. 1468 of 2019 to demonstrate that the lands, that were admittedly in 'possession' of the Corporate Debtor till the time the CIRP

started and moratorium was imposed, will continue to remain in the possession of the CD. It is further contended by the RP that the Applicant/Noida Authority is barred from taking possession of the property by virtue of Section 14(1)(d) of IBC, 2016.

25. In this context, we consider it worthwhile to refer to the Judgment of Hon'ble NCLAT, passed on a later date, in the matter of **"Neesa Leisure Limited Vs Rajasthan State Industrial and Investment Corporation"**, Company Appeal (AT) (Ins.) No. 510 of 2022, dated 07.12.2022, wherein the Hon'ble NCLAT held the following:

> *"13. In the case of Rajendra K. Bhutta (Supra), the application under Section 7 was admitted on 24.07.2017 and notice of termination was issued on 12.01.2018. The Appellant wherein filed an application before the NCLT to restrain MHADA from taking over possession till completion of the CIRP, on the ground that recovery of possession shall be in derogation of the moratorium imposed under Section 14 of the Code but the said application was dismissed. Further, NCLAT also dismissed the appeal holding that it cannot be treated to be the asset of the Corporate Debtor for the application of provisions of Section 14(1)(d) of the Code. The Hon'ble Supreme Court, however, allowed the appeal.*
>
> *14. We have carefully gone through the aforesaid decision which is in fact not applicable to the facts of this case because in the reported case constructive possession was taken, the Corporate Debtor was admitted into CIRP and moratorium was imposed on 26.04.2019.* ***It has also been observed by the Tribunal that the Corporate Debtor had lost possessory rights more than three years prior to the initiation of***

the CIRP. The property of third party, occupied by the Corporate Debtor had been expressly excluded from the purview of term asset.

15. Thus, in view of ***the aforesaid facts and circumstances, since the demised premises ceased to be the property of the Corporate Debtor much prior to the initiation of CIRP, therefore, it cannot be covered under Section 14 much less 14(1)(d) of the Code."***

26. We have already noted that in the instant case, the Lease Deed of the Plot No. SC-01/D-1, Sector 79, Noida was cancelled on 13.08.2015 i.e., much before the commencement of the CIRP on 09.03.2018. Thus, the CD lost the possessory rights more than two and half years before the initiation of the CIRP. Therefore, the ratio laid down by the Hon'ble NCLAT **in "Neesa Leisure Limited"** (Supra) is squarely applicable to the facts of the present case. **Accordingly, we hold that the benefit of Section 14(1)(d) cannot be granted to the Respondent/RP herein, for a property/project land, which ceased to be an asset of the Corporate Debtor on 13.08.2015 i.e., more than two and half years before the commencement of the CIRP.**

27. The next plea raised by the Respondent/RP is that the project was registered with the UP RERA on 15.08.2017 with Registration Number UPRERAPRJ 10636. The Applicant/Noida in this regard has submitted that -

"Registration (was) done by the Promoters without information to the applicant and wrong affidavit was given to U.P. RERA for getting the project registered, which reads as under:

> *"I. Kindle Developers Pvt. Ltd. have/has legal title to the land on which the development of the proposed project is to be carried out.'"*

> Further, the RP has himself mentioned in that the Registration with U.P. RERA was done without the intimation to the applicant i.e., Noida Authority".

Thus, what emerges is that the CD/its promoters got the RERA registration of the project done on 15.08.2017 by falsely claiming the legal title over the land whereas the same was cancelled by Noida as back as on 13.08.2015. Even otherwise, the fact of **RERA registration of the project *ipso facto* does not establish that the lease of Plot No. SC-01/D-1, Sector 79 Noida, which was cancelled by Noida Authority vide letter dated 13.08.2015, was subsisting or stood revived**. **Hence, this plea made by the Respondent/RP does not hold water, rather it is an attempt by the RP to justify the wrong/fraudulent action of the ex-management of the Corporate Debtor.**

28. As regards the submission of RP relating to the subsistence of the lease in terms of Section 116 of the Transfer of Property Act (TOPA) 1882 even after the termination of the lease deed, the Applicant/ Noida Authority submitted that it is a disputed fact, which can only be gone into by the Court of Competent Jurisdiction. Further, the Applicant/Noida Authority argued that the lease deed of the project land was terminated before the initiation of CIRP, and the land got vested with the Noida Authority. Ld. Counsel for the Noida Authority further argued that the cancellation of the lease deed was in no way

related or connected to the insolvency of the CD. In this context, the applicant relied upon the following judgments:

- Embassy Property Developments (P) Ltd Vs. State of Karnataka & Ors. reported in (2020) 13 SCC 308 [Relevant Para 41]
- Gujarat Urja Vikas Nigam Limited Vs. Amit Gupta & Ors. reported in (2021) 7 SCC 209 [Relevant Para 69]
- Tata Consultancy Services Limited Vs. SK Wheels Private Limited reported in (2022) 2 SCC 583 [Relevant Para 28].

Per Contra, the RP has relied upon Section 116 of the Transfer of Property Act, 1882 to demonstrate that the Lease was still subsisting. From a perusal of Section 116 of TOPA 1882, it is observed that the same is attracted in the case if rent received from the lessee or under-lessee is accepted by the Lessor or the latter otherwise assents to the lessee's continuing in possession. There is nothing on record, which could demonstrate that the post-cancellation of the Lease deed of Plot No. No. SC-01/D-1, Sector 79 Noida, the Noida Authority was paid any lease rent or there is any written permission/assent of the Noida Authority for restoration/continuation of the said lease.

Even otherwise, as we have already noted, the Lease Deed of the Plot No. SC-01/D-1, Sector 79, Noida was cancelled on 13.08.2015 more than two and half years before the initiation of the CIRP. The CD/ Ex Management also applied for restoration of the said plot vide their letter dated 14.06.2016, which too, was much before the commencement of the CIRP. Hence, the question of deemed subsistence of the lease deed of the plot in question has not arisen or has no relation with the commencement of CIRP Proceedings of the Corporate Debtor.

Since (a) neither there is any evidence of payment of lease rent by the CD post-cancellation of the Lease deed of Plot No. No. SC-01/D-1, Sector 79 Noida, to the Noida Authority; (b) nor there is any written permission by the Noida Authority for restoration or continuation of the lease deed of the said plot; and (c) nor the issue about the deemed continuation of the Lease deed had arisen out of the Insolvency Proceedings, hence Section 116 of TOPA 1882 does not help the case of the Respondent/RP.

29. In a nutshell, as the Lease deed of the "project land" was cancelled by the Applicant/Noida Authority vide letter dated 13.08.2015 and after the indulgence of this Tribunal, the Representation of the CD dated 14.06.2016 was also considered at the level of CEO Noida and rejected vide their letter dated 10.11.2020, the lease deed of the said plot cannot be deemed to have continued. Moreover, despite ample opportunities in the interest of justice granted by this Adjudicating Authority to the Respondent/RP, CoC (mainly comprising of Home Buyers), and SRA, they failed to arrive at any settlement qua the Noida Authority regarding the restoration of the Lease deed of the said "project land" in the name of the CD. **Hence, in compliance with the directions of the Hon'ble NCLAT passed in Company Appeal (AT) (Insolvency) No. 605 of 2020 vide order dated 27.07.2020, we have no other option but to conclude that there is nothing placed or produced on record by the Respondent/RP, COC, SRA, or anyone else, which could depict that the lease of project plot is in existence post-13.08.2015.**

Even otherwise, though the RP is claiming to have possession over the cancelled plot of the project, he has failed to bring any evidence on record in support of payment of any land dues or lease rentals of the Project Plot to the NOIDA Authority. In other words, the lease deed or allotment of the "Project Plot No. GH-SC-01/D-1, Sector 79 Noida" stood cancelled with effect from 13.08.2015. In view of the above, the property situated at Plot No. SC-01/D1, Sector 79, Noida cannot be made part of the Resolution Plan of the Corporate Debtor and accordingly, the Respondent/RP is directed to exclude the same from the Resolution Plan. Ordered accordingly.

30. However, before parting with the order, we observe that this is a classic case where, not only the ex-Directors/promoters, despite being fully aware of the cancellation of the "project land" by the Noida Authority as back as on 13.08.2015 (much before the commencement of the CIRP) due to non-payments of land dues by them, continued to accumulate money thereby duping the homebuyers, who nurtured the hope of getting a roof over their head and invested their hard earned life savings but also the IRP/RP too, (despite being fully conscious of the fact of cancellation of the "project land" as evident from the CIRP order dated 09.03.2018, RP's own averments in C.A. No. 479 of 2019 filed by him against G.S. Buildwell Pvt. Ltd. & Ors., and also, in IA-3202 of 2020), continued to take all actions including preparation of Information Memorandum (IM), projecting the cancelled "project plot" as the asset of the Corporate Debtor, inviting EOIs and getting approval of a Resolution Plan from the COC as if the said plot existed with the Corporate Debtor.

31. It is, however, again made clear that we have passed the present order pursuant to the directions passed by the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 605 of 2020, and have given finding *regarding cancellation/subsistence of lease* only. Nevertheless, this order shall not be construed to create any third-party interest in any manner. Since the orders dated 13.08.2015 and 10.11.2020 of Noida Authority are reportedly under challenge, we direct the parties to abide by the order that may be passed in Writ-C No. 26400 of 2023 by the Hon'ble High Court of Allahabad.

32. **IA. NO. 1592/(ND)/2019, is allowed accordingly.**

Sd/-	Sd/-
(L. N. GUPTA)	**(ASHOK KUMAR BHARDWAJ)**
MEMBER (T)	**MEMBER (J)**