**(2020) 02 NCLT CK 0042**

**In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi**

**Case No :** (IB) No. 995(ND) Of 2018, Company Application No. 1511 Of 2019

VMS Equipment Pvt. Ltd — APPELLANT

Vs

Primose Infratech Pvt. Ltd — RESPONDENT

**Date of Decision :** 28-02-2020

**Acts Referred:**
Insolvency And Bankruptcy Code, 2016 — Section 5(21)

**Citation :** (2020) 02 NCLT CK 0042

**Hon'ble Judges :** Ina Malhotra, J;L.N. Gupta, Member (Technical)

**Bench :** Division Bench

**Advocate :** A.S. Kindra, Anil Matta, U.N. Singh, Mrinal Harshvardhan

**Final Decision :** Dismissed

## Judgement

Ina Malhotra, J

1. An Objection has been raised by the Greater Noida Authority aggrieved by the fact that their financial claim has been converted to an operational one.. It is submitted that till the 6th COC, the RP had considered their claim as a financial one, but subsequently converted, it to an operational one. This has caused great prejudice to the Authority, both in terms of their voting power and the quantum of the claim likely to be recovered. They are aggrieved by the arbitrary decision taken by the RP.

2. Upon due notice of the IA accepted by the RP, he maintains his stand that the claim of the applicant has rightly been converted to an ''operational claim". The short point for consideration before this Bench, therefore is whether the ld. RP had rightly considered the claim of the Greater Noida Authority as an operational claim in the subsequent proceedings.

3. As per facts of the case, Greater Noida Authority had allotted land to the Corporate Debtor for their project, being developed under the name & style of M/s. Primose Infratech Pvt. Ltd. The COC consists of various plot allottees whose

claims have been considered as financial claims and have a sizable share in the voting pattern. Upon admission of the CIR process, Greater Noida Authority also filed a financial claim and were participating in the CoC meetings. The action of the RP in converting the claim to that an operational debt has been prejudicial to their interest and has resulted in a setback for them. They therefore pray for directions to the RP to reconsider his decision and to rectify their claim as a financial one, vesting them voting rights in proportion to their share.

4. The said proposition has been duly considered by a coordinate Bench of this Tribunal in IB-1059/2019, in the matter of M/s. Concord infrastructure Pvt Ltd. Vs. M/s. Shubhkamna Buildtech Pvt. Ltd. and the in the matter of Greater Noida Industrial Development Authority Vs. Mr. Anand Sonbhyadra, Resolution Professional. After going through various citations and the general terms of allotment under the Lease Deed, the Hon'ble Bench has adjudicated that the land given on lease to the Corporate Debtor for developing a Real Estate Project could not be considered as a Financial lease, leading to the conclusion that the land provider (Noida) was not a financial creditor. Reliance was placed on the decision of the Hon'ble NCLAT in the matter of Pr. Director General of Income Tax (Admn. & TPS) & Ors. Vs. Synergies Dooray Automobiles Ltd. & Ors. CA(AT) (Insolvency) 205/2017 wherein the Appellate Tribunal interpreted the Operational Creditors to be Creditors in respect of debt created for the operations of the Corporate Debtor. The relevant extract of the said order which was relied upon in the aforementioned case was observations as under:

"Operational Debt" in normal course means a debt arising during the operation of the company (Corporate Debtor). The goods and services including employment are required to keep the Company ('Corporate Debtor') operational as a going concern.

The Hon'ble Coordinate Bench further concluded that as per the guidelines of Indian Accounting Standards, the appellant (Noida) could not be considered as a Financial Creditor and therefore could not exercise-voting rights in the CoC.

5. Ld. Counsel for the RP has argued that this proposition is no longer res integra and the Hon'ble Supreme Court has laid to rest that rent (including lease rent) would be an operational debt within the definition as per section 5(21) of the Insolvency and Bankruptcy Code. Reliance is placed on the provisions of the Central Excise and Service Tax Act, 2017 which considers any lease whether commercial, industrial or residential used for business or commerce, wholly or partly, would amount to a supply of service. In the present circumstances, grant of a long-term lease is nothing but providing services. Section 5(21) of the Insolvency & Bankruptcy Code defines is debt as a claim. Licence fees/ Lease Rent would fall within the purview of providing services and the consideration i.e. receivable, becomes an operational debt.

6. It would also be relevant to place reliance on that decision of the Hon'ble Apex Court and Writ Petition (Civil) No. 940/2017 in the matter of Bikram Chatterji &

 

Ors. Vs. Union of India & Ors. The facts of the present case are similar. The rights of the Noida Authority were considered subservient to the rights of the home buyers. Matter also came up for consideration before the Hon'ble NCLAT in Company Appeal (AT) (Insolvency) No. 775/2019 in the matter of Sunil Kumar Aggarwal Vs. New Okhla Industrial Development Authority & Ors. confirming this view.

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

8. It is submitted that the Resolution Plan has already been approved by the CoC and has been submitted before this Bench for due approval. As the pending objections have been dismissed, arguments on the Resolution Plan be addressed on the next date. To come up on 11th March, 2020.

 