

**IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI**  
**COURT-III**

**Item No.207**

New IA-6059/2021 New IA-6040/2021 New IA-6018/2021

In

IB-1348(ND)/2019

**IN THE MATTER OF:**

M/s. Nisus Finance & Investment Managers LLP & Anr

.... **APPLICANT/PETITIONER**

**Vs.**

M/s. Earthcon Universal Infratech Pvt. Ltd.

.... **RESPONDENT**

**SECTION**

U/s 7 IBC code 2016

**Order delivered on 04.01.2022**

**CORAM:**

**SHRI BACHU VENKAT BALARAM DAS**  
**MEMBER (JUDICIAL)**

**SHRI NARENDER KUMAR BHOLA**  
**MEMBER (TECHNICAL)**

**PRESENT:**

For the Applicant

: Adv. Simran Kumari, Adv. Shashank in New IA 6018/2021

For the RP

: Mr. Rishabh Jain, Advocate for RP, GauravKatiyar, RP in person

For AR Home buyers

: IA 6040/2021 Sanjay KhannaAdv for AR of Homebuyers  
from CS Ramesh Singh

**ORDER**

**New IA-6018/2021:-**

Through the present IA, a copy of the order dated 28.02.2020 issued by the UPR.E.R.A. Authority has been placed on record. This has been done in pursuance to this Tribunals order dated 03.12.2021 issued in IA No. 2791/2021. The Counsel for the Resolution Professional is having no objection to the aforesaid compliance.

Consequently, the IA stands **closed**.

**New IA-6040/2021:-**

Counsel for the Applicant/Resolution Professional is present. Counsel for the Authorized Representative of the Home Buyers and the Counsel for Financial Creditor are also present.



Mamta

Through the present petition, the Counsel for Resolution Professional is seeking extension of 90 days for completion of the CIR Process of the Corporate Debtor. It is seen that in the present case, this Tribunal had already granted time of 270 days for completion of CIRP. However, the Counsel for Authorized Representative submits that there are some talks going on between the parties with regard to settlement amongst various parties including the Financial Creditor.

The Counsel for the Financial Creditor confirms the said facts during the course of hearing.

We have gone through the contents of the present IA and the circumstances mentioned therein in support of the aforesaid prayer. We are conscious that the extension of time upto 330 days can be allowed by the Tribunal and the upper limit of 330 days is not in the nature of mandatory upper limit.

Therefore, keeping in view facts and circumstances of the case, we hereby allow the present application and allow the extension of another 90 days time from today for completion of CIR Process of the Corporate Debtor. The Resolution Professional is directed to take expeditious steps for completion of the entire process within the extended period as granted above.

In view of the above, the present IA stands **disposed of**.

**New IA-6059/2021:-**

Counsel for the Resolution Professional is present. After hearing the submissions made by the Counsel, the prayer as made out in the present application is allowed. The Counsel may do the needful within a week's time from today.

Consequently, the present IA stands **disposed of**.



(BACHU VENKAT BALARAM DAS)  
MEMBER (JUDICIAL)



(NARENDER KUMAR BHOLA)  
MEMBER (TECHNICAL)

**IN THE NATIONAL COMPANY LAW TRIBUNAL,  
NEW DELHI BENCH  
COURT III**

I.A. No. 2452/2021  
in  
IB-1348(ND)/2019

**In the matter of:**

**M/s Nisus Finance & Investment Managers LLP & Anr.**

**...Financial Creditor**

**Versus**

**M/s Earthcon Universal Infratech Pvt. Ltd.**

**...Corporate Debtor**

**In the matter of:**

**Nisus Finance & Investment Managers LLP & Anr**

*...Applicants*

**Versus**

**Mr. Gaurav Katiyar,**

**Resolution Professional**

**M/s Earthcon Universal Infratech Private Limited**

**Greater Noida Industrial Development**

**Authority (GNIDA)**

**Plot No. 1, Knowledge Park IV,**

**Greater Noida,**

**Uttar Pradesh-301308**

*...Respondents*

Order delivered on 4<sup>th</sup> January, 2022

Coram:

**Shri Bachu Venkat Balaram Das**

Hon'ble Member (Judicial)

**Shri Narender Kumar Bhola**

Hon'ble Member (Technical)

Applicant

Mr. Shiv Kumar Suri, Mr. Shikhil Suri,  
Ms. Shilpa Saini,  
Ms. Vinishma Kaul & Ms. Nikita Thapar  
(Advocates)

**ORDER**

**Per: NARENDER KUMAR BHOLA, MEMBER (TECHNICAL)**

1. The present application has been filed by the Applicants under Section 60(5) of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC") seeking following reliefs:
  - I. Allow the instant application and direct the Resolution Professional to classify the debt of GNIDA of Rs. 43,95,81,181/- in relation to lease premium as operational debt and consequentially change the status of GNIDA from Financial Creditor to Operational Creditor and direct Resolution Professional to do such other acts as necessary for giving effect to such change in status;
  - II. Direct the Resolution Professional to reconstitute Committee of Creditors of M/s Earthcon Universal Infratech Private Limited;
  - III. Consequentially, direct the Resolution Professional to revise the Information Memorandum of M/s Earthcon Universal Infratech Private Limited;
  - IV. Direct the Resolution Professional to inform the other CoC members and the Resolution Applicant/s about the change in status of GNIDA;
  - V. Pending the hearing and final disposal of the present application restrain the Resolution Professional for presenting the resolution plan voted upon for approval of this Hon'ble Tribunal;
2. The facts that led to the filing of the present application are as follows:



- a. It is submitted that the Applicants are financial creditors and an interested party in ensuring that claims of other creditors are classified appropriately. It is stated that the claim of GNIDA falls within the category defined u/s 5(21) of IBC, 2016 and the claim admitted by the Resolution Professional ought to be only an operational debt. However, Resolution Professional classified the debt of the GNIDA as financial debt in the 4<sup>th</sup> CoC meeting. Therefore, the applicants are constrained to approach this Adjudicating Authority.
- b. It is further submitted that the applicants were never aware of any collation of claims for the purpose of constitution of CoC of Corporate Debtor other than their claims, the claims of Punjab and Sindh Bank and that of home buyers and the applicants were unaware of any claims being made by GNIDA from the date of publication of public notice dated 12.01.2020 till notice of the 4<sup>th</sup> CoC meeting. It is stated that the object of the Item No. 3 (Bullet II) of the 4<sup>th</sup>CoC meeting held on 21.01.2021 wherein the Resolution Professional collated the claim of GNIDA as Financial Debt and sought to include GNIDA as a part of CoC (which the Applicants seek to challenge) is highly arbitrary, belated, contrary to the provisions of the Code and prejudicial to the interests of the other members of the CoC including the present Applicants. It is submitted that the repeated objections have been made by Applicant No. 1 against such a decision to classify the claim of the GNIDA as financial debt as opposed to an operational debt under Section 5 (20) of the Code. The fact that this wrongly entitles GNIDA to 8.54% of voting share in the CoC is also a matter of grave concern.



- c. It is averred that the land for real-estate projects sought to be developed by the Corporate Debtor namely, Sanskriti and Casa Royale is allotted by GNIDA and are within residential zone as per the Greater Noida Master Plan-2021. That GNIDA is a "local authority" within whose jurisdiction the land for the real-estate project falls. The role of GNIDA is only allotting land for the real-estate project and the Corporate Debtor is bound to pay lease premium to the GNIDA. That it is not disputed that GNIDA is a local authority and any due payable to a local authority cannot fall within a definition of a financial debt and necessarily has to be considered as an "operational debt" in light of the clear and unambiguous definition in Section 5(21) of IBC, 2016.
- d. It is further averred that the 4<sup>th</sup> CoC meeting, the applicants objected the treatment of claim amount of GNIDA of Rs. 43.95 crores as financial debt, which was overruled by the Resolution Professional. It is stated that inclusion of GNIDA in the CoC as an unsecured financial Creditor has changed the constitution of CoC and resulted in the significant reduction of voting percentage of other CoC members. It is argued that such classification of GNIDA as unsecured financial creditor and its claim as a financial debt is not contemplated in the IBC, 2016.
- e. The Applicant relied on Hon'ble Appellate Tribunal Judgment in the matter of *New Okhla Industrial Development Authority Versus Mr. Anand Sonbhadra* dated 16.04.2021 (Company Appeal (AT) (Ins) No. 1183 of 2019). In this matter the status of New Okhla Industrial Development Authority as operational creditor was considered in relation to claim arising out of lease



deed. Therefore, prayed that the claim of GNIDA should be considered as operational debt in view of the judgment of Hon'ble Appellate Tribunal. The Applicant has requested the resolution professional to reconsider the position of the claim of GNIDA in view of the principal laid down by the Hon'ble NCLAT. However, resolution professional refused to consider the same. Hence, the present application.

3. The Resolution Professional has filed its reply to the application under consideration and submitted that the applicants have raised the objection only in 4<sup>th</sup> CoC and not in the next 4 CoCs held afterward, in which GNIDA as well as applicants were member of CoC. Furthermore, no application was filed by the applicants in this regard at that time; therefore, the present application is filed at much belated stage. It is stated that GNIDA is one of the important stakeholders of the CD and any dispute regarding collation of claim ought to have raised before the issuance of expression of interest (EOI). With regard to the judgement of Hon'ble Appellate Tribunal in the matter of New Okhla Industrial Development Authority Vs. Mr. Anand Sonbhadra — RP it is submitted that generally, a judgement given by a court of law is always retrospective in nature, because the court of law did not laydown the law but merely declares it but the said doctrine has exception in case of Res judicata or where the accounts have been settled in the meantime vide *Assistant Commissioner, Income Tax. Rajkot Vs. Saurashtra Kutch Stock Exchange Limited reported in 2008 AIR SCW 7153 (para 43): (2008) 14 SCC 171*. The above-mentioned judgment of Hon'ble NCLAT has been challenged before Hon'ble Apex Court; therefore, this tribunal may wait for





the outcome civil appeal pending before Hon'ble Supreme Court for avoiding any conflict.

4. The Applicants also filed a written submission and reiterated all the content of application. In short, the Applicants argued that the claim/debt can only be categorized as an "operational debt" under section 5(20) and 5(21) of the Code, ratio laid down by Hon'ble NCLAT in Company Appeal (AT) (Ins.) No. 1183 of 2019 is binding on resolution professional, Order dated 16.02.2021 in IA-780/2021 is not adjudicatory in nature. It is further submitted that Bankruptcy Law Reforms Committee's report of November 2015 clearly suggests explains that debt in relation to lease agreement where space has been rented is an operational debt and is to be treated as an operational creditor. It is further argued that order dated 31.05.2021 of the Hon'ble Principal Bench passed in the matter of New Okhla Industrial Development Authority Versus Manish Kumar Gupta, R.P., C.A. No.2863(PB)/2019 in C.P. (IB) No. 1718(PB)/2018 relied upon by the RP (R-1) and GNIDA(R-2) has been stayed by the Hon'ble NCLAT vide its order dated 06.07.2021 in Company Appeal (AT) (Insolvency) No. 457 of 2021 which stay has been further continued by the Hon'ble Appellate Tribunal vide orders dated 21.09.2021 and 08.11.2021.
5. The resolution professional also filed its written submissions and reiterated all the facts and contention raised in reply, therefore, not repeated. It is submitted that the applicants have failed to demonstrate how they are suffering from classification of claim of Respondent No.2 as financial debt as against to operational debt. It is further argued that even in the case of Operational Debt, the Resolution Applicant can provide more to an operational creditor,





who can affect the going concern and basic and essential element for the carrying on of business of the Corporate Debtor, in comparison to other stakeholders of Corporate Debtor vide *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta [2019] 111 taxmann.com 234 (SC) (para 40)*.

6. GNIDA also filed the written submission to the present application and submitted that it had filed an application bearing I.A. NO 780/2021 to issue directions for upholding and continuing the GNIDA as 'Financial Creditor' and for participation in a meeting of committee of creditors. The said I.A. No. 780/2021 was disposed of by this Hon'ble Tribunal vide its order dated 16.02.2021. The contents of the I.A. NO 780/2021 may be treated as part and parcel of this short-written submission. GNIDA also relied on the judgment of the Hon'ble NCLAT, New Delhi judgment dated 18.12.2020 passed in Company Appeal (AT) (Insolvency) No. 519 of 2020 of case titled Mr. Rajnish Jain Vs. Manoj Kumar Singh-IRP & Ors. and the Hon'ble NCLT, New Delhi Principal Bench judgment dated 31.05.2021 passed in CA-2863(PB)/2019 in CP. No. (IB)- No. 1718(PB) of 2018 of case titled New Okhla Industrial Development Authority vs. Manish Kumar Gupta (Resolution Professional). It is further argued that the corporate Debtor has made its business, taken loan from the bankers, collected monies from the buyers by showing this capital i.e., land taken from GNIDA, therefore, in all respects, the claim of GNIDA shall be treated as a 'Financial Debts'. It is further submitted that GNIDA acquired this land on payment of consideration to the farmers and thereafter an additional compensation was also paid to the farmers whereby the lessee is



under obligation to the consideration/premium as mentioned in the Lease Deed. It is a valuable asset acquired by home-buyer letting the corporate debtor to make profit out of business. Therefore, it is a commercial transaction. The clauses of lease deed are having elements of finance lease as mentioned in the Accounting Standards. Therefore, the claim of GNIDA shall be treated as a 'Financial Debts' and GNIDA as a Financial Creditor.

7. The cases laws relied upon by GNIDA in support of its contention have also been considered by us. We agree with the arguments given by GNIDA in support of its contention and hold that GNIDA shall be treated Financial Creditor for the purpose of present CIRP proceedings against the CD.
8. In view of the above findings, the present IA stands dismissed as being devoid of merits.



**(BACHU VENKAT BALARAM DAS)**  
**MEMBER (JUDICIAL)**



**(NARENDER KUMAR BHOLA)**  
**MEMBER (TECHNICAL)**