

New Okhla Industrial Development ... vs Nilesh Sharma Resolution Professional on 8 March, 2022

National Company Law Appellate Tribunal
Principal Bench, New Delhi
COMPANY APPEAL (AT) (INSOLVENCY) No. 288 of 2021
(Arising out of Order dated 02nd March, 2021 passed by National Company
Law Tribunal, Division Bench, Delhi, Bench III, in IAs- 4538 & 5050 of 2020
in IB- 1771/ND/2018).

IN THE MATTER OF:

New Okhla Industrial Development Authority
Main Administrative Building,
Sector 6, Noida, Uttar Pradesh - 201301.
(Through its Chief Executive Officer)

...Appellant

Versus

1. Mr. Nilesh Sharma
Resolution Professional of Dream Procon Pvt.
Ltd.
D-54, First Floor, Defence Colony,
New Delhi - 110024.

...Respondent No. 1

2. Victory Ace Social Welfare Society
1703, Block W, Homes 121, Sector-121
Noida, Uttar Pradesh - 201301.
(Through its President, Mr. Sushil Kumar)

...Respondent No. 2

For Appellant: Mr. Sanjiv Sen, Sr. Advocate alongwith
Mr. Sourav Roy, Mr. Kaushal Sharma and
Mr. Prabudh Singh, Advocates.

For Respondent No. 1: Mr. Abhijeet Sinha, Mr. Palash Singh and
Mr. Milan Singh Negi, Advocates for RP/R-1.

For Respondent No. 2: Mr. Prithu Garg & Mr. Yudhveer Singh Rawal,
Advocates for Caveator/R-2.

JUDGEMENT

[Per; Shreesha Merla, Member (T)]

1. Challenge in this Company Appeal Insolvency No. 288 of 2021 is to the Common Impugned Order dated 02/03/2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Division Bench, Delhi, Bench III), in IA 4538 of 2020 in IB - 1771/ND/2018 filed by 'M/s. Victory Ace Social Welfare Society' (hereinafter referred to as 'Victory Ace') and IA 5050 of 2020 filed by

'New Okhla Industrial Development Authority', (hereinafter referred to as 'NOIDA') respectively. By the Impugned Order, the Adjudicating Authority has allowed the IA filed by the Resolution Professional and dismissed I.A. 5050 of 2020 filed by NOIDA/the Appellant herein, observing as follows:

17. We are further in agreement with the contention of the Applicant/(that through the instrument of JDA, the CD has only right- in-personam against the Lessee i.e., Logix and the said right of CD is limited developing the residential complex for which the allottees paid directly the CD upon various stages of completion of the project.

All future FSIs remained with Logix (the original Lessee of the Land). It is clear from terms of JDA that CD has a limited role of undertaking development of residential project acting jointly with Logix.

18. In the present case, it is seen that existence of JDA was in the knowledge of NOIDA and all approvals as required under the Lease Deed have been granted by the said authority. In effect, there has been implied acceptance of the JDA by NOIDA authority. NOIDA Authority has raised the issue of entering into JDA by CD with Logix only when the Resolution Professional was asked by this Tribunal to approach the said authority and seek its participation in CIRP, and has come up with the argument that the said Development Agreement. has been entered into without its due permission. This argument of NOIDA seems to be an attempt to remain away from the CIRP process at this stage, which could result in a situation where commitments made to the Allottees would not be fulfilled and the rights of homebuyers will get jeopardized. Such a situation cannot be allowed to happen in the instant case in the light of the ratio laid down by the Hon'ble Supreme Court in the matter of Bikram Chatter & Ors. Vs. Union of India & Ors., (supra). The same is relied upon by the Resolution Professional in his reply.

19. The counsel for NOIDA has heavily relied upon the judgement of Hon'ble Supreme Court in the matter of Municipal Corporation of Greater Mumbai (MGM) Vs. Abhilash Lal & Ors, in Civil Appeal No. 6350 of 2019 Company Appeal (AT) (Insolvency) No. 288 of 2021 in support of his contention that NOIDA authority cannot be asked to become member of CoC. However, the facts of present case are different from those of the above case. In the instant case, the Applicant is seeking participation of NOIDA authority in CIRP to ensure that the said process could go on without any hindrance and objection from any quarter, since NOIDA is a necessary party being owner (Lessor) of the land upon which CD is constructing the project in terms of JDA entered into with Logix (the Lessee). In any case, even otherwise, when NOIDA becomes part of COC to the extent of its dues against CD in terms of JDA, the same shall be protected in terms of the Claim, which it may file before Resolution Professional.

20. To sum up, we take a holistic view of the entire matter and deem it fit to protect the interests of homebuyers in terms of objective of the Code.

Therefore, we are of the considered opinion that under the given facts and circumstances, NOIDA Authority is directed to lodge its due claim with Resolution Professional as per law and participate

in the CIRP process through duly Authorised person and attend all future CoC meetings participate in the discussions/ negotiations on the Resolution Plans submitted by prospective Resolution Applicants, and give consent to the Resolution Plan sought to be approved by the CoC."

2. Submissions of the Appellant:

It is submitted by the Learned Counsel for the Appellant that pursuant to the Group Housing Scheme GH-2011-(I), the Appellant vide Allotment Letter dated 08/04/2021 allotted an area of 1,00,090 sq. mtrs. to the consortium of Companies headed by M/s. Logix Soft-tel Pvt. Ltd. for the purpose of developing a Group Housing Project. Thereafter as per the site plan prepared by the Engineering Department, in partial modification of the Allotment Letter, the revised area of 1,00,080.98 sq. mtrs., was informed to the consortium of Companies. Vide another letter dated 08/06/2011, the name of M/s. Logix City Developers Pvt. Ltd., (hereinafter referred to as 'Logix') was Company Appeal (AT) (Insolvency) No. 288 of 2021 specified as the Special Purpose Company (SPC) for entering into a Lease Agreement. Subsequently, a Lease Deed was entered into for a period of 90 years, as per which terms, the lessee was liable to pay a lease premium of Rs.2,35,69,07,079/-. An amount of Rs.23,56,90,707.90/- was paid by the lessee at the time of signing of the Lease Deed and the remaining amount was to be paid by the lessee in 16 half yearly instalments commencing from 07/10/2013. It is submitted that in addition to the payment of the premium amount, the lessee was also liable to pay the advance lease rent equivalent to 1% of the total plot premium to the Appellant herein. The lessee also had an alternative option of paying the 'One-Time Lease Rent' equivalent to 11% of the total premium amount. As per the said Lease Deed, the lessee could sub-divide the subject premises into smaller plots and could have transferred the same to any third party with the prior approval of the Appellant herein and after due payment of transfer charges to the Appellant as per the prevailing policy. The lessee has the option to sub-lease the portion of the subject premises which is dealt with in Clause (c) of the Lease Deed. The Learned Counsel contended that this option to sub-lease was to be done only with the prior approval of the Appellant herein. If the lessee violated any of the terms of registration/allotment/lease or failed to deposit the amount, the Appellant had the right to terminate the Lease Deed.

The lessee was not allowed to assign or change its role under the said Lease Deed and in case of contravention of the same, the lease could Company Appeal (AT) (Insolvency) No. 288 of 2021 have been cancelled by the Appellant herein. The Learned Counsel drew our attention to Clause 12 of the Lease Deed which refers to 'Cancellation'.

After the signing of the said Lease Deed, the lessee entered into a Joint Development Agreement (JDA) on 08/03/2013 with M/s. Dream Procon Pvt. Ltd. ('Corporate Debtor'), whereby the lessee illegally sub- divided the subject premises and transferred the sub-divided area of 6,00,000 sq. ft. of FSI to the 'Corporate

Debtor', portraying itself as the owner of the said premises.

As per Clause 2 of the JDA, the lessee illegally transferred certain development rights in the demised premises to the 'Corporate Debtor'. These development rights included right to develop, market and sell 6,00,000 sq. ft. of Floor a Spare Index (FSI) in the subject premises. It is vehemently contended that the JDA was signed by the lessee in a clandestine manner without obtaining any prior approval from the Appellant herein. Clause 3 of the JDA stipulated the 'Corporate Debtor' to pay an amount of Rs.70,04,00,000/- to the lessee as a non- refundable Security Deposit, for which the 'Corporate Debtor' agreed to provide 60,00,000 sq. ft. of the build-up FSI to the lessee. As per Clause 4 of the JDA, the 'Corporate Debtor' agreed to pay the lease premium and the interest proportionate to its FSI share of 6,00,000 sq. ft. in the premises to the Appellant herein. As per Clause 1.1 of the JDA an amount of Rs.42,96,00,000/- was to be paid by the 'Corporate Debtor' to the Appellant herein towards its share of the amount.

Company Appeal (AT) (Insolvency) No. 288 of 2021 As per Clause 9 of the JDA, the lessee wrongfully represented to the 'Corporate Debtor' that it has all the authority and legal rights to engage in the transaction contemplated in the said JDA. The JDA tantamounts to a transfer under the said Lease Deed. The Agreement to sell entered into between the lessee and the 'Corporate Debtor' is non-est in law as the lessee has no ownership rights whatsoever in the subject premises. Pursuant to the execution of the JDA, the lessee executed the General Power of Attorney (GPA) dated 23/10/2013 authorising the 'Corporate Debtor' to construct, develop and sell 516 units/flats proposed to be built on the said premises. The lessee authorised the 'Corporate Debtor' to execute a Tripartite Agreement, NOC and permissions to mortgage the land/flats in favour of the allottee/bank.

The Appellant, lessee and M/s. Docile Buildtech Pvt. Ltd. (100% owned subsidiary company of lessee) entered into a Sub-Lease Agreement dated 20/09/2018, whereby the lessee transferred an area of 13,961 sq. mtr., in favour of M/s. Docile Buildtech Pvt. Ltd. The Adjudicating Authority vide Order dated 06/09/2018, admitted the Section 7 Petition against the 'Corporate Debtor' and initiated CIRP Proceedings, during the pendency of which M/s. Victory Ace Social Welfare Society/the second Respondent, a society comprising of 234 allottees of residential units/flats in the Project of the 'Corporate Debtor' approached the Adjudicating Authority vide IA 4538 of 2020 praying for impleadment, which was allowed.

The Adjudicating Authority vide Order dated 21/10/2020 directed the Resolution Professional to make a representation with the Appellant Company Appeal (AT) (Insolvency) No. 288 of 2021 seeking its consent for inviting a Resolution Plan in respect of the 'Corporate Debtor'. In compliance with this Order, the RP sent a letter dated 23/10/2020 along with copies of the JDA, GPA and Agreement to sell, requesting it to participate in the CIRP Proceedings. Learned Counsel vehemently contended that it was only at this time that the Appellant became aware of the existence of the JDA, the Agreement to sell and the GPA.

IA 5050 of 2020 dated 12/11/2020 was preferred by the Appellant herein seeking directions to the RP to exclude the said premises from the pool of assets of the 'Corporate Debtor' mainly on the ground that the Agreement was executed by the Lessee in a covert manner without the approval of the Appellant which is against the provisions of the terms entered into between M/s. Logix and the Appellant. Learned Counsel strenuously argued that the 'Corporate Debtor' had no rights over the subject premises as the JDA, GPA and Agreement to sell are non-est in the eyes of law. The asset does not belong to the 'Corporate Debtor' under Section 18 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'the Code'), since the interest was not transferred legally by the lessee to the 'Corporate Debtor'. Approval of the Project by UPRERA would not vest any title to the 'Corporate Debtor' in respect of the subject premises.

Learned Counsel also filed Additional Written Submissions reiterating the facts and the submissions made and further submitted that the Ledger Statements of the Appellant show that no payments were made by the 'Corporate Debtor' to the Appellant. The advertisements were Company Appeal (AT) (Insolvency) No. 288 of 2021 issued by the various unknown parties such as 'Victory Infra Projects Private Limited', where even the basic details were not mentioned. Even in the sub-Lease Deed executed between the lessee, the Appellant and M/s. Docile Buildtech Pvt. Ltd. on 20/09/2019, which sub-divided the subject premises into three different portions the lessee made no disclosure whatsoever about the existence of the said JDA, GPA and Agreement to sell.

Learned Counsel placed reliance on the Judgements of the Hon'ble Supreme Court in 'Hotel Queen Road Pvt. Ltd.' Vs. 'Union of India & Ors.', (2015) SCC DEL 9807 in which it was held that the right of ownership over a property in case of lease is not determined on the basis of the duration of the lease and a lease, even if for 99 years does not confer any 'ownership rights' on the lessee. Learned Counsel also placed reliance on the Judgement of the Hon'ble Supreme Court in 'Mohd. Noor & Ors.' Vs. 'Mohd. Ibrahim & Ors.' (1994) 5 SCC 562 enunciating the concept of ownership of the immovable property and drew our attention to para 5 which reads as follows:

"5. Austin in his book of Jurisprudence, 3rd Edition, Page 817 defines the right ownership' as 'a right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing.' The theoretical concept of 'ownership', therefore, appears to be that a person can be considered to be owner if he has absolute dominion over it in all respects and is capable of transferring such ownership. Heritability and transferability are not doubt some of the many and may be most important ingredients of ownership. But they by themselves cannot be considered as sufficient for clothing a person with absolute ownership. Their absence may establish lack of ownership but their presence by itself is not sufficient to establish it. The ownership concept does not accord with the status of Company Appeal (AT) (Insolvency) No. 288 of 2021 a person who is paying the rent. A tenant under various legislations either urban or rural property, agricultural or otherwise, enjoys right of heritability and transferability. At the same time, he does not become owner of the property. Transfer of ownership is distinct and different from transfer of interest in the property. A licensee or even a tenant may be entitled by law to transfer his interest in the property but that is not a transfer of ownership. For instance, a

lessee from a corporation or a local body or even State Government to raise building may have heritable and transferable right but such a person is not an owner and the transfer in such a case of his interest in the property and not the ownership. In *Inder Sen and Anr. v. Naubat Singh and Ors.* I.L.R. 7 All. 553 it was held that absolute ownership is an aggregate of compendium of rights such as right of possession, the right of enjoying usufruct of the land and so on and so forth. The ownership, therefore, is a sum total of various subordinate rights. The right to transfer the subordinate right either under general law or statutory law does not make it transfer of ownership. Section 6 of the Transfer of Property Act, 1882 permits transfer of any property. It may be transfer of absolute or subordinate right....."

3. Submissions of the first Respondent/Resolution Professional (RP):

Learned Counsel for the RP submitted that a Lease Deed was entered into between NOIDA/Appellant and M/s. Logix on 08/06/2011; that the JDA was executed on 08/03/2013 between M/s. Logix and the 'Corporate Debtor'; that the JDA recognised NOIDA as the 'owner' of the plot; that the 'Corporate Debtor' in pursuance of the Lease Deed and JDA, commenced construction of the Group Housing Project in the name and style of 'Victory Ace' and the said Project was duly registered under UPRERA; that while the Project was under construction, CIRP was commenced on 06/09/2019; during the CIRP as the CoC and RP were looking to consider the Resolution Plan, it was felt that NOIDA has certain claims arising out of the lease premium payable and in order to Company Appeal (AT) (Insolvency) No. 288 of 2021 balance the interest of all stakeholders, 'Victory Ace Society' (Homebuyers Association) having 234 allottees, preferred IA 4583 of 2020.

A representation dated 23/10/2020 was issued by the RP to NOIDA with a request to participate in the CIRP of the 'Corporate Debtor'. In response to the said representation, NOIDA vide communication dated 06/11/2020, denied to participate in the CIRP on the basis that the JDA was non-est in law. NOIDA also informed that they have no contractual relationship with the 'Corporate Debtor' and preferred an IA Application 5050 of 2020 with a prayer that the said premises should not be included as an asset of the 'Corporate Debtor'. The Project 'Victory Ace' was duly approved by the Appellant and accordingly 80% construction work was completed after getting the approval for the Building Plans, Water Supply Plan and Water Disposal Plan etc., from the Appellant as per the statutory requirements. As per Section 4(2)(c) of RERA Act, 2016, a Project could not be registered without submitting the authenticated copy of approvals and Commencement Certificate from the Competent Authority. In the instant case, the Project of the 'Corporate Debtor' was duly registered with UPRERA.

The JDA and the development of the Project and the subject premises, was well within the knowledge of the Appellant who is now taking a contrary stand and trying to defeat the CIRP which would adversely affect more than 500 homebuyers.

Company Appeal (AT) (Insolvency) No. 288 of 2021 The Resolution Professional duly performed his duties and took control and custody of the assets of the 'Corporate Debtor' as mentioned in the Balance Sheet as under Section 18(1)(f); the development rights have vested in the 'Corporate Debtor' is admittedly a proprietary right of the 'Corporate Debtor'. The RP did not create any pool of asset for the CIRP. The JDA is a valid contract and with duly recognises in the recitals that NOIDA is the 'sole owner' of the said plots. M/s. Logix has been recognised as the 'sole lessee' of the said plot. The term 'Owner' assigned to M/s. Logix in the said JDA is merely with a purpose of convenience and does not confer any such title to M/s. Logix. The 'Corporate Debtor' is defined as a Joint Developer in the JDA and as per Clause 2, development right over the FSI of 6,00,000 sq. ft. were granted in favour of the 'Corporate Debtor' and this does not amount to any change in the role of M/s. Logix and assigned under the Lease Deed.

The Construction Clause under the Lease Deed provides that the construction shall be as per the Building Plan approved by NOIDA which is strictly being adhered to. The Lease Deed is an admitted document based on which the rights of development, sub-Lease Deed and transfer of plots was exclusively transferred by the Appellant in favour of M/s. Logix. The parties to the JDA have duly ensured that all the terms and conditions laid down by the Appellant and Lease Deed were adhered to and there is no violation of the covenants of the Lease Deed regarding approvals, payments, etc. Company Appeal (AT) (Insolvency) No. 288 of 2021 Learned Counsel strenuously contended that Resolution Plan submitted by the second Respondent has been approved by the CoC on 07/05/2021 by over 90% votes and despite the fact that the Appellant had not filed its claim, the second Respondent in the Resolution Plan allocated a sum of Rs.10 Crs./- towards the dues payable under the Lease Deed while leaving it open to the Appellant to recover its remaining dues, if any, to M/s. Logix.

The Learned Counsel relied on the Judgements of the Hon'ble Supreme Court in 'Bikram Chatterjee & Ors.' Vs. 'Union of India', (2019) 19 SCC 161 in support of his case.

4. Submissions of the second Respondent/'Victory Ace Welfare Society':

The Project was formerly registered with UPRERA and the Building Plans were prepared and submitted to the Appellant and also approved by the Appellant. All details about the Project were always in public domain and well within the knowledge of the Appellant. Further, in terms of the JDA, the 'Corporate Debtor' was liable to pay proportionate lease premium and rent to the Appellant, which the 'Corporate Debtor' duly paid and the Appellant accepted these payments from time to time. It was only based on the approvals given by the Appellant that the 'Corporate Debtor' completed 80% of the construction activity on the subject land.

The Appellant raised no objection to the Project for over 7 years and fully accepted the performance of the parties under the Lease Deed and the JDA. For the very first time an objection was raised on 06/11/2020, Company Appeal (AT) (Insolvency) No. 288 of 2021 in reply to the representation made by the RP in furtherance of the direction given by the Adjudicating Authority in IA 4538 of 2020. The Lease Deed does not require that the development activity to be carried out by M/s. Logix itself and therefore does not prevent M/s. Logix from transferring the development rights in the Project land to the 'Corporate Debtor'. The 'Development Rights' are independent of the leasehold rights over the property and are freely transferable in law. The Lease Deed only requires the permission of the Appellant for creation of the sub-lease rights, but not for transferring development right per se. JDA only creates development rights in favour of the 'Corporate Debtor' as the 'Corporate Debtor' has been authorised by GPA to carry out construction and marketing of the completion. There is no registered instrument by a payment of stamp duty as would be required if M/s. Logix were to create any form of leasehold interest in favour of the 'Corporate Debtor'.

Since the execution of the JDA, the Project is in occupation of the 'Corporate Debtor' and therefore the ratio of the Hon'ble Supreme Court in 'Rajendra K. Bhutta' Vs. 'Maharashtra Housing and Area Development Authority & Anr.' (2020) 13 SCC 208 in paras 7, 8 and 19 is squarely applicable to the facts of this case. In this decision, it was held that as the development rights constitute the property of the 'Corporate Debtor' and not attempt to dispossess the developer can be made by the landowner/authority during the CIRP in view of Section 14(1)(d) of the Code.

Company Appeal (AT) (Insolvency) No. 288 of 2021 This Tribunal in 'Victory Iron Works Ltd.' Vs. 'Jitendra Lohia, RP of Avani Towers Ltd. & Ors., Company Appeal (AT) (Insolvency) No. 507 & 377 of 2020, has also taken the same view and held that since the development Agreement of the 'Corporate Debtor' was not terminated by the landowner before the commencement of CIRP, the protection under Section 14 of the Code will apply.

A bare perusal of the terms of the JDA, and also the Builder Buyer Agreement issued by the 'Corporate Debtor' to the allottees, clarifies that both M/s. Logix and the 'Corporate Debtor' have clearly represented that the Appellant is the 'owner' of the plot and M/s. Logix is only a 'lessee' of the plot.

The Appellant has not chosen to file their 'Claim' despite a representation and direction but instead decided to contest the validity of the JDA on vexatious ground.

On 31/05/2021, the Appellant has issued a letter stating that it is in the process of filing the claim before the RP. Hence, the Appeal has adopted as contradictory stand inasmuch as of one in it has denied the rights of the 'Corporate Debtor' in the Project land and on the other hand it has sought permission to file its claim before the RP.

The Resolution Plan submitted by the second Respondent has been accepted by the CoC and is pending approval before the Adjudicating Authority. An amount of Rs.10 Crs./- was allocated to the Appellant towards its dues and is also entitled to recover the dues from M/s. Logix.

Company Appeal (AT) (Insolvency) No. 288 of 2021 80% of the construction has been completed and the rights of over 500 buyers hangs in balance on account of the stand taken by the Appellant. The Appellant being a statutory authority is under the legal duty and obligation to protect the interest and rights of the homebuyers. The Hon'ble Supreme Court in 'Bikram Chatterji & Ors.' Vs. 'Union of India', (2019) 19 SCC 161 has held that innocent homebuyers cannot be left in the lurch and hence this Appeal is devoid of any merits and is liable to be dismissed with costs. Analysis

5. For the sake of brevity, the facts admitted are not being repeated.

6. At this juncture, this Tribunal addresses to the contention of the Appellant that the 'Corporate Debtor' has no rights over the subject premises as the JDA, GPA and the Agreement to sell are non-est in the eyes of law; that the JDA was entered into clandestinely by the 'Corporate Debtor' and the Appellant is the 'sole owner' of the premises.

7. For better understanding of the issue on hand, Clause(c) of the Lease Deed dated 08/06/2011 entered into between NOIDA and M/s. Logix City Developers Private Limited is reproduced as hereunder:

"c) EXECUTION OF SUB LEASE DEED

1. After the approval of the lay-out plan by the Lessor, the lessee shall have the option to sub-lease portions of land earmarked for group housing, subject to minimum plot size of 10,000 Sqm, and adherence to the planning norms of the Lessor, after prior approval from the Lessor.

2. The Lessee shall sub-lease an*area only once the internal development work such as internal-roads, sewerage, drainage, culverts, water-supply, electricity distribution/transmission lines, street-lighting, etc. in that area is in progress.

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3. The Lessee shall have to execute the sub-lease deed in favour of the Sub Lessee in the form and format as prescribed by the Lessor.

4. On execution of such sub-lease deed(s), the sub- lessee(s) will be bound to comply with the provisions of payment of proportionate share of the lease premium, lease rent and all other charges payable to the Lessor in the proportionate share of the land area so sub-

leased. Any default on the part of such sub-lessee to fully implement the terms and conditions of the lease deed /sub-lease deed/ scheme shall not be automatically considered as default of the Lessee. The Lessor shall be entitled to take any action against the sub-lessee as well, including cancellation of the sub- lease and forfeiture of the premium etc. as per the terms and conditions of Brochure of the Scheme."

(Emphasis Supplied)

8. It is the main case of the Appellant that prior approval from the lessor has not been taken as contemplated under the aforementioned Clause before sub- leasing portion of the land to the 'Corporate Debtor' for development of the Housing Project. It is also the case of the Appellant that they had no knowledge about the existence of the said JDA, GPA and Agreement to sell. At this juncture, it is relevant to reproduce the 'CONSTRUCTION' Clause as stipulated in the Lease Deed dated 08/06/2011:

"CONSTRUCTION

1. The Lessee is required to submit building plan together with the master plan showing the phases for execution of the project for approval within 6 months from the date of possession and shall start construction within 12 months from the date of possession. Date of execution of lease deed(s) shall be treated as the date of possession. The Lessee/Sub- lessee(s) shall be required to complete the construction of group housing pockets on allotted plot as per approved layout plan and get the completion/occupancy certificate issued from Building Cell Department of the LESSOR in maximum 5 phases within a period of 7 years from the date of execution of the lease deed(s). The lessee/Sub-lessee(s) shall be Company Appeal (AT) (Insolvency) No. 288 of 2021 required to complete the construction of minimum 15% of the total F.A.R. of the allotted plot as per approved layout plan and get temporary occupancy/completion certificate of the first phase accordingly issued from the building cell of the LESSOR within a period of three years from the date of execution of lease deed/Sub- lease deed."

(Emphasis Supplied)

9. This CONSTRUCTION Clause under the Lease Deed provides that the construction shall be as per the Building Plans approved by the Appellant/NOIDA. It is based on the Lease Deed, of M/s. Logix. The 'Corporate Debtor' has entered into the said JDA, whereby the development rights and other privileges over the said Project premises has been transferred by M/s. Logix in favour of the 'Corporate Debtor'. As regarding the contention of the Appellant that NOIDA is completely unaware of the said Project and any sort of construction activity going on, is untenable specially in the light of Annexure R-3 which refers to the Project namely i.e., 'Victory Ace', the Registration Date being 18/03/2019 and the 'signing Competent Authority' being 'NOIDA Authority'. It is relevant to note that the 'original start date' is given as 15/10/2012 and the 'proposed completion date' is 31/12/2019. The said document is not denied by NOIDA. It is pertinent to note that NOIDA has

extended permission to this Project on 08/01/2014. For better understanding of the permissions accorded by NOIDA on 08/01/2014, the relevant document is being reproduced as hereunder:

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10. It is seen that the Appellant/NOIDA had extended permissions for the Building Plans; that the Project 'Victory Ace' is registered under UPRERA which establishes that all copies of approvals and Commencement Certificate from the Competent Authority were submitted in compliance of Section 4(2) of RERA Act, 2016. Keeping in view these reasons, we are of the view that the stand taken by the Appellant that they were not in knowledge of the Group Housing Scheme at Plot H-02, Sector 143 NOIDA, is unsustainable.

11. Now this Tribunal addresses to the contention of the Appellant that the JDA is not a valid contract in the eyes of law. In terms of the Lease Deed, M/s. Logix was entitled to sub-divide the plot into smaller plots and not less than 10,000 sq. mtr., each and develop the Housing Project. Accordingly, M/s. Logix sub-divided the plot into smaller landholdings and entered into a JDA with the third party developer/the 'Corporate Debtor'. Vide a Joint Development Agreement dated 08/03/2013, the 'Corporate Debtor' came into the occupation of the Project land. It is also seen from the record that the 'Corporate Debtor' rightly advertised the Project on Print and Digital Media. The material on record establishes that all details of the Project were in public domain and therefore the stand of the Appellant that they had absolutely no knowledge about the Project, holds no water. It is also seen from the record that the Project commencement date was 2012 and the completion date was 2019. There is no documentary evidence filed by the Appellant showing any sort of objection raised by them for this 7 year period.

12. A perusal of the JDA shows that the Agreement only creates development rights in favour of the 'Corporate Debtor' which is authorised by a GPA to carry out construction and sale of the flats. There is no leasehold Company Appeal (AT) (Insolvency) No. 288 of 2021 interest created in favour of the 'Corporate Debtor'. There is no Clause in the Lease Deed which prevents M/s. Logix from transferring development rights or creating a sub-lease right to a third party.

13. Adverting to the submissions of the Learned Counsel for the Appellant that M/s. Logix has represented it as the 'Owner', it is relevant to reproduce the portion of the JDA to ascertain whether M/s. Logix has claimed to be the owner of the subject land:

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14. It is the case of the Appellant that the aforementioned JDA describes M/s. Logix as the 'Owner' which is illegal. A careful reading of the JDA shows that the Appellant/NOIDA is shown as 'the sole owner' of Plot No. GH-02. A comprehensive reading of all the terms and conditions show that pursuant to the registered Lease Deed dated 08/06/2011 leasehold rights were granted to M/s. Logix and it is clearly stated in the JDA that it considers itself the 'sole lessee' of the plot. The JDA read with the

Allotment Letter and the Builder Buyer Agreement further strengthens the case of M/s. Logix that both M/s. Logix and the 'Corporate Debtor' have clearly repeated that the 'NOIDA is the Owner of the Project land' and M/s. Logix is only a 'lessee of the plot'. For all the aforementioned reasons, this Tribunal is of the earnest view that the issue raised by the Appellant regarding the usage of the word 'Owner' with reference to M/s. Logix in the JDA, is misconceived.

15. Section 3(27) of the Code reads as follows:

"3(27) "property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;"

16. The Hon'ble in 'Rajendra K. Bhutta' Vs. 'Maharashtra Housing and Area Development Authority & Anr.' (2020) 13 SCC 208 in paras 18 and 19 observed as follows:

"18. The matter had come to this Court after the Adjudicating Authority had approved of a certain resolution plan, unlike in the facts of the present case, and what was clear, on the facts of that case, was that a show cause notice of the Municipal Corporation, which preceded admission of the insolvency resolution process, made it clear that assets of MCGM could not possibly be subsumed within a resolution plan without its approval/permission. It was in this context that this Company Appeal (AT) (Insolvency) No. 288 of 2021 Court, in para 47 of the said judgment, stated that Section 238 of the Code 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. "Properties" was referred to in this judgment as referring to assets of the corporate debtor. We have seen how, in the facts of this case, we are not concerned with the assets of the corporate debtor, least of all the assets of MHADA. The limited question before us is as to whether Section 14(1)(d) of the Code will apply to statutorily freeze 'Occupation' that may have been handed over under a Joint Development Agreement.

19. Likewise, the recent judgment Sushil Kumar Agarwal (supra) deals with specific performance and whether a Development Agreement may be specifically performed. The ratio of that judgment appears to be that where Development Agreements create an interest in property, they may be specifically performed, but not otherwise. As we have pointed out herein above, it is clear that Section 14(1)(d) of the Insolvency & Bankruptcy Code, when it speaks about recovery of property "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property. For this reason also, this judgment is wholly distinguishable."

17. It is clear from the provisions of this Section that the development rights vested in the 'Corporate Debtor' is a proprietary right and the rights under JDA fall within the definition of the term 'Propriety'. The 'Corporate Debtor' is defined as a 'Joint Developer' in the Joint Development Agreement and as per Clause 2 of the Agreement, the development rights over the FSI of 6,00,000

sq. ft. were granted in favour of the 'Corporate Debtor'. This does not amount to any change in the role of M/s. Logix as can be seen from the Lease Deed. At this juncture, it is significant to mention that Clause 4 of the JDA stipulates that the lease premium specified under the Lease Deed was to be paid by the 'Corporate Debtor'. All the payment schedules stipulated under the Lease Company Appeal (AT) (Insolvency) No. 288 of 2021 Deed were to be strictly adhered to. Clause 4 of the JDA entered into between M/s. Logix and the 'Corporate Debtor' is detailed as hereunder:

(Emphasis Supplied)

18. As regarding the 'Project Development' Clauses 5.1 and 5.2 are also relevant and reproduced as hereunder:

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19. These Clauses evidence that the development activity was to be executed as per the plans approved by the Appellant/NOIDA. It is clearly specified that even if the change is a material one, the Joint Developer shall not have the liberty to change the nature of development of the Project or amend the construction plans, 'duly approved by NOIDA'.

20. Having accepted the lease premium amounts towards lease premium and lease rentals under the Lease Deed and benefited therefrom, the Company Appeal (AT) (Insolvency) No. 288 of 2021 Appellant cannot now turn around and say that they are completely unaware of the Project or that the JDA is non-est in the eyes of the law.

21. Additionally, we do not find any substantial reasons given by the Appellant to have not exercised their rights to cancel the Lease Deed in view of their stand that M/s. Logix had sub-leased the property without their approval and in contravention of Clause 5 of the Lease Deed. Clause No. 12 clearly mentions that the lessee/sub-lessee shall not be allowed to change his role otherwise the lease/sub-lease can be cancelled and the entire amount deposited shall be forfeited. There is no whisper with respect to any steps taken by the Appellant to cancel the Lease Deed. It is beyond comprehension as to how the Appellant/NOIDA could have overlooked this factual scenario for 7 long years, having approved the Building Plans, having accepted the premium amounts and the lease rentals and now at this stage of CIRP, stating that they were completely unaware of any such Housing Project coming up, is completely untenable. Clause 12 of the Lease Deed reads as hereunder:

"12. The Lessee/sub-lessee shall not be allowed to change his role, otherwise the lease/sub-lease shall be cancelled and entire money deposited shall be forfeited."

22. At the cost of repetition there are no substantial reasons given by the Appellant for not having exercised their legal right in invoking Clause 12 of the Lease Deed and cancelling the Agreement.

23. We are also conscious of the fact that the Appellant NOIDA has challenged the Order passed by the Adjudicating Authority inter alia directing the Appellant to participate in the CIRP of the

'Corporate Debtor' and submit its claim before the RP. It is the case of the Resolution Applicant/second Respondent that the Appellant/NOIDA had taken a contradictory stand in its Company Appeal (AT) (Insolvency) No. 288 of 2021 stay Application seeking a direction to the RP not to close its right to lodge its claim against the 'Corporate Debtor' till the final disposal of the Appeal. Further, vide letter dated 31/05/2021 addressed to the second Respondent NOIDA had stated that action was being taken to file the 'Claim' before the RP. The Learned Counsel for the second Respondent argued that this was an inconsistent stand being taken by NOIDA and that NOIDA is unjustified in taking inconsistent positions and that the principle that 'one cannot approbate and reprobate only to defeat the proceedings or to delay and prolong them is completely unnecessary' as held by the Hon'ble Supreme Court in 'Joint Action Committee of Air Line Pilots' Association of India (ALPAI) & Ors.' Vs. 'Director General of Civil Aviation & Ors.' (2011) 5 SCC 435 is applicable to the facts of this case.

24. Keeping in view the decision of the Hon'ble Supreme Court in 'Rajendra K. Bhutta' (Supra), we are of the view that 'development rights' construe 'Property' of the 'Corporate Debtor' and hence we hold that the Resolution Professional has duly performed his duties as per Section 18(1)(a)(iii) and has taken control and custody of the assets of the 'Corporate Debtor' mentioned in the Balance Sheet in compliance of the provisions of Section 18(1)(f) and resultantly we do not find any deficiency of service on behalf of the RP.

25. The Hon'ble Supreme Court in 'Ebix Singapore Pvt. Ltd.' Vs. 'Committee of Creditors of Educomp Solutions Ltd. & Anr.', [2021 SCC OnLine SC 707] in its concluding paragraph observed as follows:

"202. The residual powers of the Adjudicating Authority under the IBC cannot be exercised to create procedural remedies which have substantive outcomes on the process of insolvency. The framework, as it stands, only enables withdrawals from the CIRP process by following the procedure detailed in Section Company Appeal (AT) (Insolvency) No. 288 of 2021 12A of the IBC and Regulation 30A of the CIRP Regulations and in the situations recognized in those provisions. Enabling withdrawals or modifications of the Resolution Plan at the behest of the successful Resolution Applicant, once it has been submitted to the Adjudicating Authority after due compliance with the procedural requirements and timelines, would create another tier of negotiations which will be wholly unregulated by the statute. Since the 330 days outer limit of the CIRP under Section 12(3) of the IBC, including judicial proceedings, can be extended only in exceptional circumstances, this open-ended process for further negotiations or a withdrawal, would have a deleterious impact on the Corporate Debtor, its creditors, and the economy at large as the liquidation value depletes with the passage of time. A failed negotiation for modification after submission, or a withdrawal after approval by the CoC and submission to the Adjudicating Authority, irrespective of the content of the terms envisaged by the Resolution Plan, when unregulated by statutory timelines could occur after a lapse of time, as is the case in the present three appeals before us. Permitting such a course of action would either result in a down-graded resolution amount of the Corporate

Debtor and/or a delayed liquidation with depreciated assets which frustrates the core aim of the IBC."

26. Though the aforementioned para speaks of withdrawals and modifications of 'Plans' submitted by the Resolution Applicants, the stress placed on the importance of timelines to be adhered to cannot be undermined. The Adjudicating Authority has allowed IA 4538 of 2020 filed by M/s. Victory Ace Social Welfare Society seeking a direction to NOIDA to participate in the CIRP Proceedings. This Application was allowed by the Adjudicating Authority with a direction to NOIDA to lodge its due 'Claim' with the RP as per law and participate in the CIRP Process through a duly authorised person and attend all the meetings. However, NOIDA preferred this Appeal seeking to set aside the Common Impugned Order dated 02/03/2021, instead of exercising their right in participating in the CIRP Proceedings and filing their 'Claim' before Company Appeal (AT) (Insolvency) No. 288 of 2021 the RP. Vide Order dated 07/04/2021, this Tribunal had rejected the prayer for filing of claim by the Appellant observing that the Resolution Plans were pending approval before the CoC. This Order has not been challenged and has attained finality. In the meantime, the CoC has approved the Resolution Plan by a majority of 90% votes on 07/05/2021.

27. Further we do not have 'equity jurisdiction' as held by the Hon'ble Supreme Court in 'Pratap Technocrats Private Limited & Ors.' Vs. 'Monitoring Committee of Reliance Infratel Limited & Ors.' (2021) 10 SCC 623, wherein the Hon'ble Apex Court has noted that 'under the Indian Insolvency Regime, a conscious choice has been made by the legislature to not confer any independent equity based jurisdiction on the Adjudicating Authority and the Appellate Authority'. The jurisdiction of the Appellate Authority under Section 61(3) in an Appeal against an Order wherein the Resolution Plan has been approved by the CoC is similarly placed and is strictly restricted and therefore this Tribunal cannot exercise any jurisdiction beyond what is expressly conferred. Having regard to the timelines and the observations made by the Hon'ble Supreme Court in the aforementioned 'Ebix Singapore Pvt. Ltd.' (Supra) read together with the fact that vide Order dated 07/04/2021, this Tribunal had closed the right of NOIDA, which closure has not been challenged and has attained finality, resultantly, this Tribunal is of the earnest view that being a time bound process and also keeping in view the interest of the homebuyers, this Appeal is dismissed with the aforementioned observations. Needless to add, the Learned Adjudicating Authority shall proceed in accordance with law.

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28. The Registry is directed to upload the Judgement on the website of this Tribunal and send the copy of this Judgement to the Learned Adjudicating Authority (National Company Law Tribunal, Division Bench, Delhi) forthwith.

[Justice Anant Bijay Singh] Member (Judicial) [Ms. Shreesha Merla] Member (Technical) NEW DELHI 08th March, 2022 ha Company Appeal (AT) (Insolvency) No. 288 of 2021