

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

IA. NO. 4869/ND/2022

IN

Company Petition No. (IB)-995(ND)/2018

IN THE MATTER OF:

VMS Equipment

... Applicant/Financial Creditor

Versus

Primrose Infratech Private Limited

... Respondent

AND IN THE MATTER OF IA. NO. 4869/ND/2022:

Greater Noida Industrial Development Authority

Through its Manager (Builder)
Plot No. 01, Knowledge Park-04
Greater Noida, Gautam Buddha Nagar,
Uttar Pradesh - 201308

... Applicant

VERSUS

Mr. Anil Mata

Resolution Professional
For Primrose Infratech Private Limited

Address at:

308, R.G. Trade Tower,
Plot No. B-7, Netaji Subhash Place,
Pitampura, Delhi - 110034

... Respondent

Order Delivered on: 24.07.2023

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. Adhish Sharma, Adv. Nitin Pandey for SRA

For the GNIDA : Adv. U. N Singh

For the RP : Adv. Arvind Kr. Jadon & Adv. Taru Saxena,
Mr. Anil Matta

ORDER

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

The present IA No. 4869 of 2022 has been filed by Greater Noida Industrial Development Authority (GNIDA), through its Manager (hereinafter referred to as the “**Applicant**”/ “**Objector**”) under Section 60(5) of IBC, 2016, read with Rule 11 of NCLT Rules, 2016 seeking the following reliefs:

- “a) Reject the Resolution Plan put up for its approval in IA. No. 1489/2020; and*
- b) Direct the Resolution Professional to serve a copy of application bearing IA. No. 1489/2020 for approval of Resolution Plan upon the Applicant/Objector; and*
- c) Pass any such other order/direction which it may deem fit in the interest of justice.”*

2. To put the facts succinctly, the underlying main Petition CP (IB)-995/ND/2018 was filed by M/S VMS Equipment Pvt. Ltd. against the Corporate Debtor (CD) namely, M/s Promise Infratech Pvt. Ltd. under Section 7 of IBC, 2016, which was admitted vide Order dated 21.12.2018 of this Adjudicating Authority and the Corporate Insolvency Resolution Process (CIRP) in respect of the CD was initiated. Presently, the Corporate Debtor is represented through its Resolution Professional (RP) Sh. Anil Matta.

3. It is submitted that the Applicant/Objector is established under the UP Industrial Area Development Act, 1976 for performing functions as a statutory authority. It is stated by the Applicant that it had acquired the land under the

Land Acquisition Act 1894 and developed the same for the purpose of setting up an Urban and Industrial Township.

4. It is further stated by the Applicant that through a sealed two-bid system, it allotted Plot No.GH-06, SECTOR CHI-V, Greater Noida, vide Reservation/Acceptance Letter No. PROP/BRS-05/2010-11/443 dated 25.03.2011 and Allotment Letter No. PROP/BRS-05/2010-11/456 dated 30th March 2011 to the Consortium consisting of M/s Pratham ExpoFab Pvt. Ltd. (Lead Member), M/s PSA Impex Pvt. Ltd. (Relevant Member), M/s Earthcon Constructions Pvt. Ltd. (Relevant Member) and M/s Ajay Kumar Garg, and for the development and marketing of Group Housing Pockets/Flats/Plots. Accordingly, the applicant executed a Registered Lease Deed dated 29.11.2011 in respect of the said plot in favour of the Lessee i.e., Corporate Debtor M/s Primrose Infratech Pvt. Ltd. It is submitted by the Applicant that there is an amount payable by the Corporate Debtor i.e., M/s Primrose Infratech Pvt. Ltd. to the Applicant on account of allotment/premium, additional compensation and time extension Penalties for complete construction, etc. against the said plot of land. Therefore, the applicant demanded the said amount from the lessee/Respondent through demand notice and show cause notices. However, the Respondent failed to make payment.

5. It is further submitted that the applicant i.e., GNIDA has already filed the claim of Rs.55,96,80,208/- as of 04.01.2019 with the respondent Mr. Anil Matta, RP of the Corporate Debtor.

6. As per the averments made in the Application, the Applicant/GNIDA has objected to the Resolution Plan on the following grounds, which were also

reiterated by the Ld. Counsel for the Applicant/GNIDA during the course of the hearing:

6.1 GNIDA is a secured 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. There is a Security Interest created by virtue of Sections 13 and 13A of the Uttar Pradesh Industrial Area Development Act, 1976, which makes the GNIDA, a Secured Creditor in terms of the Judgement of the Hon'ble Supreme Court passed in Civil Appeal No. 1661 of 2020 of the case titled "State Tax Officer (1) Vs. Rainbow Paper Ltd".

6.2. The RP and the COC have erred in bifurcating the claim amount of Rs.55,96,80,208/- into Rs.25,40,03,256/- as Principal & Rs.30,56,76,952/- as interest, compensation, lease, Rent, Penalty and allocated Nil payment in the alleged Resolution Plan.

6.3 It is an admitted fact that the lessee/CD namely, M/s Primrose Infratech Pvt. Ltd., which is now under CIRP, has not paid the entire amount of consideration of lease premium, therefore, the leasehold right in respect of the plot in question has not been transferred to the lessee/CD namely M/s Primrose Infratech Pvt. Ltd. The impugned decision of RP and the COC violates the law laid down by the Hon'ble Supreme Court in the judgment dated 29.11.2013 in Civil Appeal No. 10753 of 2013 case titled "Andhra Pradesh Industrial Infrastructure Corporation Limited Vs. Team-Asia Lakhi Semiconductors Limited" (In Liquidation) Represented by The Official Liquidator, Hyderabad and Another, (2014)14 SCC 716.

6.4 The dues of a statutory authority/ government authority cannot be overlooked for the purpose of constituting the COC even if it does not fall in the category of the financial creditor. The present resolution plan ignores this obligation; therefore, it should be set aside. If the CoC, the RP, and the RA are unable to conceive and approve a Resolution Plan taking into account the dues of statutory authority/Government authority etc., then it would be a fit case where the corporate debtor should be liquidated.

6.5 The Adjudicating Authority may have to examine that public property (i.e., the land of GNIDA) should not be allowed to be monetized by the resolution applicant (SRA) without making a provision to pay the entire outstanding dues of the applicant/Objector and all other government dues. The dues payable to the applicant/objector constitute a charge over the land, which under the resolution plan will be transferred to the SRA without paying the dues. Even when a loan is taken by the respondent from the bank by creating a mortgage, the applicant/ objector has a first charge.

6.6 The Resolution Plan is completely conditional, which is impermissible in law and cannot be approved. The conditionality for the transfer of leasehold rights in the Resolution Plan is so gross that it even fixes the timeline for such an alleged transfer without following the law. The Resolution Plan completely ignores that under the Rules and Regulations set by the applicant, there is a procedure to be followed for the transfer of leasehold rights. Even otherwise, the applicant/objector is neither under any obligation to transfer the leasehold right in the Plot to the SRA nor the CoC have the competence or legal right to approve any Plan or make it binding on the applicant.

6.7 Under the abovesaid Lease Deed and rules, the first prerequisite for the transfer of leasehold rights is a no-dues certificate regarding premium, additional compensation, lease rentals, and other charges payable under the Lease Deed. Moreover, the transfer formalities are set out in detail including forms to be filled and transfer charges to be paid to the applicant as fixed by the applicant from time to time. In fact, the Resolution Plan pays no heed to the terms and conditions of the Lease Deed, rules, and regulations and does not even provide for the following of formalities. Therefore, the Resolution Plan is unimplementable and in violation of the terms and conditions of the Lease Deed as well as applicable rules and regulations.

6.8 The Resolution Plan violates the law laid down by the Hon'ble Supreme Court's judgment dated 15.11.2019 passed in Civil Appeal No. 6350 of 2019 titled "**Municipal Corporation of Greater Mumbai (MCGM) VS. Abhilash Lal & Ors.**", the relevant excerpts of which are reproduced below:

"33. The show cause notice in this case preceded admission of the insolvency resolution process. In view of the clear conditions stipulated in the contract, MCGM reserved all its rights and its properties could not have therefore, in any manner, been affected by the resolution plan. Equally in the opinion of this court, the adjudicating authority could not have approved the plan which implicates the assets of MCGM especially when Seven Hills had not fulfilled its obligations under the contract.

47. In the opinion of this court, Section 238 cannot be read as overriding the MCGM's right-indeed its public duty- to control and regulate how its properties are to be dealt with. That exists in sections 92 and 92A of the MMC Act. This court is of opinion that section 238 could be of importance when the properties and assets are of a debtor and not when a third party like the MCGM is involved. Therefore, in the absence of approval in terms of section 92 and 92A of the MMC Act., the adjudicating authority could

not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands.”

6.9 Any stipulation in the Resolution Plan contrary to the terms and conditions of the Lease Deed or any amendment to the Lease Agreement as sought to be made by the SRA/Resolution Plan is contrary to Regulation 37 of CIRP Regulations. The Applicant, being the Authority established by the State Government under the Uttar Pradesh Act, 1976, its approval is *sine qua non* for validity of the Resolution Plan in question, particularly *qua* the terms related to the Lease Deed as well as approvals, which admittedly has not been obtained in the present case. The Resolution Plan is also contrary to the judgment of the Hon'ble Supreme Court in “**Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd.**”, (2022) 1 SCC 401.

7. The Respondent/RP has filed its Reply and stated the following regarding “the background” of the matter -

7.1 The Resolution Plan has been approved by 80.84% votes of the CoC.

7.2 The GNIDA/Applicant filed its claim on 15.10.2019 for an amount of Rs.55,96,80,208/- under Form C, which is a claim form prescribed for a Financial Creditor.

7.3 Pursuant to the filing of the claim of the Applicant, the RP provisionally admitted the said claim in the 4th CoC meeting held on 21.10.2019.

7.4 Subsequently, the Ex-Directors of the Corporate Debtor filed an application bearing no. CA-1511/2019, impugning the claim filed by the GNIDA and consideration of the same as Financial Debt. It was directed by

this Adjudicating Authority while hearing CA-1511/2019 that the decision in this regard would be taken by RP, who shall place it before the CoC. The contents of the order dated 25.11.2019 are reproduced below:

“CA-1511/2019 has been filed by Ex-Directors impugning the inclusion of the claim filed by the Greater Noida Authority and the same be considered as a Financial debt. The decision to this effect would be taken by the RP who shall put it forth to the COC. Despite notice of the Greater Noida Authority, no one has appeared on their behalf. Let affidavit of service be filed.”

7.5 The RP, in compliance with the aforesaid order, placed the claim of the GNIDA before the CoC in its meeting held on 17.12.2019, wherein the claim of the Applicant was changed from “financial debt” to an “operational debt”.

7.6 Further, this Adjudicating Authority vide order dated 28.02.2020, passed in CA-1511/2019, categorized the claim of the Applicant as an “operational debt”, the relevant extracts of which reads thus:

“7. Keeping in view the citations referred to, this Bench is of the opinion that the claim of the Greater Noida Authority can unequivocally be categorized as being an “operational debt”. We therefore do not find any infirmity in the decision of the Resolution Professional who has deemed it justified to amend and correct the claim of the Greater Noida Authority from one of “financial claim” to an “operational debt”. Accordingly, the CoC which has been reconstituted upon amending the aforesaid claim, consisting of home buyers as financial creditors along with other Financial Creditors, if any, would be vested with the voting rights to the exclusion of Greater Noida Authority.”

7.7 The aforesaid order was challenged before the Hon’ble NCLAT in Appeal CA(AT) (Ins) 55 of 2021, which was dismissed vide order dated 21.06.2021.

7.8 It is further stated that during the pendency of Appeal No. CA(AT)(Ins) 55 of 2021, the Applicant had filed one more application bearing no. CA No. 812/2020 challenging the declaration of the Applicant as an operational creditor, which was dismissed vide order dated 02.07.2021, on the ground that the issue raised by the Applicant has already been decided to vide order dated 28.02.2020. The relevant extracts of the order dated 02.07.2021 are reproduced below:

“6. In the light of aforesaid order, when we consider the averments made in the present application filed by the applicant, we notice that similar facts/objections were raised by the applicant in CA/ 1511/2019. The applicant, in CA/1511/2019, had challenged the decision taken by the CoC in its 6th meeting dated 17.12.2019, by which the applicant i.e. Greater Noida Authority was declared as an Operational Creditor instead of Financial Creditor.

7. We further observe that this Adjudicating Authority, after considering the submissions of the applicant as well as RP and the decisions referred by the parties, passed a detailed order dated 28.02.2020 and confirmed the decision of the RP, to treat the applicant as an Operational Creditor instead of Financial Creditor.

8. RP has also informed that the applicant has also preferred an appeal before the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 55/2021, which is pending before the Hon'ble NCLAT.

9. Having considered the aforesaid facts and the order dated 28.02.2020, we are of the considered view that since the similar issue raised earlier by the applicant in CA/ 1511/2019 has already been decided by this Bench, hence, the present application is not maintainable.”

7.9 The aforesaid order dated 02.07.2021 was also challenged before the Hon'ble NCLAT in Company Appeal (AT) (Ins) No. 1014 of 2021, which too was dismissed vide order dated 10.12.2021.

8. The following is stated by the Respondent/RP with regard to the “merits of the Application”:

8.1 That the IBC 2016 by virtue of Section 238 is having an overriding effect over the Uttar Pradesh Industrial Area Development Act 1976.

8.2 Even if the contention of the Applicant is considered and provisions of the Uttar Pradesh Industrial Area Development Act 1976 (**hereinafter referred to as “UPIAD”**) are taken into consideration, the claim of the Applicant would still come under the ambit of an operational debt and the same is liable to be treated in terms of the provisions of the IBC 2016. The contention of the Applicant that an ‘owner’, i.e., the Applicant in the instant case, would have a charge on the property and thereby be treated as a ‘secured creditor’ is irrational. Further, the Applicant even after being aware of the fact that the Resolution Plan is pending before this Hon'ble Tribunal since 2020, has only approached this Hon'ble Tribunal in 2022.

8.3 NOIDA Authority has been declared as an Operational Creditor by the Hon'ble Supreme Court in the matter of “**New Okhla Industrial Development Authority Versus Anand Sonbhadra**” in Civil Appeal No. 2222 of 2021.

8.4 The treatment given to NOIDA Authority under the Resolution plan as an Operational Creditor is in line with the provisions of IBC 2016.

9. Earlier, the matter was heard and reserved for orders. However, vide the order dated 12.04.2023, this Adjudicating Authority had de-reserved the matter with certain directions to the parties. The relevant portion of the order dated 12.04.2023 is reproduced overleaf:

5. On perusal of the documents on record, it is observed that certain material facts, which are necessary for adjudication of the Application, are not mentioned in the application. **Accordingly, in the interest of justice, we consider it appropriate to direct both parties to indicate the following by filing an Additional Affidavit within 10 days from today:**

- i) The date on which the debt of GNIDA became due and payable for the very first time and thereafter, the financial year-wise, in a tabular format;
- ii) The payment due dates/schedule for the lease rentals vis-a-vis the details of lease rentals paid and defaulted by the CD (a) prior to the initiation of CIRP, and (b) after the commencement of CIRP, in a tabular format.
- iii) Whether the Corporate Debtor committed any default in respect of any of the other dues (a) prior to the initiation of the CIR process (b) post-initiation of the CIR process, in a tabular format.
- iv) The details of the property, over which GNIDA is claiming to have its security interest, and the date from which it is claimed to have been created along with supporting documents, if any.

10. In compliance with the aforesaid directions, the GNIDA filed its affidavit on 24.05.2023 and has stated the following:

**ADDITIONAL AFFIDAVIT ON BEHALF OF APPLICANT-
GREATER NOIDA INDUSTRIAL DEVELOPMENT
AUTHORITY IN PURSUANCE TO THE ORDER DATED
12.04.2023**

I, Aradhana, D/o Sh. Nand Kishor, aged about 42 years, working as a Manager (Builder) with Greater Noida Industrial Development Authority plot no. 01, knowledge park-04 Greater Noida, Gautam Budh Nagar, Uttar Pradesh 201308 do hereby duly affirm and state as under:

1. That I am presently posted as a Manager (Builders) with the Greater Noida Authority and as such I am duly authorized and competent to affirm this affidavit. I am well conversant with the facts of the case and competent to swear the present affidavit.

2. That this Hon'ble Tribunal vide order dated 12.04.2023 observed that certain material facts, which were necessary for adjudication of the instant application, were not mentioned in the application and directed the parties to indicate the following by filling an Additional Affidavit:

- i) The date on which the debt of GNIDA became due and payable for the very first time and thereafter the financial year-wise, in a tabular format;
- ii) The payment due dates/schedule for the lease rentals vis-a-vis the details of lease rentals paid and defaulted by the CD (a) prior to the initiation of CIRP, and (b) after the commencement of CIRP, in a tabular format.
- iii) Whether the Corporate Debtor committed any default in respect of any of the other dues (a) prior to the initiation of the CIR process (b) post-initiation of the CIR process, in a tabular format.

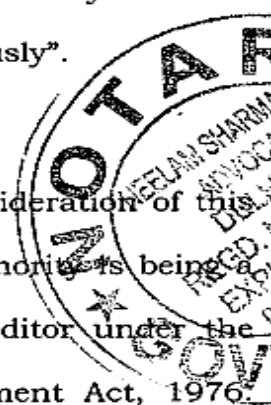
- iv) The details of the property, over which GNIDA is claiming to have its security interest, and the date from which it is claimed to have been created along with supporting documents, if any.
3. That I say that the Greater Noida Authority allotted, on lease hold basis, the Plot No. Plot No. GH-06A, Sector CHI-V, Greater Noida, District- Gautam Budh Nagar, U.P. measuring 24485.00 square meter to M/s Primrose Infratech Pvt. Ltd. for the purpose of constructing Residential flats and/or Residential Plots (in case of plotted development) according to the setbacks and building plan approved by the applicant/ Objector. The Allotment Letter and the lease deed provide the schedule of payment and its due date. The lease deed further provide that in the event of non-payment of the installment by the due date, further interest is payable.
4. That I say that the details regarding the calculation of default amount of additional compensation, calculation of default amount of rescheduled installments, calculation of default amount of premium installments, calculation of lease rent installments and calculation of construction penalty for whole project has been prepared in a tabular form, which are annexed as **ANNEXURE 'A' colly.**
5. It is further submitted for the kind consideration of this Hon'ble Tribunal that as per section 13 A of the Uttar



Pradesh Industrial Area Development Act, 1976 “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 simultaneously”.

6. It is further submitted for the kind consideration of this Hon'ble Tribunal that the Applicant/Authority is being a statutory authority and is a secure creditor under the Uttar Pradesh Industrial Area Development Act, 1976. Section 3(30) of the Insolvency and Bankruptcy Code, 2016 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.



7. It is further submitted for the kind consideration of this Hon'ble Tribunal that even in terms of the permission to mortgage, the Greater Noida Industrial Development Authority has the first charge. This is expressly mentioned in the permission to mortgage. It is reiterated that since there are dues payable to the applicant- Authority, therefore, the first charge on the said leased plot is that of the applicant- Authority, being the secure creditor created by operation of law.
8. This additional affidavit is being filed in compliance of the order dated 12.04.2023 passed by this Hon'ble Tribunal.

I identified the deponent who
has signed in my presence
Kishor

Madhava
DEPONENT
Greater Noida Indl. Dev. Au'

11. In compliance with the aforesaid directions, the RP too filed its affidavit 05.05.2023 and stated the following:

Additional Affidavit on behalf of the Resolution Professional in compliance of order dated 12.04.2023

I, Anil Matta, son of Late Shree Darshan Lal Matta, aged about 63 years, having office at 308, RG Trade Tower, Plot No. B-7, Netaji Subhash Place, Pitampura, Delhi, 110034, the Resolution Professional of Primrose Infratech Pvt. Ltd. do hereby solemnly affirm as under:

1. That I am the Resolution Professional in the captioned matter and am competent to swear the present Affidavit.
2. This Tribunal vide order dated 12.04.2023 observed that certain material facts, which were necessary for adjudication of the instant application, were not mentioned in the application and directed the parties to indicate the following by filing an Additional Affidavit:
 - i) *The date on which the debt of GNIDA became due and payable for the very first time and thereafter, the financial year-wise, in a tabular format;*
 - ii) *The payment due dates/schedule for the lease rentals vis-a-vis the details of lease rentals paid and defaulted by the CD (a) prior to the initiation of CIRP, and (b) after the commencement of CIRP, in a tabular format.*
 - iii) *Whether the Corporate Debtor committed any default in respect of any of the other dues (a) prior to the initiation of the CIR process (b) post-initiation of the CIR process, in a tabular format.*

iv) The details of the property, over which GNIDA is claiming to have its security interest, and the date from which it is claimed to have been created along with supporting documents, if any.”

3. Thus, the present Affidavit is being filed in compliance with the order dated 12.04.2023 in I.A. No. 4869 of 2022. The details in this Affidavit have been provided on the basis of the documents available with the Deponent and the documents submitted by GNIDA while filing its claim which were duly certified by a Chartered Accountant.

I. The date on which the debt of GNIDA became due and payable for the very first time and thereafter, the financial year-wise, in a tabular format

4. As per the information available, the date on which the debt of GNIDA became due is 30.09.2015. The financial year-wise tabular format may be provided by GNIDA.

II. The payment due dates/schedule for the lease rentals vis-a-vis the details of lease rentals paid and defaulted by the CD (a) prior to the initiation of CIRP, and (b) after the commencement of CIRP, in a tabular format

5. As per the Lease Deed dated 29.09.2011 executed between the Applicant and the Corporate Debtor, a tabular chart representing the due dates and installments has been reproduced below:

Head	Due Date	Payable Premium	Payable Interest	Total payable instalment	Balance Premium
Instalment No. 1	30.09.2011	0	15240195	15240195	254003256
Instalment No. 2	30.03.2012	0	15240195	15240195	254003256
Instalment No. 3	30.09.2012	0	15240195	15240195	254003256
Instalment No. 4	30.03.2013	0	15240195	15240195	254003256
Instalment No. 5	30.09.2013	15875204	15240195	31115399	238128053
Instalment No. 6	30.03.2014	15875204	14287683	30162887	222252849

Instalment No. 7	30.09.2014	15875204	13335171	29210374	206377646
Instalment No. 8	30.03.2015	15875204	12382659	28257862	190502442
Instalment No. 9	30.09.2015	15875204	11430147	27305350	174627239
Instalment No. 10	30.03.2016	15875204	10477634	26352838	158752035
Instalment No. 11	30.09.2016	15875204	9525122	25400326	142876832
Instalment No. 12	30.03.2017	15875204	8572610	24447813	127001628
Instalment No. 13	30.09.2017	15875204	7620098	23495301	111126425
Instalment No. 14	30.03.2018	15875204	6667585	22542789	95251221
Instalment No. 15	30.09.2018	15875204	5715073	21590277	79376018
Instalment No. 16	30.03.2019	15875204	4762561	20637765	63500814
Instalment No. 17	30.09.2019	15875204	3810049	19685252	47625611
Resolution Plan was approved by the Committee of Creditors on 13.02.2020					
Instalment No. 18	30.03.2020	15875204	2857537	18732740	31750407
Instalment No. 19	30.09.2020	15875204	1905024	17780228	15875204
Instalment No. 20	30.03.2021	15875204	952512	16827716	0

6. Lease rentals defaulted by the Corporate Debtor

(a) Prior to the initiation of CIRP = Rs. 43,61,90,319

APR-2022

(b) After the commencement of CIRP = Rs. 12,34,89,889

7. Lease Rentals paid by the Corporate Debtor

(a) Prior to the initiation of CIRP = Rs. 4,77,78,165

(b) After the commencement of CIRP = NIL

Calculation highlighting the above mentioned amounts has been attached as Annexure A.

III. Whether the Corporate Debtor committed any default in respect of any of the other dues (a) prior to the initiation of the CIR process (b) post-initiation of the CIR process, in a tabular format

8. As per the records available with me, the dues of GNIDA against the CD have been detailed in Paragraph 6 of this affidavit.

IV. The details of the property, over which GNIDA is claiming to have its security interest, and the date from which it is claimed to have been created along with supporting documents, if any.

9. This information may be provided by GNIDA.

10. I solemnly state that the contents of this affidavit are true to the best of my knowledge and belief.

Resolution Professional of Primrose Infratech Pvt. Ltd.



12. On perusal of the affidavits (ibid), it is observed that in response to query no. 1, the Applicant/GNIDA has annexed the Schedule of payment and due date commencing from 29.09.2011. However, it has made no specific averment as to when the debt of GNIDA became due and payable for the very first time. Nevertheless, the Respondent/RP has averred in its affidavit that the debt of GNIDA became due and payable for the very first time on 30.09.2015.

13. Further, as regards query no. 2 and 3, the Applicant has provided a Schedule of payment and due dates in the annexure without any specific averment indicating the exact amount of default towards the “lease rentals” prior to the initiation of CIRP and post-initiation of CIRP. However, the Respondent/RP, in its affidavit, has specifically stated that prior to the initiation of CIRP, the Corporate Debtor committed default of Rs.43,61,90,319/- in payment of lease rentals to GNIDA, and after the initiation of CIRP, the default of Corporate Debtor in payment of lease rentals stood at Rs.12,34,89,889/- only. It is also noticed that in response to query no. 4, the GNIDA has not specified any property over which it has been claiming to have the creation of Security Interest.

14. We heard the submissions of both parties and perused the documents, Written Submissions, and additional affidavits placed on record by the parties. It is evident from the order dated 21.06.2021 passed in the matter of “Greater Noida Industrial Development Authority Vs. Promod Agrawal & Ors.” in CA (AT) (Ins.) No. 55/2021 and order dated 10.12.2021 in the matter of “Greater Noida Industrial Development Authority v. CA Anil Matta” in CA (AT) (Ins.) No. 1014/2021 that the GNIDA has been confirmed as an Operational Creditor.

15. However, through the present IA as well as during the hearing and written submissions, the Applicant/GNIDA has claimed to be a “Secured Operational Creditor”, which has not been tested so far by this Adjudicating Authority. Therefore, we would like to examine **“Whether Greater Noida Industrial Development Authority (GNIDA) is a Secured Creditor in terms of Section 3(30) of IBC 2016.**

16. It is contended by the Applicant/GNIDA that by virtue of Section 13 read with Section 13A, of the Uttar Pradesh Industrial Area Development (UPIAD) Act 1976, security interest was created in favour of the Applicant, which makes the Applicant a “Secured Creditor” in terms of Section 3(30) of IBC, 2016. We would like to examine this contention and accordingly, we refer to Sections 13 and 13A of the Uttar Pradesh Industrial Area Development Act, 1976, which read thus:

**Imposition of
penalty and
mode of
recovery of
arrears**

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 ¹“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.

2[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 simultaneously.]

17. On perusal of the above, it is observed Sections 13 and 13-A of the UPIAD Act 1976 deal with the “Imposition of penalty and mode of recovery of arrears”. From the bare perusal of Section 13, it transpires that in order to trigger the provision of this Section, there has to be a default committed by the Transferee in respect of any of the following:

- (i) payment of any consideration money or installment thereof, or
- (ii) any other amount due on account of the transfer of any site or building by the Authority, or
- (iii) any rent due to the Authority in respect of any lease.

Section 13 also triggers, when the default with respect to the following is committed by any Transferee or Occupier in respect of the payment of any fee or tax levied under this Act. Further, the Chief Executive Officer may direct 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.

18. In the instant case, the Respondent/RP vide its affidavit dated 05.05.2023 has admitted that the Corporate Debtor had committed a default in payment of lease rentals prior to the commencement of CIRP. Hence, the same qualifies to be a default in terms of Section 13 of the UPIAD Act 1976. Further, it is observed that in terms of Section 13-A of the UPIAD Act 1976, any amount payable to the Authority under Section 13 will constitute a “Charge” over the property.

19. At this stage, we refer to the definition of “Secured Creditor” as provided under Section 3(30) of IBC 2016:

*“Secured creditor” means a creditor in favour of whom **security interest** is created;*

(Emphasis Supplied)

20. Further, the term “Security interest” is defined under Section 3(31) of IBC 2016, which reads thus:

*“(31) “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, **charge**, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*

(Emphasis Supplied)

21. Thus, it is clear that the term “security interest” as defined in IBC, includes “charge”. **In view of the above, it won’t be wrong to say that the Creditor in whose favour the “charge” is created is considered “a Secured Creditor”.**

22. At this juncture, we refer to the Judgement dated 06.09.2022 of the Hon’ble Supreme Court of India passed in the matter of “**State Tax Officer (1) Vs. Rainbow Papers Limited**” in Civil Appeal No. 1661 of 2020, wherein the following was held:

“30. The learned Solicitor General rightly argued that in view of the statutory charge in terms of Section 48 of the GVAT Act, the claim of the Tax Department of the State, squarely falls within the definition of “Security Interest” under Section 3(31) of the IBC and the State becomes a secured creditor under Section 3(30) of the Code.

..

*57. As observed above, the State is a secured creditor under the GVAT Act. Section 3(30) of the IBC defines secured creditor to mean a creditor in favour of whom security interest is credited. Such **security interest could be created by operation of law. The definition of secured creditor in the IBC does not exclude any Government or Governmental Authority.**”*

(Emphasis Supplied)

23. In view of the judgment of the Hon’ble Supreme Court (supra), a security interest can be created by operation of law, and undisputedly, the Greater Noida Industrial Development Authority (GNIDA) is a Government Authority and the aforesaid observation would be squarely applicable to the facts of the case. Accordingly, in our considered view

the Greater Noida Industrial Development Authority (GNIDA) is “a secured creditor” in terms of Section 3(30) of IBC 2016.

24. However, it is contended by the RP that provisions of Section 13 and Section 13A are inconsistent with IBC 2016 and the “charge”, in the instant case, has not been registered in terms of Section 77 of the Companies Act, 2013. Therefore, before reaching any conclusion at this stage, we would also like to examine **“Whether provisions of Section 13 and Section 13A of Uttar Pradesh Industrial Area Development Act, 1976 are inconsistent with the provisions of IBC, 2016 by virtue of Section 238 of IBC, 2016.”**

25. It is a matter of fact that CIRP in the instant case commenced on 21.12.2018 and the Moratorium under Section 14(1) came into force from 21.12.2018 only. As per provision under Section 14(1)(a), no proceedings can be initiated against the Corporate Debtor *“in any court of law, tribunal, arbitration panel or **other authority**”*. The contents of Section 14(1)(a) read thus:

14. Moratorium. -

(1) 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: -

(a) the institution of suits or **continuation** of pending suits or **proceedings against the corporate debtor including execution** of any judgement, decree or order in any court of law, tribunal, arbitration panel **or other authority**;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(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.

From the above, it is clear that the Moratorium provisions are applicable to an “Authority” and the GNIDA is undisputedly an Authority. Hence, it emerges that due to the Moratorium under Section 14(1) commenced on 21.12.2018, all the recovery proceedings initiated post-21.12.2018 including security interest, if any, created by virtue of those proceedings are void.

26. However, in the instant case, as we have noted earlier in paragraph 13 the Corporate Debtor had committed a default of Rs. 43,61,90,319/-, even prior to the initiation of the Moratorium. Therefore, the provisions of Sections 13 and 13A of the Uttar Pradesh Industrial Area Development Act 1976 had been triggered prior to the initiation of the Moratorium. **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 IBC 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.**

27. It is further contended by the RP that the charge has not been registered in terms of Sections 77 and 78 of the Companies Act 2013. The Ld. Counsel for the RP further relied upon the judgment dated 18.12.2019 of Hon’ble IA. No. 4869/ND/2022 in (IB)-995/(ND)/2018
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NCLAT passed in the matter of “**Indiabulls Housing Finance Ltd. vs. Mr. Samir Kumar Bhattacharya & Ors.**” in Company Appeal (AT) (Ins.) No. 830/2019, wherein the following was held:

“9. *It is thus clear that the CoC had made it clear that in absence of Charge being registered, the Appellant could not be treated as Secured Financial Creditor. Although the transaction is stated to be of 2012, it is clear that the Charge was not got registered either by the Corporate Debtor or the Appellant till now on 03.10.2019 which is after the Resolution Plan was approved on 04.07.2019. **Section 77 of the Companies Act, 2013 required the Charge to be registered and the Appellant had an option to resort to even Section 78 of Companies Act, 2013, if there were any grievances. Not having done so, when CIRP started trying to rely on the equitable mortgage without a charge created, we do not find there was any error in the CoC meetings which in its wisdom did not recognize creation of security. The transaction did not even reflect in the Books of Account of the Corporate Debtor. Appellant should be happy that it has been at least treated as Financial Creditor. Appellant took no actions since 2012 and till late stage of CIRP. Charge registered after Resolution Plan is approved cannot be considered.***”

(Emphasis Supplied)

28. From the Judgement (supra), it transpires that the security interest in “**Indiabulls Housing Finance Ltd. vs. Mr. Samir Kumar Bhattacharya & Ors.**” was not created by virtue of law, and therefore, the findings of the aforesaid judgment are not applicable to the facts of the present case. **Further, in our considered view, the registration of a charge is for the purpose to prove the existence of such a charge, but where the charge is found to have been created by virtue of law, its existence cannot be denied or questioned merely because the charge is not registered.**

29. In the sequel to the aforesaid discussion, we conclude that –

(a) the Greater Noida Industrial Development Authority (GNIDA) is “a secured creditor” in terms of Section 3(30) of IBC 2016;

(b) 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 (UPIAD) Act 1976 well before the Moratorium period and Section 14 (1) of IBC 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 UPIAD Act, 1976;

(c) there is no inconsistency between the provision of Sections 13 and 13A of the UPIAD Act, 1976 and IBC 2016, hence the provisions of Section 238 of IBC, 2016 do not get attracted to.

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

31. Nevertheless, we do not espouse at what priority and in what position the Applicant would be placed under the Waterfall Mechanism.

32. **The Application is disposed of accordingly.**

Sd/-
(L. N. GUPTA)
MEMBER (T)

Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)