

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL PRINCIPAL
BENCH, NEW DELHI**

**Comp. App. (AT) (Ins) No. 1351 of 2022 & I.A. No. 4196,
4197, 4666, 4731 of 2022 & 1500 of 2023**

IN THE MATTER OF:

Sunil Kumar Agarwal & Anr.

...Appellant(s)

Versus

Anand Sonbhadra

Resolution Professional

of Shubhkamna Buildtech Pvt. Ltd. & Ors. ...Respondent(s)

Present:

For Appellant :

Mr. Sandeep Bhuraria, Ms. Nishtha Grover, Advocates

For Respondents :

Mr. Abhishek Anand, Mr. Nipun Gautam, Advocates for RP/R-1

Mr. Saurabh Jain, Advocate in IA No. 4666/2022

Mr. Arjun Singh Bhati, Advocate for Applicant in IA No. 4731/2022

Mr. Abdhesh Chaudhary, Ms. Geetanjali Setia, Mr. Vinayak Mishra, Mr. Nishikant Singh, Ms. Meena Yadav, Ms. Manisha Suri, Advocates for R-2/Noida

Mr. U. N. Singh, Advocate for R-3/GNIDA

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is filed by the Successful Resolution Applicant (SRA) against the impugned order dated 12.09.2022 passed by

the Adjudicating Authority (National Company Law Tribunal, Bench No. IV, New Delhi) in C.A No. 485/ND/2019 filed in CP No. IB-1059/ND/2018.

2. In brief, M/s Concord Infrastructure Pvt. Ltd. (Operational Creditor) filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') bearing CP No. IB-1059/ND/2018 before the Adjudicating Authority against M/s Shubhkamna Buildtech Pvt. Ltd. (Corporate Debtor) which was admitted on 26.11.2018.

3. The resolution plan submitted by the Appellants was approved by the CoC in its 6th meeting held on 09.10.2019 by an affirmative vote share of 87.57 % on 17.10.2019.

4. After approval of the resolution plan by the CoC, the RP filed CA No. 485 of 2019 under Section 30(6) and 31 of the Code read with Regulation 39(4) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (in short 'Regulations') for approval of the resolution plan.

5. During the pendency of the application filed by the RP, New Okhla Industrial Development Authority/Respondent No. 2 (objector no. 3) and Greater Noida Industrial Development Authority/Respondent No. 3 (GNIDA) (objector no. 4) raised the *Comp. App. (AT) (Ins) No. 1351 of 2022*

following objections, noticed in the impugned order, which read as under:-

“a) The objector no.3 and objector no.4 submits that as per the terms of the resolution plan specifically clause 8.9 of the resolution plan, the objector no.3 and objector no. 4 are restrained for future instalments, penalties for deviations, lease rents etc. for future. The relevant extract of the clause relied by the objector no.3 and objector no.4 is reproduced as below:-

"This plan proposes to pay NIL amount to Departments as the liquidation value accruing to them would be NIL. Also, if any further claim of any government authority such as NDA, GNIDA, Electricity department etc is received then that shall also be paid in NIL.

b) The objector no.3 and objector no.4 further submits that the lease premium and lease amount due during the CIRP period of the corporate debtor should form part of the CIRP cost in line with Regulation 31 of the CIRP Regulations, 2016.

c) The objector no.3 further submits that NOIDA Authority vide notice dated 05.07.2022 had claimed the outstanding lease rental and premium of Rs.13,84,40,999/- which was due and unpaid after the cut-off date 31.01.2019 i.e., date up to which the claim of the NOIDA Authority has been admitted. The objector no.3 adds that the demanded claim of Rs.13,84,40,999/- is exclusive of the interest and penalty.”

6. The AA while allowing the application filed by the RP, dealt with the objections raised by Respondent No. 2 and 3 in para 11 of the impugned order and made the following observations:-

“11. As regard to the objector no.3 and objector no.4's objection regarding the accrued and outstanding lease rentals and lease premium during the CIRP period of the corporate debtor i.e. from the CIRP commencement date (26.11.2018) till approval of the resolution plan by this Adjudicating Authority in accordance with Section 30 of the Code, 2016, we observe that the same will be covered under the definition of Insolvency Resolution Process cost as defined under Section 5(13) of the Code read with Regulation 31 of the CIRP Regulations, 2016. Further, it is an undisputed fact that the corporate debtor was in possession of the premises, consequently, exposed to the liabilities to pay lease rentals and lease premium due during the CIRP period as a part of the CIRP costs. The mere fact that CIRP has triggered and Moratorium has been imposed does not absolve the Corporate Debtor to pay for premises and facilities which is being enjoyed by the Corporate Debtor during the CIRP period. Resultantly, the same will be become part of the CIRP Costs which can be recovered when the Resolution Plan is approved. The objector no.3 and objector no.4 are directed to submit the details of the lease rentals and premium accrued and remaining outstanding during the CIRP Period to the Resolution Professional and the Successful Resolution Applicant within a period of 15 days from the pronouncement of this order, failing which the same shall not become the part of the CIRP Cost.”

7. The purport of the aforesaid order is that outstanding lease rental and premium due from the date of CIRP commencement that is 26.11.2018 till the approval of the resolution plan i.e. 12.09.2022 has been ordered to be included in the CIRP costs and both the authorities have been directed to submit the details

of the lease rentals and premium within a period of 15 days of the impugned order to the RP.

7. Counsel for the Appellant has submitted that the resolution plan approved by the CoC cannot be tinkered with by the AA for the purpose of alteration and modification in the resolution plan and in this regard, reliance has been placed upon a decision of this Court in the case of Mathuraprasad C Pandey Vs. Partiv Parikh, CA (AT) (Ins) No. 201 of 2021 decided on 14.12.2022. It is further submitted that interest of Respondent No. 2 and 3 have been secured in the resolution plan because as per clause 8.9 of chapter VIII of the resolution plan, the Appellants have proposed to pay Rs. 25 Cr. to Respondent No. 2 and Rs. 18.50 Cr. to Respondent No. 3. It is further submitted that the plan already includes the CIRP cost as ratified by the CoC which is to be paid in priority to other creditors as per Clause 8.3, Chapter VIII of the resolution plan, but on the basis of the impugned order, Respondent No. 2 filed the claim dated 20.09.2022 with the RP amounting to Rs. 27,65,02,686/-. The breakup of the total amount claimed by Noida is as under:-

S. No.	Component of Claim	Amount (INR)

Dues after 12.09.2022		
1.	Due amount in instalment	8,64,39,102/-
2.	Due amount w.r.t. interest on instalment	4,38,20,789/-
3.	Due amount on land rate	2,53,80,850/-
4.	Due amount w.r.t. interest on land rent	74,17,237/-
Total dues after 12.09.2022 (I)		16,30,57,978/-
Liability of time extension dues till 12.09.2022		
1.	Second year @ 5% from 01.03.2019 to 29.07.2019 (5 months)	96,13,958/-
2.	Third year @ 6% from 30.07.2019 to 29.07.2020	96,13,958/-
3.	Fourth year @ 7% from 30.07.2020 to 29.07.2021	3,23,02,900/-
4.	Fifth year @8% from 30.07.2021 to 29.07.2022	3,69,17,600/-
5.	Sixth year @ 8% from 30.07.2021 to 29.07.2022 (2 Months)	69,22,050/-

Total time extension dues till 12.09.2022 (II)	11,34,44,708/-
TOTAL DUES CLAIMED BY NOIDA (I+II)	27,65,02,686/-

8. Similarly, Respondent No. 3 on 27.09.2022 filed its claim for the first time of an amount of Rs. 1,00,95,82,526/- which included the amount of default under land premium, additional compensation, default under lease rent and default under late construction penalty. The said amount is tabulated as under:-

Grand Total of all dues upto 26.11.2018 (INR)	Grand Total of all dues from 26.11.2018 till 12.09.2022 (INR)
44,21,25,326.18/-	56,74,57,209.71/-
TOTAL DUES CLAIMED BY GNIDA= INR 1,00,95,82,536	

9. It is also submitted that the lease premium and unpaid instalments of lease premium have already been included in the claim which was filed in Form B dated 22.02.2019 towards the future component of Rs. 8,12,05,605/-.

10. It is also argued that by virtue of the impugned order, total aggregate amount of Rs. 128,60,85,222/- is CIRP costs whereas the entire financial projection in the resolution plan submitted by the Appellants is based on the crystallised and duly verified claims of the creditors of the CD by the RP and the information as furnished to the Appellants in the IM would be detrimental to the feasibility and viability of resolution plan.

11. Counsel for the Appellant has also placed reliance on an order passed by this Court in the case of Sunil Kumar Agrawal Vs. New Okhla Industrial Development Authority, CA (AT) (Ins) No. 622 of 2022 where, in similar circumstances, the payment of lease amount, lease rent and premium was declared as not payable. However, it is also submitted that the said order dated 12.01.2023 passed in Sunil Kumar Agrawal (Supra) is under challenged before the Hon'ble Supreme Court in CA No. 901 of 2023 but there is no order of stay.

12. On the other hand, Counsel for Respondent No. 2 and 3 have submitted that a conjoint reading of Section 5(13) of the Code and Regulation 31 of the Regulations makes it clear that the Tribunal is bound to provide lease rentals and lease premium which become due during the CIRP period and the same has to

form part of the CIRP costs. It is submitted that Regulation 31(b) provides that “amount due to a person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1)(d)”. It is argued that Section 14(1)(d) specifically prohibits the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the CD during the CIRP period and explanation ensues that the owner/lessor is not permitted to suspend/terminate the said lease/license granted in favour of the CD on the grounds of insolvency, provided that there is no default in payment of current dues arising from the use or continuation of the said lease/license etc.

13. It is further submitted that since the right of Respondent No. 2 to cancel the lease during the moratorium period is prejudicially effected and their due amount is not granted in their favour as CIRP costs then they can terminate the lease as per explanation to Section 14(1)(d) of the Code.

14. He has further submitted that the judgment in the case of Sunil Kumar Agrawal (Supra) is in appeal before the Hon'ble Supreme Court but there is no stay and secondly that the decision in the case of Mathuraprasad C. Pandey (Supra) is not

applicable because the Tribunal has not altered or modified the resolution plan approved by the CoC , the inclusion of lease rental and lease premium as CIRP cost is consistent with the requirement to keep the CD as operational & a going concern during the resolution plan, therefore, the Tribunal has the jurisdiction to pass order in terms of Section 31(1) of the Code. It is further submitted that in the case of GNIDA Vs. Prabhjit Singh Soni & Anr., 2023 SCC OnLine SC 122 the Greater Noida Authority has been declared as secured operational creditor and also in the case of Atul Mittal Vs. Noida (2024) SCC OnLine NCLAT 477.

15. We have heard Counsel for the parties and perused the record with their able assistance.

16. The Appellant is aggrieved against the order of the Tribunal by which it has observed that the lease rental and lease premium occurred during the CIRP period of the CD i.e from the date of commencement of the CIRP (26.11.2018) till the approval of the resolution plan is covered by the definition of Insolvency Resolution Process Cost defined in Section 5(13) of the Code and the mere fact that the CIRP has been triggered

and moratorium has been imposed does not absolve the Corporate Debtor from its liability to pay the aforesaid amount.

17. The land of the project Shubhkamna Techhomes, Situated at Plot No. GH-05, Sector 137, Noida, Gautam Budh Nagar, UP was leased to the CD by Noida for a period of 90 years vide lease deed dated 30.07.2010. After the public announcement by the RP on 29.11.2018 by which the RP invited the claims from the creditors, Noida submitted its claim under Form B dated 22.02.2019 of an amount of Rs. 99,32,55,183/- which is inclusive of the future component of Rs. 8,12,05,605/- which was duly admitted by the RP.

18. As far as the project of Shubhkamna City is concerned situated at GH-02, Sector 1, Greater Noida, it was leased by GNIDA to the CD for a period of 90 years vide lease deed dated 04.04.2011. Pursuant to the public announcement by the RP, no claim was filed by GNIDA with respect to its dues owed by the CD during the CIRP period even though GNIDA had ample opportunity to file its claim. As per the Information Memorandum dated 26.11.2018, published by the RP Rs. 60,64,54,762/- was indicated as unclaimed land authority dues of the CD towards GNIDA which were the dues of

GNIDA reflected in the IM is inclusive of lease rent, premium alongwith interest and future instalments as on insolvency commencement date.

19. As per the Appellant, the resolution plan dated 12.10.2019 submitted by the Appellants was based on the IM as prepared by the RP and the economic conditions prevalent during the year 2019. The Appellants have duly catered to the claims of Noida and GNIDA in the resolution plan as it has proposed to pay Rs. 25 Cr. to Noida in six equal half yearly instalments and the first instalment is to be paid after a period of six months from the implementation date. With respect to the dues of GNIDA for which no formal claim has been filed, the Appellants have proposed to pay Rs. 18,50,00,000/- in six equal half yearly instalments wherein the first instalment shall be paid after a period of six months from the implementation date. Clause 8.9 of Chapter VIII of the resolution plan is regarding the payments to the financial creditors and operational creditors, have been duly approved by the CoC in exercise of its commercial wisdom by a majority of 87.57%. It is also the case of the Appellant that it had already included CIRP costs as ratified by the CoC which is to be paid in

priority to the tune of Rs. 2,20,00,000/- but by virtue of the impugned order, the Respondent NOIDA has claimed amount of Rs. 27,65,02,686/- and GNIDA has claimed Rs. 1,00,95,82,526/- which comes to a total of Rs. 128,60,85,222/-. It is the case of the Appellant that the financial projection in the resolution plan submitted by the Appellants is based on the crystalized and duly verified claims of the creditors of the CD by the RP and the information as furnished to the Appellants under the IM but the amount which is now ordered to be paid, on the basis of the impugned order, towards the CIRP costs shall arbitrarily increase the CIRP costs which would be detrimental to the feasibility and viability of the approved resolution plan which has modified and amended the payment terms towards the CIRP costs. In this regard, in the case of Mathuraprasad C Pandey & Ors. Vs. Partiv Parikh RP on Omni Projects (India) Limited, CA (AT) (Ins) No. 201 of 2021 relied upon by the Appellant the issue was as to whether the Adjudicating Authority can modify the resolution plan because in that case the plan was modified by observing “ if any member of the resolution applicants has entered into or stand as guarantor in the individual capacity, in that event, he shall not be covered

with any immunity given under the resolution plan” and in this regard, the following observations have been made by this Court:-

“21. So far as appeal filed by M/s Mathuraprasad and others i.e. Company Appeal (AT)(Ins) No.201/2021 is concerned before going into the merit it would be appropriate to reproduce Section 31 of the IBC which is as follows:

“31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation.

(2) Where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan.

(3) After the order of approval under sub-section (1),—

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database.

(4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later;

Provided that where the resolution plan contains a provisions for combination, as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors.”

22. On examination of the aforesaid provisions there is no doubt that if a resolution plan is submitted before the Adjudicating Authority which is in compliance with sub-section (1) of Section 31 as well as in consonance with the provisions of Section 30 of the Code such resolution plan has to be approved by the Adjudicating Authority since in Section 31 word “shall” has been incorporated with proviso that the Adjudicating Authority must be satisfied that the resolution plan has provisions for its effective implementation. Sub-section (2) of Section 31 of the IBC further empowers the Adjudicating Authority to reject the resolution plan, if he is satisfied that resolution plan is not in conformity with the requirements as referred to in sub-section (1) of Section 31 of the IBC. It is clear that mandate of legislation is either to approve the resolution plan or to reject. However, there is no provision for making alteration or modification in the resolution plan. In view of the statutory provisions as

contained in Section 31 of the IBC we are satisfied the learned Adjudicating Authority to some extent exceeded its jurisdiction in modifying/altering the conditions in the resolution plan which has been done in para 15 of the impugned order which we have already quoted hereinabove. In such view of the matter the appeal i.e. Company Appeal (AT)(Ins) No.201/2021 can be allowed and it is held that the condition in para 15 of the impugned order shall not be looked into or may not be taken note of.

23. Accordingly the Company Appeal (AT) (Ins) No.201/2021 is allowed and Company Appeal (AT)(Ins) No. 266/2021 is dismissed with no cost.”

20. The argument of the Respondent is that Section 5(13) of the Code and Regulation 31 of the Regulations empowers the Tribunal to provide for payments of lease rentals and lease premium due during the CIRP period and the same would be a part of the CIRP costs. The Appellant has pressed Section 5(13) (e) of the Code to argue that it means any costs as may be specified by the Board and Regulation 31(b) of the Regulations which provides that amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1)(d) can be recovered. Section 14(1)(d) explanation says that the owner/lessor is not permitted to suspend / terminate the said lease/license granted in favour of the corporate debtor on the grounds of insolvency provided that there is no default in payment of current dues arising for
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the use or continuation of the said lease/license etc. Section 5(13)(e), 14(1)(d) and explanation are reproduced as under:-

“Section 5(13)(e) “insolvency resolution process costs” means—

(e) any other costs as may be specified by the Board;

Section 14 (1)(d): Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

1[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

21. In this regard, the Appellant has relied upon a decision of this Court in the case of Sunil Kumar Agrawal (Supra) in which a similar controversy was involved. In the said case, the application was filed under Section 60(5)(c) of the Code by *Comp. App. (AT) (Ins) No. 1351 of 2022*

GNIDA for a direction to the resolution professional to make the payment of the amount due and payable towards the outstanding dues which became due during the CIRP. The same was allowed by the Tribunal. It was argued by the Appellant in that case that the Adjudicating Authority has erred in applying explanation of Section 14(1)(d) for allowing the application because the said explanation is not applicable and thus the question was framed by this Court as to whether the explanation under Section 14(1)(d) of the Code for the purpose of directing the Appellant to pay the lease premium amount and the lease rent to the Respondent is applicable?. This court in the decided case has held that explanation is not applicable because the premium amount or lease rent is not part of Section 14(1)(d) which cannot be read as similar grant or right which has to be in respect of the license, permit, registration, quota, concession, clearance etc. but not with premium amount or lease rent. The order passed in the case of Sunil Kumar Agarwal (Supra) applies to this case also even though the said decision has been challenged by the Noida by way of Civil Appeal No. 901 of 2023 before the Hon'ble Supreme Court in which notice has been issued but stay has not been granted.

22. In such circumstances, we cannot but have to maintain the same order that has been passed in the case of Sunil Kumar Agrawal (Supra) till a decision about its correctness is taken by the Hon'ble Supreme Court in Civil Appeal No. 901 of 2023.

23. In view of the aforesaid observations, the present appeal is allowed and the impugned order is set aside. No costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Indevar Pandey]
Member (Technical)

New Delhi

25th October, 2024

Sheetal