

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1147 of 2023

[Arising out of order dated 24.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Court No.II, New Delhi in I.A. No.4869/(ND)/2022 in CP (IB) No.995/(ND)/2018]

IN THE MATTER OF:

Mr. Anil Matta

Resolution Professional

For Primrose Infratech Private Limited

Address at:

308, R.G. Trade Tower

Plot No. B-7, Netaji Subhash Place

Pitampura, Delhi-110034

...Appellant

Versus

Greater Noida Industrial Development Authority

Through its Manager (Builder)

Plot No. 01, Knowledge Park-04

Greater Noida, Gautam Buddha Nagar,

Uttar Pradesh-201308

...Respondent

Present:

For Appellant: Ms. Anuja Pethia, Mr. Subhashish Kumar,
Advocates

For Respondents: Mr. U.N. Singh, Advocate for GNIDA.
Mr. Adish Sharma, Mr. Nitin Pandey, Advocates
for SRA.

With

Company Appeal (AT) (Insolvency) No. 1519 of 2023

[Arising out of order dated 30.08.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Special Bench (Court-II) in IA-4588/2023 in CP (IB)-237(ND)2019]

Cont'd.../

IN THE MATTER OF:

Atul Mittal

(Resolution Professional
of Zeal Developers Pvt. Ltd.)
163, Blaco Apartments, Plot No.58,
IP Extension, Patparganj, Delhi – 110092.

...Appellant

Versus

New Okhla Industrial Development Authority

Through its Chief Executive Officer
Main Administrative Building
Sector-6, Noida.

...Respondent

Present:

For Appellant: Mr. Abhishek Anand, Mr. Karan Kohli, Ms. Sakshi Chahar, Mr. Sikhar Tiwari, Kashish Rehan, Krishna Sharma, Palak Kalra, Ishaan Dhingra, Abhishek Sinha, Advocates.

For Respondents: Mr. Rachit Mittal, Mr. Parish Mishra, Mr. Adarsh Srivastava, Advocates for NOIDA.

J U D G M E N T

ASHOK BHUSHAN, J.

Company Appeal (AT) (Ins.) No.1147 of 2023 has been filed challenging the order dated 24.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench, Court II in I.A. No.4869 of 2022 filed by Greater Noida Industrial Development Authority. By the impugned order the I.A. filed by Greater Noida Industrial Development Authority was

disposed of holding the Applicant to be treated as Secured Operational Creditor. Aggrieved by said order, the Resolution Professional of the Corporate Debtor – M/s Primrose Infratech Private Limited has come up in this Appeal. Company Appeal (AT) (Ins.) No.1519 of 2023 has been filed challenging the order dated 30.08.2023 passed by Adjudicating Authority (National Company Law Tribunal), New Delhi Special Bench (Court II) in I.A. No.4588 of 2023, which was filed by New Okhla Industrial Development Authority. I.A. No.4588 of 2023 has been disposed of in view of the order passed in I.A. No.4869 of 2022. The order dated 30.08.2022 is thus passed on order passed on I.A. No.4869 of 2022 against which Company Appeal (AT) (Ins.) No.1147 of 2023 has been filed, as noted above. For deciding both the appeals it is sufficient to notice the facts and issues of Company Appeal (AT) (Ins.) No.1147 of 2023.

2. Adjudicating Authority vide its order dated 21.12.2018 admitted CP No. IB-995(ND)/2018 against the Corporate Debtor – M/s Primrose Infratech Private Limited. The Appellant – Amit Matta was appointed as Interim Resolution Professional and confirmed as Resolution Professional. The Respondent - Greater Noida Industrial Development Authority (GNIDA) has made allotment of Plot No.GH-06, Section CHI-V, Greater Noida to the consortium consisting of M/s Pratham ExpoFab Pvt. Ltd., M/s PSA Impex Pvt. Ltd., M/s Earthcon Constructions Pvt. Ltd. and M/s Ajay Kumar Garg. Registered Lease Deed was executed on 29.11.2011 in respect of said plot in favour of the Corporate Debtor - M/s Primrose Infratech Private Limited.

Thereafter, for dues against the lease, demand notices were issued by the Respondent to the Lessee. Payment of dues to the Greater Noida Authority was not made. The Respondent filed claim of Rs.55,96,80,208/- with the Resolution Professional. The Resolution Plan was approved by the CoC. The Resolution Professional filed I.A. No.1489 of 2020 praying for approval of Resolution Plan. Respondent - Greater Noida Industrial Development Authority filed I.A. No.4869 of 2023, where following reliefs were claimed.

“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.”

3. Adjudicating Authority heard the Applicant and recorded its conclusions in Para 29. Para 29 of the order is as follows:

“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.”

4. The conclusion recorded by the Adjudicating Authority is that the Greater Noida Authority is held to be Secured Creditor. The Resolution Professional aggrieved by the said order declaring GNIDA as Secured Creditor has come up in this Appeal.

5. Submissions raised by the Resolution Professional objecting to the claim of the GNIDA as Secured Creditor was noticed and dealt by the Adjudicating Authority in the impugned order. The Adjudicating Authority relying on the Section 13 and 13-A of the Uttar Pradesh Industrial Area Development Act, 1976 held that charge of GNIDA in the instant case has been created by virtue of law. The submission that provision of Section 13 and 13-A of UPIAD Act are inconsistent with Section 238 of I&B Code was also dealt with and rejected.

6. Learned counsel for the Appellant challenging the order impugned submitted that Greater Noida Authority is not a Secured Creditor and the

Adjudicating Authority committed error in holding the GNIDA is a Secured Creditor. Learned counsel for the Appellant submits that Section 13-A was enforced five years after Lease Deed was executed on 29.11.2011. The Adjudicating Authority committed error in holding that there is no conflict between Section 13-A and Section 238 of the IBC. It is submitted that declaring GNIDA as Secured Creditor will harm the interest of the homebuyers. Greater Noida Authority has not registered its charge with Registrar of Companies, hence, it cannot claim to be Secured Operational Creditor. It is further submitted that Section 13A can be relied when recovery notices have been issued by the CEO and no recovery notices have been issued to the Corporate Debtor.

7. Learned counsel for the GNIDA refuting the submissions of learned counsel for the Appellants submits that issue raised by the Appellant is now fully covered by the recent judgment of Hon'ble Supreme Court dated 12.02.2024 in ***“Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni & Anr., Civil Appeal Nos.7590-7591 of 2023”*** where the Hon'ble Supreme Court held the GNIDA as Secured Operational Creditor after considering all relevant submissions. It is submitted that issues sought to be raised by the Appellant are fully covered by the judgment of Hon'ble Supreme Court, hence, order passed by the Adjudicating Authority need to be affirmed.

8. We have considered the submissions of learned counsel for the parties and perused the record.

9. We may first notice the judgment of Hon'ble Supreme Court in ***Greater Noida Industrial Development Authority vs. Prabhjit Singh Soni & Anr.*** delivered on 12.02.2024. Appeals were filed before the Supreme Court against the judgment of this Tribunal whereby the appeal filed by the GNIDA before the Tribunal was dismissed. GNIDA had filed an application before the Adjudicating Authority to recall the order dated 04.08.2020 and further to set aside decision of the Resolution Professional to treat the GNIDA as an Operational Creditor. In the above case also the GNIDA has allotted Plot No.01-C, Sector 16C, Greater Noida, District Gautam Budh Nagar, UP to M/s JNC Construction (P) Ltd., the Corporate Debtor. CIRP commenced on 30.05.2019, claims were invited, the claim was set up by the Appellant as Financial Creditor, which was rejected and Appellant was treated as Operational Creditor. CoC approved the plan which was presented before the Adjudicating Authority and was approved by the Adjudicating Authority on 04.08.2020. Appellant after coming to know that plan has been approved has filed I.A. No.344 of 2021 questioning the Resolution Plan and decision of the Resolution Professional to treat the Appellant as Operational Creditor. Another I.A. was filed to recall the order dated 04.08.2020. NCLT rejected both the applications against which Appeals were filed before Appellate Tribunal. Appeals were also dismissed by this Appellate Tribunal. Before the Hon'ble Supreme Court submission was advanced by the Appellant that Appellant is a Secured Creditor. Hon'ble Supreme Court in the appeal held that recall application was maintainable and further held that Appellant was a Secured Creditor.

Hon'ble Supreme Court after noticing the provision of Section 13-A of 1976 Act observed that non-placement of Appellant in the class of Secured Creditor did affect its interest, which question was not addressed by NCLT and NCLAT. In Para 54 and 55 following was held:

“54. In our view the resolution plan did not meet the requirements of Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 for the following reasons:

- a. The resolution plan disclosed that the appellant did not submit its claim, when the un rebutted case of the appellant had been that it had submitted its claim with proof on 30.01.2020 for a sum of Rs.43,40,31,951/- No doubt, the record indicates that the appellant was advised to submit its claim in Form B (meant for operational creditor) in place of Form C (meant of financial creditor). But, assuming the appellant did not heed the advice, once the claim was submitted with proof, it could not have been overlooked merely because it was in a different Form. As already discussed above, in our view the Form in which a claim is to be submitted is directory. What is necessary is that the claim must have support from proof. Here, the resolution plan fails not only in acknowledging the claim made but also in mentioning the correct figure of the amount due and payable. According to the resolution plan, the amount outstanding was Rs. 13,47,40,819/- whereas, according to the appellant, the amount*

due and for which claim was made was Rs. 43,40,31,951/-. This omission or error, as the case may be, in our view, materially affected the resolution plan as it was a vital information on which there ought to have been application of mind. Withholding the information adversely affected the interest of the appellant because, firstly, it affected its right of being served notice of the meeting of the COC, available under Section 24 (3) (c) of the IBC to an operational creditor with aggregate dues of not less than ten percent of the debt and, secondly, in the proposed plan, outlay for the appellant got reduced, being a percentage of the dues payable. In our view, for the reasons above, the resolution plan stood vitiated. However, neither NCLT nor NCLAT addressed itself on the aforesaid aspects which render their orders vulnerable and amenable to judicial review.

- b. The resolution plan did not specifically place the appellant in the category of a secured creditor even though, by virtue of Section 13-A of the 1976 Act, in respect of the amount payable to it, a charge was created on the assets of the CD. As per Regulation 37 of the CIRP Regulations 2016, a resolution plan must provide for the measures, as may be necessary, for insolvency resolution of the CD for maximization of value of its assets, including, but not limited to, satisfaction or modification of any security interest. Further, as per Explanation 1, distribution under clause (b) of*

sub-section (2) of Section 30 must be fair and equitable to each class of creditors. Non-placement of the appellant in the class of secured creditors did affect its interest. However, neither NCLT nor NCLAT noticed this anomaly in the plan, which vitiates their order.

- c. *Under Regulation 38 (3) of the CIRP Regulations, 2016, a resolution plan must, inter alia, demonstrate that (a) it is feasible and viable: and (b) it has provisions for approvals required and the time-line for the same. In the instant case, the plan conceived utilisation of land owned by the appellant. Ordinarily, feasibility and viability of a plan are economic decisions best left to the commercial wisdom of the COC. However, where the plan envisages use of land not owned by the CD but by a third party, such as the appellant, which is a statutory body, bound by its own rules and regulations having statutory flavour, there has to be a closer examination of the plan's feasibility. Here, on the part of the CD there were defaults in payment of instalments which, allegedly, resulted in raising of demand and issuance of pre-cancellation notice. In these circumstances, whether the resolution plan envisages necessary approvals of the statutory authority is an important aspect on which feasibility of the plan depends. Unfortunately, the order of approval does not envisage such approvals. But neither NCLT nor NCLAT dealt with those aspects.*

Relief

55. As we have found that neither NCLT nor NCLAT while deciding the application / appeal of the appellant took note of the fact that, (a) the appellant had not been served notice of the meeting of the COC; (b) the entire proceedings up to the stage of approval of the resolution plan were ex parte to the appellant; (c) the appellant had submitted its claim, and was a secured creditor by operation of law, yet the resolution plan projected the appellant as one who did not submit its claim; and (d) the resolution plan did not meet all the parameters laid down in sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016, we are of the considered view that the appeals of the appellant are entitled to be allowed and are accordingly allowed. The impugned order dated 24.11.2022 is set aside. The order dated 04.08.2020 passed by the NCLT approving the resolution plan is set aside. The resolution plan shall be sent back to the COC for re-submission after satisfying the parameters set out by the Code as expounded above. There shall be no order as to costs.”

10. Hon'ble Supreme Court after noticing Section 13-A of 1976 Act held that by virtue of provision a charge was created on the assets of the Corporate Debtor and non-placement of the Appellant in the class of Secured Creditors did affect its interest. Observation made in Para 54(b) clearly supports the submission of Respondent No.1 that by virtue of 1976 Act, a charge has been created on the assets of the Corporate Debtor and

the GNIDA has to be held a Secured Creditor. The Hon'ble Supreme Court ultimately set aside the orders approving the Resolution Plan and matter was sent back for re-submission after satisfying the parameters set out by the Code as expounded in the judgment.

11. The submission of the Appellant that Section 13-A was inserted in the Act subsequent to lease having been granted to the Corporate Debtor does not in any manner affect the claim of the Respondent No.1 as Secured Creditor. Section 13-A was inserted by U.P. Act 10 of 2016 in The Uttar Pradesh Industrial Area Development Act, 1976. Section 13-A provides as follows:

“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.”

12. Any dues of the Authority is a charge as per Section 13-A over the property. The Corporate Debtor has not paid the dues of Respondent – GNIDA, which has been brought before the Adjudicating Authority by means of an application giving all relevant details. In the present case, the Adjudicating Authority returned finding that Resolution Professional in its affidavit dated 05.05.2023 has admitted that the Corporate Debtor has committed a default in payment of lease rentals prior to the commencement of CIRP. In Para 18 of the order following has been held:

“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.”

13. The submission of the Appellant that no recovery notices have been issued by CEO has no relevance since statutory charge is created as soon as an amount under lease deed becomes payable. The default on part of the Corporate Debtor is an admitted fact.

14. The submission advanced by the Resolution Professional that charge has not been created under Section 77 of Companies Act has already been dealt and rightly rejected. Present is a case where charge on the assets of

the Corporate Debtor was created by virtue of law i.e. Section 13-A and registration of charge under Section 77-78 of Companies Act is inconsequential. We, thus, endorse the above view taken by the Adjudicating Authority that non-registration of charge in favour of Greater Noida Authority was inconsequential. The Adjudicating Authority being aware that lease rentals are due on the Corporate Debtor also directed the parties to file affidavit. In Para 11 of the judgment details of dues have been noticed.

15. Judgment of Hon'ble Supreme Court in ***“State Tax Officer vs. Rainbow Paper Ltd., 2022 SCC Online SC 1162”*** relying on Section 48 of Gujrat Vat Tax Act held that charge to be statutory, which judgment also fully supports the submission of counsel for the Respondent.

16. In view of the foregoing discussion, we are of the view that decision of the Adjudicating Authority declaring the Greater Noida Industrial Development Authority as Secured Operational Creditor does not warrant any interference in this appeal.

17. The order dated 24.07.2023 passed in I.A. No.4869 of 2022 is upheld. Consequently, Company Appeal (AT) (Ins.) No.1147 of 2023 is dismissed.

18. The order dated 30.08.2023 passed in I.A. No.4588 of 2023 being based on the order dated 24.07.2023 in I.A. No.4869 of 2022, the order

dated 30.08.2023 is also upheld in view of upholding of order dated 24.07.2023, as aforesaid.

19. In result, both the Appeals are dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

NEW DELHI

09th April, 2024

Archana