

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, DELHI
BENCH III

IA-2771 of 2020
In
IB -1771/ND/2018

Application U/S 60(5) of the IBC, 2016
r/w., Rule 11 of the NCLT Rules, 2016

In the matter of

Priyanshi Arora

... Financial Creditor

Versus

Dream Procon Pvt. Ltd.

... Corporate Debtor

In the Matter of

Shabeena Arshad & Anr.

....Applicant

Versus

Nilesh Sharma

Resolution Professional

...Respondent

Order delivered 2nd of March, 2021

CORAM:

CH. MOHD SHARIEF TARIQ, HON'BLE MEMBER (JUDICIAL)



**SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER
(TECHNICAL)**

For Applicant: Abhishek Anand and Radhika (Advocates)

*For Intervener/RP : Ms. Ashu Kansal and Mr. Milan Negi,
(Advocates for RP)*

ORDER

(Through Video Conferencing)

Per: NARENDER KUMAR BHOLA, MEMBER (TECHNICAL)

1. Under consideration is Application bearing No. IA-2771 of 2020 filed under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC, 2016") for issuance of Direction to the Resolution Professional of the Corporate Debtor to accept the claim in full filed by the Applicants.
2. The brief facts that compelled the Applicants to file the application under consideration are as follows: -

- i. The applicant invested in scheme of the Indirapuram Habitat Centre, Indirapuram, Ghaziabad ("Project") floated by the Indirapuram Habitat Centre Private Limited (IHCPL), the associate company of the CD. The payment of Rs. 37,23,876/- was made towards the booking of commercial space in 4 instalments after filling the application dated 28.06.2017. However, the IHCPL was not able to provide the Unit in the project. In the month of the February and March 2019, the representative of IHCPL approached the applicant for transfer of applicant's investment from IHCPL to CD's project namely 'Victory

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Ace', which was agreed by the applicant and swapping request letter was sent vide dated 03.03.2019 to the IHCPL.

ii. It is submitted that vide allotment letter No. VA-000993 the applicant was allotted Flat No. A2-0902 in Victory Ace for the Consideration of Rs. 45,94,625/- For the above flat the applicant paid a further amount of 6,00,000/-. The total amount including the payment to IHCPL, assured rent as per the MOU terms and other payments was Rs. 47,78,761/-. After the initiation of CIR process against the CD, the applicant filed its claim in prescribed Form before the Interim Professional Resolution on 29.10.2019 for Rs. 47,78,462/- plus interest amounting to Rs. 10,68,694/- (as per section 16A (7) of IBC). The claim amounting to Rs. 47,78,461/- was admitted by the IRP on 06.12.2019. However, the Resolution Professional (RP) unilaterally revised the claim amount and reduced it to 15,75,279/- vide updated list dated 17.06.2020.

iii. It is further submitted that the Resolution Professional himself vide process update dated 10.06.2020 clearly stated that the Resolution Professional was unable to get the tally data for the Corporate Debtor for the financial year 2018-19, 2019-20 and for earlier years and the data for F.Y. 2017-18 and 2018-19 (not complete) was made available on 05.06.2020. It is also stated by the Resolution Professional in the process update dated 10.06.2020 that the appointed Forensic Auditor, M/S S.P Chopra & Co. was not able to proceed with the audit of the Corporate Debtor due to non-availability of the books of account and the financial statements for F.Y 2018-19 and for the period up to 06.09.2019. The RP has completely eschewed the admitted claims of the previous Resolution Professional. As per section 18 and 25 of

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the IBC, it is the duty of RP/IRP to collate all claims submitted by the creditors but nowhere it is empowered to verify and admit or reject claims.

iv. The Applicant relied on the judgment of Hon'ble NCLAT namely, **Mr. S. Rajendaran, Resolution Professional of PRC International Hotels Private Limited v/s Jonathan Mousalidaran, CA (AT)(Ins) 1018/2019**. It was held in this judgment that:

"Having heard learned Counsel for the Appellant, we are of the opinion that the 'Resolution Professional' had no jurisdiction to "determine" the claim as pleaded in the Appeal. He could have only "collated" the claim, based on evidence and the record of the 'Corporate Debtor' or as filed by Jonathan Mousalidaran (Financial Creditor). If an aggrieved person thereof moves before the Adjudicating Authority and the Adjudicating Authority after going through all the records, comes to a definite conclusion that certain claimed amount is payable, the 'Resolution Professional' should not have moved in Appeal, as in any manner, he will not be affected"

The applicant also cited the judgment of Hon'ble Supreme Court namely, **Swiss Ribbons Pvt. Ltd. & Anr vs. Union of India & Ors**, in which Apex Court held that 'Resolution Professional has no adjudicatory power.

The Applicant also placed its reliance on judgment of Hon'ble Apex Court namely, **Committee of Creditors of Essar Steel India Limited vs Satish Kumar & Ors.** It has been held that the role of the RP is not adjudicatory but administrative.



3. The Resolution Professional filed its reply to the Application and argued on following grounds:

- i. It is submitted that the amount claimed by the Applicant was not reflected in the books of account of the Corporate Debtor and it has transpired that Applicant No.1 has paid an amount of Rs.15,29,057/- through cheques to IHCPL in June 2017 and same has been transferred to CD, apart from said amount, no other amount is being reflected in the books of account of CD and said revision was made as per regulation 14(2) of the CIRP Regulations. Hence, after verification the claim of the applicant was admitted to the tune of Rs.15,75,279/-. The respondent is entrusted with such duties of verification of claims as per regulation 13 of CIRP Regulations.
- ii. It is further submitted that the claim of the Applicant was not rejected as the RP has only revised the claim of the applicant as per the books of account of the CD as per regulation 14(2) r/w regulation 13 of CIRP regulation. Furthermore, the CIR Process is a timebound process and the IRP had admitted the claim of the Applicant to the tune of Rs. 47,78,461/- which was reduced after the receipt of the CRM data and tally data of the CD, wherein it was discovered that the alleged cash payment claimed to have been made by the Applicants could not be verified from the books of account of the CD.
- iii. It is submitted that the Answering Respondent at no. 1 of its list of financial creditors annexed at page 78 of the Application has duly mentioned that the amount of claim admitted may undergo a revision in case any additional information/documents come to notice of the Answering Respondent. Further, the Answering Respondent at note 3 has also clarified that the



amount admitted is based on actual amount received in the books of Corporate Debtor. The case of the Applicants that the Answering Respondent has exceeded its powers and rejected the claim of the Applicants is baseless and unfounded.

4. The Applicant also filed the rejoinder against the Reply filed by the resolution professional and argued that the RP completely relied on the data maintained by the fraudulent ex-directors, who are responsible for the initiation of CIR Process of the CD and neglected all the proofs submitted by the Applicant. The RP has neglected the handwritten receipt of Rs. 21,94,819/- issued by Mr. Rohit in the capacity of Employee of CD, which was not verified from the Ex-management. The RP ignored the transaction as reflected in form 26AS, Annual Tax Statement under section 203AA. Furthermore, the applicant duly disclosed that their flat in the IHCPL as their assets and filed the balance sheet and profit and loss. Moreover, the RP has not accepted the claim of first allottee of Flat no. A2-0902 and instead of allotting the flat to the Applicant, the RP reduced the admitted claim of the applicant. The Applicant also filed the written submissions and reiterated the same facts as mentioned in the Application and Rejoinder. Hence, not repeated for sake of brevity.

5. The main issue before this adjudicating authority is as to whether the Resolution Professional has rightly revised the claim of the Applicant to the tune of Rs. 15,75,279/-?

6. We have heard the counsel for petitioners as well as for the Respondent i.e., Resolution Professional, perused the petition and other material on placed on record. In this connection in order to decide the issue framed at para 5 above, it is considered appropriate to look to the duties of IRP/RP in relation to claims as

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mentioned under sections 18 and 25 of the Code and the IBBI Regulations. Section 18 of the Code states as under: -

*“18. Duties of interim resolution professional. — (1) the interim resolution professional shall perform the following duties, namely:- (a)******

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;”

Further Section 25 of the Code, *inter alia*, states as under:

“25. Duties of resolution professional. — (1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor;

(2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely: --

(e) maintain an updated list of claims;

(k) such other actions as may be specified by the Board.”

In the above background the IBBI has issued CIRP Regulations, 2016 to be followed by IRP/RP. The Regulations 10, and 13 of the said Regulations are relevant in the present case and the same are reproduce below for easy reference: -

“10. Substantiation of claims—The interim resolution professional or the resolution professional, as the case may be, may call for such other evidence or

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clarification as he deems fit from a creditor for substantiating the whole or part of its claim.

13. Verification of claims. — (1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claim admitted and the security interest, if any, in respect of such claims, and update it.”

7. The above provisions of the Code along with IBBI regulations, make it obligatory on part of IRP/RP to collate, verify and admit such claims of the creditors as are duly supported by appropriate evidence along with proper record in books of account of a corporate debtor. Therefore, the IRP/RP can always ask for such information/documents/evidence from creditors as is considered necessary for the purpose of verification/substantiation of the claims.

8. In the instant case, the petitioner has admittedly paid only an amount of Rs. 15,29,057/- to the Corporate Debtor, as is evident from books of account of the CD. This amount is duly supported by credible documentary evidence i.e., books of account and other accounting record of CD and verified by the RP. It is worthwhile to record that RP has to do the verification of claims strictly in accordance with accounting entries appearing in the CD's accounts. The payments claimed to have been made by petitioners in cash to the Mr. Rohit is not supported with any of the entries in the books account of the CD. The applicant himself admits in the application on hand that ex-directors are fraudulent. The independent legal remedies are available with the applicant to recover the amount, if any, from Mr.Rohit. But the



CIR Process can't be used to perpetuate fraud. Accordingly, it is noted that RP has admitted the claim of Rs.15,75,279/- after allowing interest @ 8% on Rs.15,29,057/- which is rightly calculated and the same is not arbitrary in nature and therefore does not warrant any direction to RP from this Authority.

9. In view of above the present IA is **dismissed**.

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(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)

-2d-

(CH. MOHD SHARIEF TARIQ)
MEMBER(JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH, DELHI
BENCH III

IAs-4538 & 5050 of 2020

In

IB -1771/ND/2018

Application U/S, 60(5) of the IBC, 2016 r/w

Rule 11 of the NCLT Rules, 2016

In the matter of

Priyanshi Arora

... Financial Creditor

Versus

Dream Procon Pvt. Ltd.

... Corporate Debtor

In The Matter of IA 4538/2020:

Victory Ace Social Welfare Society

...Applicant

Versus

New Okhla Industrial Development Authority (NOIDA) & Anr

....Respondent

In the Matter of IA 5050/2020

New Okhla Industrial Development AuthorityApplicant

Versus

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Contd.

Nilesh Sharma

Resolution Professional

...Respondent

Order delivered on 2nd March, 2021.

CORAM:

**CH. MOHD SHARIEF TARIQ, HON'BLE MEMBER (JUDICIAL)
SHRI NARENDER KUMAR BHOLA, HON'BLE MEMBER
(TECHNICAL)**

For Applicant: Mr. Rachit Malik, Advocate for Noida Authority in IA-5050 and Respondent-1 in IA-4538/2020.

Mr. Shailendera Singh, Mr. Prithu Garg and Ms. Athira Sankar, Advocate for applicant in IA-4538/2020.

For Intervener/RP: Mr. Manish Bishnoi and Mr. Milan Negi, (Advocates for RP)

ORDER

(Through Video Conferencing)

Per: NARENDER KUMAR BHOLA, MEMBER (TECHNICAL)

1. Under consideration are IAs. 4538, 5050/2020 filed under Section 60 (5) of the Insolvency and Bankruptcy Code. 2016 (hereinafter referred as "IBC, 2016") read with Rule 11 of the NCLT Rules.
2. The above are cross IAs, containing the similar facts and therefore, are taken together to pass a common order. The IA 4538/2020 is

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filed by the Victory Ace Social Welfare Society seeking the following reliefs: -

- a. Determine the question of law and fact as to the position of the Respondent No.1 in the present CIRP process;
- b. Implead the Respondent No. 1 as a party to the Corporate Insolvency Resolution Process of the Corporate Debtor in the present case;
- c. Direct the Respondent No. 1 to participate in the Corporate Insolvency Resolution Process of the Corporate Debtor in the present case, by deputing duly authorised representative(s) who shall attend all future CoC meetings, participate in the discussions/negotiations on the Resolution Plans submitted by Prospective Resolution Applicants, and give consent on behalf of the Respondent no.1 to the Resolution Plan sought to be approved by the CoC.
- d. Grant ad interim stay on further proceeding before CoC relating to submission and evaluation of Resolution Plans and/or suitably extend the timeline for conclusion of the CIRP, until the disposal of the present application.

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3. IA-5050/2020 is filed by the NOIDA Authority seeking the relief of direction to the Resolution professional not to include the plot No.GH-02, Sector 143, Noida in the pool of assets of corporate debtor.

4. The facts that compelled the applicant in **IA-4538/2020** to file the application are as follows: -

i. Members of the Applicant namely, Victory Ace Social Welfare Society holds 52.26% in the CoC and funded the project to the extent of 90% approx., from and out of their individual life saving. The fate of the project lies with the NOIDA/respondent no.1, which is the owner of the project land. Hence, seeking impleadment of NOIDA as a party to the CIRP and issuance of directions to NOIDA to participate in the CIRP, by appointing duly authorised representative(s).

ii. NOIDA is the sole owner of the Plot No.GH-02 situated in Sector -143, Noida, District Gautam Budh Nagar, Uttar Pradesh, admeasuring 1,00,080.98 Sq. Mtrs. The plot was allotted to a consortium led by M/s Logix Softel Private Limited vide Reservation Letter No. NOIDA/GHP/GH-2011(I)/2011/2961 dated 31.03.2011, Allotment Letter No. NOIDA/GHP/GH-2011 (I)/2011/3057 dated 08.04.2011 and Allotment Letter (Corrigendum) No. NOIDA/GHP/GH-2011(I)/2011/3697 dated 08.06.2011, for the development and marketing of Group Housing Pockets/Flats on the detailed terms and conditions set out in the aforesaid

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Brochure and Allotment Letter of the said Scheme. Subsequently, NOIDA approved the name and status of a Special Purpose Company, namely M/s Logix City Developers Private Limited ("Logix") on the request of the consortium members in accordance with Allotment Letter No. NOIDA/GHP/GH-2011(I)/2011/3699 dated 08.04.2011. The lease deed was entered between the NOIDA and Logix for 90 years dated, 08.06.2011.

iii. It is stated that after the said lease execution, Logix entered into a Joint Development Agreement (JDA) dated 08.03.2013 irrevocably granted in favour of the Corporate debtor, the rights to undertake the development including marketing and sale over 6, 00,000 sq. Ft. FSI on the Plot ("Project Land"), thereafter, Logix executed a General Power of Attorney dated 23.10.2013 ("GPA") authorizing the Corporate Debtor/its representative to construct, develop and sell 516 flats proposed to be built on the Project land, to receive consideration and also execute Tripartite Agreement, Allotment Letter/Agreement, NOC and Permissions to Mortgage the land/flats in favour of the Allottee/Bank. Pursuant to the JDA and the GPA, the Corporate Debtor entered into the Project land and commenced construction of the Project, namely "VICTORY ACE", which was advertised to the public at large and funds were collected from individual Allottees, including the members of the Applicant Society

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iv. The Corporate Debtor entered into separate Flat Buyers' Agreements/Allotment Letters with the Allottees, including the members of the Applicant, for transfer of the individual flats to the Allottees on leasehold basis. These Agreements categorically provided that in order to affect the transfer of flat to the Allottee, a sub-lease deed will be executed between the Allottee and NOIDA after obtaining the Occupancy/Completion Certificate and NOC from NOIDA. However, the construction could not be completed because of various acts and omission of the CD and CIRP was commenced against the CD on 06.09.2019.

v. Amongst the creditors, the Respondent No. 2 namely, Arable Builders Private Limited ("Arable"), who claims to be the assignee of Logix of its rights and obligations under the JDA vide Assignment Deed dated 17.09.2018, has filed a claim in Form-C dated 29.01.2020 for inclusion as a Financial Creditor to the extent of Rs. 118,71,30,555/-, the break-up of which is, Principal due under the JDA-Rs. 2,50,00,000/-, Interest @ 24% p.a. on principal due under the JDA- Rs.3,56,25,205/-, Dues towards NOIDA as on 06.09.2019- Rs.89,46,93,345/-, Dues towards NOIDA incurred after 06.09.2019- Rs. 23,18,12,005/-. The claim was admitted to the extent 20,68,70,529/- by the Resolution Professional. Against the order of the Resolution Professional the Arable filed an appeal in this Court vide I.A. No.3216/2020. The IA was served upon the member of the

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applicant vide Email dated 06.10.2020, whereupon they came to know about the Lease deed between the Logix and NOIDA and immediately moved to this Tribunal vide IA no. 4435/2020 for impleadment in 3216/2020.

vi. It is averred that the contents of the IA No. 3216/2020 revealed that Arable has threatened to act to the detriment of the CD and CIRP, in case the balance claim of Rs. 98,02,60,026/- is not accepted as the financial debt. Arable's assertion that the payments to NOIDA under the Lease Deed, post 01.02.2013, have to be made "on behalf of" the Corporate Debtor, implies that the Corporate Debtor owes the said liability under the Lease Deed/JDA, directly to NOIDA, which makes NOIDA a 'creditor' of the Corporate Debtor. NOIDA's position, therefore, as a creditor brings it within the ambit of the present CIRP and makes it an important stakeholder in the process.

vii. It is further averred that NOIDA's participation in the CIRP and its consent to the eventual Plan/arrangement that may be approved by the CoC are, therefore, sine qua non to the continuation of the Corporate Debtor as a 'going concern' and resultantly the success of the CIRP. This course of action has also become inevitable in light of the recent decisions of the Hon'ble Supreme Court of India holding that a Resolution Plan will not automatically bind statutory/local authorities and, specifically in the

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case of a land owing body/authority, that the consent of such body/authority to the Resolution Plan ought to be obtained in order to bind it to the Resolution Plan. It is thus apprehended, that despite this Hon'ble Tribunal's approval of a Plan which would provide for payment of premium and rent under the Lease Deed to NOIDA, there is a possibility that NOIDA may cancel the Lease Deed (for breach) through which the remaining parties derive their rights, making the entire CIRP a futile exercise. This can only be avoided through a certain determination of the position of NOIDA in the CIRP and binding it to the approved Plan. Hence prayed that the application may be allowed after giving due consideration to the facts and circumstances.

5. During the proceedings, this tribunal has directed the RP to make an appropriate representation before the NOIDA vide order dated 21.10.2020 and in compliance to that RP made representation before the NOIDA on 23.10.2020 as evident from the affidavit filed by the RP. The reply to the representation by the RP made by the NOIDA on 06.11.2020 and averred that the CD has no legal right on the concerned property and same cannot be regarded as the asset of the CD. It has no contractual relationship with the CD; hence, it is not a creditor, and therefore, NOIDA's participation in the instant CIRP does not arise.

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6. The NOIDA authority also filed the reply to the IA 4538/2020 and raised the following issues: -

- i. It is stated that when RP made a representation on 23.10.2020, it is for the first time NOIDA was made aware about the existence of JDA dated 08.03.2013 between Logix and CD. Moreover, the Logix mentioned itself as the owner of the plot despite being the lessee. In another agreement to sell dated 20.06.2013 executed between Logix City Developers Pvt. Ltd. and CD, the Logix mentioned itself as the owner of the plot despite being the Lessee.
- ii. It is further submitted that the NOIDA filed IA No.5050/2020 seeking directions against the RP (respondent no.3) for not including Plot No. GH-02, Sector 143, Noida in the pool of Assets of CD after the representation made by the RP.

7. Written Submissions are also filed by the Applicant in 4538/2020 and argued on following points: -

- i. IA 5050/2020 has prayed for a single relief, "to not include Plot No. GH-02, Sector 143 Noida ("Plot") in the pool of assets of the Corporate Debtor (CD)". This is a misconceived relief because the Plot is already a property in possession of the CD. By way of a lease deed dated 08.06.2011 (the "Deed"), the NOIDA Authority granted a 90-year lease of the Plot to M/s

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Logix City Developers Private Limited ("Logix") for constructing residential flats in accordance with building plans approved by it. The lease does not stipulate that the residential flats need to be constructed solely by Logix, and as an industry practice, and because the CD possesses expertise, Logix entered into a joint development agreement ("JDA") on 08.03.2013 with the CD to jointly develop 6,00,000 sq. ft FSI out of the 16.62 lacs sq. ft. FSI of the Plot. The remaining 10.62 lacs sq. ft. of FSI is being developed by Logix into two other separate residential projects, with knowledge and approval of NOIDA, by a similar arrangement.

ii. The Plot in question is a property covered within the definition of property under section 3(27) of the Code. Pursuant to the JDA, this property is occupied and in possession of the CD within section 14(1)(d). It is also settled by the Supreme Court that in arrangements of this kind, development rights are in possession of the developer (CD) and therefore any attempt to dispossess the CD, directly or indirectly, would be in violation of section 14 moratorium imposed by the NCLT. Reliance in this regard is placed on the case of **Rajendra K Bhutta v. Maharashtra Housing and Development Authority [Civil Appeal 12248 of 2018]** at paras 7, 18 and 19.

iii. The apprehension of NOIDA is premature and misplaced that if it will participate in the CoC, it might be subjected to a haircut under the

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prospective plan, however, no plan is received yet, every plan would first protect the interest of the NOIDA and same is evident from the acts of the applicant. Furthermore, the total number of flats sold are 509 for which the sale consideration received by CD is 244 crores and 109 crores are receivables, which will in all likelihood be deposited by the Allottees, which is sufficient to cover the interest of NOIDA towards the rent payable (about 55 crores with interest).iv. The stand of NOIDA that the JDA is in violation of the Deed is wrong because CD only has right-in-personam against Logix, to receive the consideration for developing the residential complex, which Logix shall have the allottees paid directly to the CD upon stages of completion of the project. For this purpose, the CD has been authorized to act through a power of attorney, and not a registered instrument by payment of stamp duty as would be required if Logix were to create any form of leasehold interest in favour of CD. Similarly, rights to all future FSI are still retained by Logix, which would have become an asset of CD, if CD was a sub-lessee under the JDA—which it is not. Furthermore, Logix has always represented to the CD that NOIDA is the sole owner, Logix is the lessee, and JDA only gives the CD the right to develop jointly with Logix. The word “Owner” used in the JDA is a misnomer, only for the purposes of ease of reference and to avoid repetition in the JDA. Moreover, the JDA was always in the knowledge of NOIDA and all approvals as required under the Deed have been contemplated under the

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JDA. Further, the fact of approval of NOIDA to development plans submitted by Logix, and its compliance by CD is evident from the additional documents of approvals submitted by the RP post the hearing of the IAs.

8. The written submissions are also filed by the NOIDA in the IA 4538/2020 and raised following objections: -

- i. The Lease deed nowhere permits the lessee to get the construction done by the third party which is alien to the lease deed therefore, JDA dated 8.3.2013 as well as agreement to sell dated 20.06.2013 between Logix City Developers Pvt. Ltd. and the Corporate Debtor, executed in concealment from the Respondent No. 01/Lessor and to which the Respondent No.01 is not a party, is barred by the provisions of the lease deed and hence is *non est* in law. Further, the Lessee was not allowed to assign or change his role, as has been done in the present case.
- ii. The Respondent No. 01 does not recognize Corporate Debtor as it is neither Lessee nor the sub-lessee of the allotted plot. The JDA and agreement to sell illegally seeks to transcend and change the basic framework and the legal position of the original lease-deed, which is the only valid legal and agreed upon framework between the Respondent No. 01/ lessor and the Lessee. The JDA and the agreement to sell cannot bind the Respondent No. 01 or the terms of the lease.

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iii. All approvals, occupancy/completion certificates can be obtained only by the legally recognized lessee/sub-lessees. The rights granted to the lessee could not have been divided, bartered or sold as has been done in the present JDA and agreement to sell. No transactions with regard to the leased property could have been entered into without due permission and explicit consent by the Respondent No.01. The Respondent No. 01 has no contractual relationship with the Corporate Debtor and thereby is not a creditor of the Corporate Debtor. As per the IBC, 2016 the CIRP and other proceedings relating to CIRP can only be attended/ participated by the creditor of the corporate debtor and not otherwise.

iv. Reliance has been placed on the Hon'ble Supreme Court Judgment namely, **Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal & Ors.**, reported in 2019 SCC Online SC 1479.

9. The facts that compelled the Filing of the IA 5050/2020 by the NOIDA Authority are as follows: -

i. Most of the facts are quite similar as discussed above so are not repeated here again only the relevant points are mentioned. The lease-deed between the applicant/Lessor and the Lessee M/s Logix City Developers Pvt. Ltd forms the legal and mutually agreed basis of all the transactions to be carried out regarding the leased plot. The JDA dated 8.3.2013 as well as the agreement to sell dated 20.06.2013 between Logix

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City Developers Pvt. Ltd. and the Corporate Debtor, which was executed in concealment from the applicant/Lessor and to which the applicant is not a party, is barred by the provisions of the lease deed and hence is *non est* in law.

ii. It is submitted that the clauses of the JDA and the agreement to sell are in contravention and in utter disregard to the provisions of the lease-deed and have been entered into with the mala-fide and fraudulent intention to defraud public money. The applicant does not recognize Corporate Debtor as it is neither the Lessee nor the sub-lessee of the allotted plot. The JDA and agreement to sell illegally seeks to transcend and change the basic framework and the legal position of the original lease-deed, which is the only valid legal and agreed upon framework between the applicant/lessor and the lessee.

iii. It is averred that the corporate debtor cannot be said to be in a legal possession of the property as the development agreement entered into with Logix City Developers Pvt. Ltd. was *non est* in law. Since JDA is *non est* in law therefore all the agreements which have been entered into based on such JDA are void ab initio. The applicant has no contractual relationship with the Corporate Debtor and thereby is not a creditor of the Corporate Debtor. It is submitted that in terms of the Lease Deed, the Lessee was not allowed to assign or change his role, as has been done in

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the present case. On perusal of the JDA, it is found that the Lessee has granted and authorized the Corporate Debtor exclusive rights given by the applicant to the Lessee as per the lease deed to undertake the development, marketing and sale over 6,00,000 sq. Ft., which was not all permissible.

iv. It is further averred that as per section 18 of IBC, 2016 it is the duty of the IRP to take control and custody of the asset over which CD has ownership rights. Section 36 of the IBC, 2016 provides that the liquidator shall form an estate of the assets of the CD and hold the same as a fiduciary, however, sub-section 4 of section 36 specifically excluded assets owned by a third party which are in possession of the Corporate Debtor from the liquidation estate. Hence the Property of NOIDA cannot be made part of the CD in the Light of the above provisions.

v. The NOIDA also placed its reliance on the Apex Court Judgment namely, **Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal & Ors. (Civil Appeal No. 6350 of 2019)**. The following observations has been made:

"33. Equally in the opinion of this court, the adjudicating authority could not have been approved the plan which implicates the assets of MCGM especially when SevenHills had not fulfilled its obligations under the contract.

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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 Section 92 and 92A of the MMC Act. This Court is of the opinion that Section 238 could be of importance when the properties and assets are of 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. No doubt, the resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question which undeniably are public properties. The resolution plan therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval!

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under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM)."

Hence, prayed for the relief sought in IA-5050/2020.

10. Resolution Professional (RP) filed its reply to the above application and objected on the following grounds: -

i. It is submitted that the corporate debtor is undergoing CIRP, therefore Chapter II of Part-II of IBC and the rules & regulations thereunder are applicable to the present case. Interestingly, the term "pool of assets" has nowhere been used in the said chapter. Even otherwise, there is nothing in the said chapter to even remotely suggest that the Resolution Professional has to create a pool of assets, as has been contended by NOIDA in the captioned application. It is for this reason, NOIDA has not referred to any provisions of said chapter (Chapter-II, Part-II) so as to substantiate as to which pool of assets is NOIDA referring to in its application. Though in Para (L) of the application, a reference has been made by NOIDA to Section 36 of IBC, so as to suggest that the assets owned by a third party shall not form part of the liquidation estate. In this regard, the Resolution Professional states that Section 36 of IBC envisages a process of creation of a liquidation estate pursuant to commencement of liquidation process of a corporate debtor under section

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33 of IBC, which falls under chapter III and has no relevance with the CIRP as provided in chapter II of IBC.

ii. It is further submitted that the Lease Deed in the instant case is an admitted document, based on which the rights of development, sub-lease and transfer of Plot was exclusively transferred by NOIDA in favour of Logix. Basis the said Lease Deed, the Corporate Debtor and Logix have bona fide entered into the said JDA, whereby the development rights along with other rights and privileges over the said project area have been transferred by Logix in favour of the Corporate Debtor. It is pertinent to point out that while the said right / privileges were being transferred in favour of the Corporate Debtor, the parties to the JDA have duly ensured that all the terms & conditions laid down by NOIDA in the said lease Deed are duly adhered to by the Parties.

iii. In connection with the above, Clause 4 of the said JDA envisages the NOIDA deferred payment and other dues of the subject land. Similarly, Clause 5 speaks about project development and entails that the Corporate Debtor has to develop the said project / project area strictly in accordance with the development plans approved by NOIDA. Pertinently, all the reservations made by NOIDA under the Lease Deed have been specifically protected under the JDA. The *bona fide* of the parties may also be understood from the fact that Clause 8 of the said JDA enables Logix /

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Arable (assignee of Logix) to make payments towards NOIDA deferred payments on behalf of the Corporate Debtor.

iv. It is averred that no objections were raised by any party including NOIDA till 23.11.2020 i.e., the date when RP made representation in compliance of direction of this authority. However, when the RP bona fide approached the NOIDA for its participation in the CIR process, NOIDA has filed IA 5050/2020. Furthermore, the development and other rights & privileges of the Corporate Debtor over the said housing project area, basis the said JDA, is completely valid and legal, therefore the possession of RP on the Project is appropriate and as per the prevailing law.

v. It is further averred that Keeping in view that the fate of over 500 homebuyers is associated with the project, and also that the project/ construction is as per the regulations/ building plans, it is uncalled for that NOIDA goes ahead to contend that merely because of some technical latches, that too on part of the erstwhile management of the Corporate Debtor and a third party (Logix), the innocent homebuyers shall lose every right over the units/ flats. Such contention of NOIDA is clearly against the public policy. NOIDA is duty bound to value and uphold public policy being a public office and doctrine of Public trust is also applicable in the present case.



vi. The RP also quoted the Hon'ble Supreme Court judgment namely, **Bikram Chatterji & Ors. Vs. Union of India & Ors WP(C) 940 of 2017 dated 23.07.2019**. The Hon'ble Apex Court, while culling out the object and purpose of RERA Act held as under: -

"111. It is clear that RERA intends for completion of the project in case any fraud is committed by the promoter and the activity is not completed, the home-buyers cannot be left in lurch, allowing the prayer on behalf of Bankers as well as by the Authorities would amount to unfair treatment of home buyers in the facts of this case. It is too late for them to submit that home buyer has no rights in the teeth of the provisions contained in the RERA, which intends to prevent fraud.

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138. It was submitted by learned senior counsel on behalf of the Greater Noida authority that title has to pass in home buyers by way of registered document as provided in section 17(1)(b) of the Registration Act and section 13 of the U.P. Apartments Act, 2010 and also the provisions of the lease deed. The deed of transfer will be a tripartite sub-lease deed. Completion certificate has to be obtained, for that it has to be applied for. Dues of the authorities have to be paid before a completion certificate is issued. The charge

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of Noida and Greater Noida authority has priority over other charges. None of the aforesaid submissions impress us so as to defeat the rights of home buyers. We have already dealt with that the dues have to be recovered in accordance with law from the properties which have been created by the funds which have been diverted and the property of the directors etc. In order to do complete justice between the parties so that the faith of public is not shaken in the real estate sector and such frauds are prevented in the future. We cannot permit the authorities in the facts and circumstances of the case to deal with the rights of the home buyers in arbitrary and in an unjust manner.

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139. In case the authorities are making allotment of plots at a paltry sum of 10% and giving the builders 8 years period to make payment of premium with a moratorium of 2 years then the period runs to 10 years and the project is to be completed within 3 years. It is clear that the authorities have to be very vigilant for securing their interests otherwise in every case even if the promoter has completed the project and realised the charges from the home buyers and has not deposited the amount due to the authorities in case no action is taken by the Authorities, can it be taken after 10

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years against home buyers. The question arises whether innocent home buyers would have to pay the amount to authorities which they have already paid to promoters as part of the component of cost of flats or plots as the case may be, whether they are to be saddled once over again with the liability to pay, though the amount paid by them has been illegally usurped and diverted elsewhere and not paid to the authorities and they have acted in connivance of officials.
The authorities have to be vigilant in such cases and not to tolerate the default. They have to blame themselves for their inaction and have to wait for the realization of dues by sale of other properties and as against guarantors etc. The projects have to be completed as mandated by section 8 of RERA.

140. It was submitted that the authorities on cancellation of the lease have to forfeit 25% of the amount and have to resume the lands along with the structure. It cannot be done in view of the provisions of RERA, particularly in view of the provisions of section 8 and other beneficial provisions contained in the said Act. Under section 14 of the Act of 1976, there can be forfeiture of the entire amount also, in case of breach of condition or breach of rules, etc. by the promoters/builders. Be that as it may. We hold and direct no action under any provisions derogatory to the interest of home buyers can be taken

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either by the authorities or the bankers in the peculiar facts and circumstances of the case, that is to Say, that no part of the building can be demolished. Buildings have to come up and completed even the ones which are at the nascent stage as mandated by RERA. No doubt about it that in case of failure to pay the dues the onus of payment of land dues has to be passed on to the buyers on pro-rata basis but in the instant case they have already paid the substantial amounts, huge amount has been permitted to be diverted by the authorities and bankers as such they have to wait for recovery and cannot act in a manner further detrimental to the interests of the home buyers.

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150. There was no valid mortgage created in favour of Banks and there was huge diversion of money paid by homebuyer which were more than required for payment of dues of the Noida/ Greater Noida Authorities and banks. The buyers have paid dues of Noida and Greater Noida authorities as a component of the price for flats. Thus, the premium and other dues payable under the lease deeds to the Noida and Greater Noida Authorities, cannot be recovered from the home buyers or the projects in question. The dues as may be ordered shall be recovered by sale of other properties which have

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been created by the diversion of funds and have been attached by this Court. The banks have also failed to ensure that the money was used in the projects. As found in the forensic audit, there was no necessity of obtaining loans from the banks and it has not been used for the purpose it was obtained. The Authorities and Bankers have violated the doctrine of public trust and their officials, unfortunately, acted in collusion with builders. The dues of the banks are also to be recovered from the other attached properties as observed by us.

153. We have also found that non-payment of dues of the Noida and Greater Noida Authorities and the banks cannot come in the way of occupation of flats by home buyers as money of home buyers has been diverted due to the inaction of Officials of Noida/ Greater Noida Authorities. They cannot sell the buildings or demolish them nor can enforce the charge against homebuyers/ leased land/ projects in the facts of the case. Similarly, the banks cannot recover money from projects as it has not been invested in projects. Homebuyers money has been diverted fraudulently, thus, fraud cannot be perpetuated against them by selling the Rats and depriving them of hard-earned money and savings of entire life. They cannot be cheated once over again by sale of the projects raised by their funds. The Noida and Greater Noida Authorities have to issue the Completion/part

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completion certificate, as the case may be, to execute tripartite agreement and registered deeds in favour of the buyers on part-completion or completion of the buildings, as the case may be or where the inhabitants are residing, within a period of one month."

The above ratio and observations of the Hon'ble Supreme Court are squarely applicable to the facts and circumstances of the present case.

vii. It is submitted that the JDA specifically reads that NOIDA is the sole owner of the said project land and said status remain clear as on date. Furthermore, it is stated that the judgment of the Hon'ble Supreme Court in the case of **Municipal Corporation of Greater Mumbai (MCGM) Vs. Abhilash Lal & Ors., being Civil Appeal No. 6350 of 2019** is not applicable to the facts and circumstances of the present case, as there is no approved resolution plan in the instant case, also that the present case pertains to various homebuyers and therefore concerns public trust and equity. Needless to say, that the rights and interests of homebuyers is to be measured differently from a corporate entity/ resolution applicant, as has been done in numerous cases by the courts across the nation.

11. The NOIDA authority also filed the rejoinder to IA-5050/2020 and raised the contentions as follows: -

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i. It is submitted that the other clauses of the lease deed at clause no. 12 clearly mentions that 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. In case the JDA was required to be executed, then the explicit consent of the lessor/NOIDA was required. A lessee is not owner of the lease hold property but only governed by the rights granted by the agreement. Logix has termed itself as the owner in JDA as well as in agreement to sell which is completely untrue. Furthermore, the General Power of Attorney dated 23.10.2013 are not known to NOIDA as the same has neither been filed nor has been made available to the applicant.

ii. It is further submitted that the applicant by mentioning the word of pool meant that the said property is not an asset of the CD and same should not be included in the asset of CD. The purpose of the reference to section 36 of IBC, 2016 was to draw the inference that even in liquidation estate, the asset of third party cannot form part of the liquidation estate. The applicant/NOIDA also referred to section 18, sub-section 2(g) of section 25, section 29 and section 30 of IBC, 2016 and sub-regulation (2) regulation 36 of the CIRP regulations.



iii. At the end submitted that the judgment referred by the RP in his affidavit namely, Bikram Chatterji & Ors. Vs. Union of India & Ors., is not applicable to the facts and circumstances of the present case.

12. The NOIDA Authority also filed the written submissions and argued on same points as argued in IA-4538/2020, hence, not repeated for sake of brevity.

13. The RP also filed the Written submission collectively in 4538/2020 and 5050/2020 and argued that the JDA is a valid contract and the said contract duly recognized NOIDA as the sole owner of the said plot. The term "owner" assigned to Logix in the said JDA is merely for the convenience and does not confer any such title to Logix. Furthermore, the development was to be done as per the plans approved by the NOIDA. The purpose of IA-4538/2020 is to balance the interest of all stakeholders. Moreover, prior approval of the NOIDA is required in case of sub-lease, not in case of JDA. Prayer sought in IA-5050/2020 is premature and misconceived. In addition to it, over 80% of the work of the project is done and duly registered with RERA. After quoting the Hon'ble Supreme Court judgment namely, Bikram Chatterji & Ors vs. Union of India & Ors., prayed that the IA-5050/2020 may be rejected and appropriate direction may be given to NOIDA in IA-4538/2020.

CONCLUSION:



14. After hearing the counsels for the rival parties and perusal of the pleadings including the documents placed on case file, it reveals that vide lease deed dated 08.06.2011, the NOIDA Authority granted a 90-year lease of the Plot to M/s Logix City Developers Private Limited ("Logix") for constructing residential flats in accordance with building plans approved by it. The covenants of lease do not stipulate that the residential flats need to be constructed solely by Logix. By following the industry practice and looking to the expertise of the CD in the concerned field, Logix entered into a joint development agreement ("JDA") on 08.03.2013 with the CD to jointly develop 6,00,000 sq. ft FSI out of the 16.62 lacs sq. ft. FSI of the Plot. The remaining 10.62 lacs sq. ft. of FSI is being developed by Logix into two other separate residential projects, with knowledge and approval of NOIDA, by a similar arrangement. The plea taken by NOIDA that the JDA dated 8.3.2013 as well as the agreement to sell dated 20.06.2013 entered into between Logix City Developers Pvt. Ltd. and the Corporate Debtor, to which the applicant (NOIDA) is not a party, is barred by the provisions of the lease deed and is *non est* in law, has no legal basis at all, because the arrangement between Logix City Developers Pvt. Ltd. and the Corporate Debtor is to give effect to the lease deed dated 08.06.2011.

15. A bare perusal of the said Agreement indicates that CD has been engaged by Logix to undertake project development work on its behalf in respect of some portion of the land covered by Lease Deed dated



8.6.2011 and the status of CD is in the nature of an Associate of Logix. The said JDA in no way can be equated to sub-lease as is contended by NOIDA authority. In other words, the object of JDA is in furtherance of the object of Lease Deed executed by NOIDA in favour of Logix.

16. Further, we are persuaded to accept the contention made by the Applicant/CD in IA 4538/2020 that since the property under JDA is in physical possession of CD, the same is covered by Section 14(1)(d) of the Code and cannot be released. The said property is covered by the definition of "property" under section 3(27) of the Code. In this connection section 3(27) of the Code is reproduced below: -

(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;

The contention made above, is fortified with the ratio laid down by Hon'ble Supreme Court in the case of Rajendra K Bhutta v. Maharashtra Housing and Development Authority (Civil Appeal 12248 of 2018) [paras 7, 18 and 19] decided on 19.2.2020 and relied upon by the Applicant/CD herein IA 4538/2020.

17. We are further in agreement with the contention of the Applicant/CD 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 to developing the residential complex for which the allottees paid directly to the CD upon various stages of completion of the project. All future FSI still remained with Logix (the original Lessee of the Land). It is clear from the

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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 Chatterji & 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 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

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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.

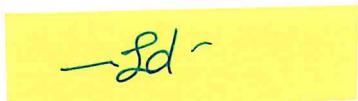
20. To sum up, we take a holistic view of the entire matter and deem it fit to protect the interests of homebuyers in terms of objective of the Code. Therefore, we are of the considered opinion that under the given facts and circumstances, NOIDA Authority is directed to lodge its due claim with Resolution 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.

21. Accordingly, IA No.4538/2020 filed by the Resolution Professional is **allowed** and IA No.5050/2020 filed by NOIDA authority is **dismissed**.

22. The order is pronounced in open court.



(NARENDER KUMAR BHOLA)
MEMBER (TECHNICAL)



(CH. MOHD SHARIEF TARIQ)
MEMBER(JUDICIAL)

IA 4538 + 5050/20 in IB-1771/ND/18

C-III
02.3.21