

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH-II**

**(IB) 470 (ND)/2017**  
**IA/445/2021**

**IN THE MATTER OF:**

**Amit Kumar Malik**

**Financial Creditor**

**Versus**

**Kindle Developers Pvt. Ltd.**

**Corporate Debtor**

**AND IN THE MATTER OF:**

**Rishi Kapoor**  
**S/o Mr. K.M. Kapoor**  
**R/o- E-11, LGF, Jangpura Extension**  
**New Delhi-110014**

**Applicant**

**Versus**

**Mr. Kashi Vishwanathan Sivaraman**  
**Resolution Professional**  
**Kindle Developers Pvt. Ltd.**  
**R/o- E-10A, Basement, Kailash Colony,**  
**Greater Kailash I, New Delhi-110048**

**Respondent**

**Order delivered on: 16.08.2021**

**CORAM:**

**MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

**MR. L. N. GUPTA, MEMBER (TECHNICAL)**

**PRESENT:**

Adv. Nakul Mohta, Advocate for Petitioner, Mr. Prateek Kushwaha, Advocate with Kashi Vishwanathan Sivaraman, for RP, Mr. Rachit Mittal, Adv. for Noida Authority.

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**ORDER**

**AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)**

The present application is filed u/s 60(5) of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code") read with Rule 11 of National Company Law Tribunal Rules, 2016, for seeking the following directions:

*"i. Allow this application and amend the CA No. 1442/ND/2020 titled as "Rishi Kapoor versus Kashi Viswanathan Sivaraman" in terms of the present Application; and*

*ii. Any further or other order which this Hon'ble Tribunal may deems fit and necessary in the interest of justice."*

2. The facts mentioned in the application in brief are as follows:

- i. That the Corporate Insolvency Resolution Process (CIRP) was initiated against the Corporate Debtor vide order dated 01.08.2018 passed in IB 470/ND/2017 and Mr. Yogesh Kumar Tyagi was appointed as Interim Resolution Professional of the Corporate Debtor. Subsequently, Mr. Kashi Viswanathan Sivaraman was appointed as Resolution Professional (RP).
- ii. That it is further contended that the Applicant has provided various legal and allied services to the Corporate Debtor for the period 01.04.2014-31.03.2018 based upon the Retainership Agreement dated 23.03.2014 ("Agreement") with effect from 01.04.2014, executed between the Corporate Debtor and Applicant, and the amount agreed for the Retainership under the agreement for a period of each Six



Months was Rs. 75,00,000/-. Thereafter, consolidated invoices dated 03.10.2017 to the extent of Rs. 5,25,00,000/- for the period from 01.04.2014-30.09.2017 were raised by the Applicant upon the Corporate Debtor.

- iii. That it is further contended that the corporate wide letter dated 13.10.2017 requested to reduce the retainership amount to Rs. 60,00,000/- per six months instead of Rs. 75,00,000, which was duly accepted by the Applicant. Accordingly, a fresh consolidated invoice of an amount of Rs. 4,20,00,000/- for the services rendered was raised and the same was accepted by the Corporate Debtor vide Letter dated 20.10.2017. Further, an invoice dated 05.04.2018 under the Retainership agreement was also raised for the agreed amount of Rs. 60,00,000/-.
- iv. That it is further contended that the Applicant also extended a Loan Facility to the Corporate Debtor through account bearing no. 003105500870 dated 30.03.2015 to the extent of Rs. 75,00,000/-, out of which Rs. 5,62,500/- was repaid on 21.05.2015. However, the Corporate Debtor failed to make payment towards the remaining amount of Rs. 69,37,000/- against the said Loan Facility as well as Rs. 4,20,00,000/- towards the Retainership services.
- v. That it is further contended that the Corporate Debtor entered into a Memorandum of Understanding dated 19.04.2018 ("MOU") with the Applicant and allotted 20 units to the Applicant in lieu of the outstanding debt along with immediate possession and accordingly executed Apartment Buyer Agreements (the "ABAs") for each such unit. Therefore, in terms of the ABAs read with the MOU dated 19.04.2018, the Applicant became an "Allottee" within the meaning of section 5(8)(f) of the Insolvency and Bankruptcy



Code, 2016 ("IB Code"). However, since the definition of an Allottee was a bit unclear when an allottee was included within the definition of a financial creditor as well as by way of an inadvertent error, the applicant mistakenly preferred a Form B dated 19.09.2019 instead of Form CA under the Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations 2016 (the "IBBI Regulations"). It has been pointed out by the Applicant that the RP has not verified the claims till date.

- vi. That it is further contended, that in the meanwhile, the Honorable Supreme Court of India in its Judgment dated 19.01.2021 titled as "Manish Kumar & Ors. V. Union Of India & Ors., in W.P. (C) 26/2020" has held with clarity as to who can be an Allottee in terms of and for the purposes of I&B Code. It has been categorically held that any person, in favor of whom a document of allotment including and an Apartment Buyers Agreement is there, would be an allottee under the Code.
- vii. Further, the applicant has sought amendment in its earlier application I.A. 1442/ND/2020 in the following manner:

*"A. Paragraph No. 5 in CA No. 1442/ND/2020 be substituted with the following paragraph:*

*"5. That on account of failure to make the payment towards the legally outstanding debt, the corporate debtor entered into a memorandum of understanding dated 19<sup>th</sup> April 2018 with the applicant wherein the corporate debtor allotted 20 units to the applicant in lieu of the outstanding debt along with immediate possession and accordingly executed Apartment Buyer Agreements*



*(the "ABAs") for each such unit. Therefore, in terms of the ABAs read with the MOU dated 19<sup>th</sup> April 2018, the applicant became an allottee within the meaning of section 5(8)(f) of the Insolvency and Bankruptcy Code, 2016 ("IB Code"). However, since the definition of an allottee was a bit unclear when an allottee was included within the definition of a financial creditor as well as by way of an inadvertent error, the applicant mistakenly preferred a Form B instead of Form CA under the Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 (the "IBBI Regulations"). It would be trite to mention that the RP has not verified the claims till date, let alone pointing out the usage of wrong Form. Moreover, meanwhile, the honorable Supreme Court Of India in its judgment dated 19<sup>th</sup> January 2021 titled as Manish Kumar &Ors. V. Union Of India &Ors., WP (C) 26/2020 has held with clarity as to who can be an allottee within the terms and for the purposes of IB Code. It has been categorically held that any person in favor of whom a document of allotment including and an ABA would be an allottee under IB Code."*

*B. That after paragraph 5 of CA No. 1442/ND/2020, the following paragraph shall be inserted:*

*"5A. That since the RP has not considered the claims of the applicant nor has pointed out the discrepancy in Form, it is submitted that as per law the claims of the applicant should be verified as an allottee for which a Form CA is annexed herewith*



*as Annexure – A. That interest of justice would warrant that the claims of the applicant shall be verified in the revised Form CA.”*

*C. That Prayer Clause (a) of CA No. 1442/ND/2020 be substituted with the following:*

*“(a.) Allow the present application and direct the resolution professional to verify, entertain and accept the claims of the applicant as an allottee; and”*

viii. That it is further contended that since the Apartment Buyer Agreements have been executed in favour of applicant by Corporate Debtor, it would be just and appropriate to consider the claims of the Applicant as an allottee in Form CA. It is also submitted that no prejudice will be caused to RP. However, if the prayer of applicant is not allowed, the applicant will suffer an irreparable injury.

3. The facts mentioned in the written submissions filed by the applicant in brief are as follows: -

- i. That as per the public announcement made by the IRP himself, the date of insolvency commencement has been mentioned as 22.06.2018 (Copy annexed). The Order of admission was intimated to IRP by uploading upon the website of NCLT only on 22nd June 2018.
- ii. That it is further contended, in the present case, the IRP was appointed only on 22.06.2018 by the Order. In fact, prior to the said date, it was the ex-management, which had been carrying out the business of the Corporate Debtor.
- iii. That it is further contended that the said order dated 30.07.2018 was passed by the Adjudicating Authority, when the proviso to Section 5(12) was in operation and therefore,

has to be considered in light of the said proviso as the actions taken and orders passed under the then existing law would not get invalidated merely because of subsequent amendment. The proviso to Section 5(12) as amended thereafter is reiterated as under:

*“Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or section 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority;”*

As on the date of the Order dated 30.07.2018, the said proviso was applicable, therefore, the Insolvency Commencement date would be when the IRP was appointed in the instant case i.e. 30.07.2018 in terms of the proviso.

- iv. That it is further contended that Section 17 of IBC is abundantly clear that it is only on the date of the appointment of IRP that the Board of Directors stand suspended and the management would vest in the IRP. It cannot be the case that the Board of Directors would be suspended prior to the appointment of IRP. In such circumstances, the MOU dated 19.04.2018 entered prior to such appointment is valid in law. That moreover, the RP being bound by such contracts cannot unilaterally choose to not accept the claims based on the same.
4. The facts mentioned in the written submissions filed by the respondent in brief are as follows: -
    - i. That the respondent submits that the present application is not maintainable because the relief sought by the applicant cannot be granted as Mr. Paramjit Gandhi, erstwhile

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management of the Corporate Debtor had contravened the provisions of Section 14.

- ii. That it is further contended, Mr. Amit Kumar Malik filed an application for initiation of CIRP of the Kindle Developers Private Limited (hereinafter referred to as 'Corporate Debtor') under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'the Code, 2016) which was allowed by this Hon'ble Tribunal vide order dated 09.03.2018. The copy of the application for initiation of CIRP was duly served and the same has been recorded in the order.
- iii. That it is further contended that the applicant had filed a claim before the resolution professional on 09.07.2019 in Form B as an Operational Creditor, which is beyond the stipulated time of 90 days as per Regulation 12(2) of the Insolvency Resolution Regulations, 2016. The applicant was supposed to apply for condonation of delay before this Hon'ble Tribunal but had failed to do so. Considering the fact the applicant has filed the claim as an Operational Creditor, the respondent in good faith had entertained the claim of the applicant.
- iv. That it is further contended that in the resolution plan approved by the Committee of Creditors on 04.12.2019, the resolution Applicant had provided the provision for payment of dues of the applicant as operational creditor and all the Operational Creditor are kept at the equal footing.
- v. That it is further contended that Mr. Paramjit Gandhi being only a shareholder of the Corporate Debtor had executed the Memorandum of Understanding dated 19.04.2018 ("MOU") with the Applicant, wherein 20 units were allotted and beneficial interest in contravention of the order dated





09.03.2018 was created without any authority of prior Board Resolution. The said allotment, as per the MOU, was made after the Insolvency Commencement Date and is prohibited by Section 14 of the Code, 2016, and the erstwhile management and the Applicant are liable to be punished under Section 74 for the Contravention of the order of Moratorium.

vi. That "Insolvency Commencement Date" has been defined in Section 5(12) as follows:

5(12) "**insolvency commencement date**" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be;

vii. That Section 14 of the Code states as follows:

14(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) .....

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or **beneficial interest** therein;

(c) any .....

viii. The Hon'ble Supreme Court of India in "**P. Mohanraj and Ors. Vs. Shad Brothers Ispat Pvt Ltd - AIR 2021 SC 1308**" held that:



*“A cursory look at Section 14(1) makes it clear that subject to the exceptions contained in sub-sections (2) and (3), on the insolvency commencement date, **the Adjudicating Authority shall mandatorily, by order, declare a moratorium to prohibit what follows in clauses (a) to (d). Importantly, under sub-section (4), this order of moratorium does not continue indefinitely, but has effect only from the date of the order declaring moratorium till the completion of the corporate insolvency resolution process** which is time bound, either culminating in the order of the Adjudicating Authority approving a resolution plan or in liquidation.”*

ix. That based on the above-mentioned facts, the application filed by the applicant should be dismissed in limine. The Applicant and Mr. Paramjit Gandhi are liable to be punished as per Section 74 of the Code, 2016 for contravening the order of Moratorium.

5. We have heard the Ld. Counsel for the applicant as well as Resolution Professional and perused the averments made in the application as well as written submissions filed by the respective parties.

6. Ld. Counsel for the applicant has raised all the facts and laws referred to in the written submissions. Similarly, the RP has also raised all the facts and laws referred to in the written submissions. Therefore, it is needless to repeat the argument of the parties.

7. On the basis of the averments made in the application, written submissions of respective parties, we notice that earlier the applicant has filed his claim in Form B as an Operational Creditor before the RP. The applicant has also filed one application bearing



IA/1442/2020 with a prayer to direct the RP to verify, entertain and accept the claim of the applicant.

8. We further notice that by filing this application, the applicant seeks permission to bring on record the averments that on the basis of the MoU dated 19.04.2018, the applicant was allotted 20 units in lieu of the outstanding debt along with the immediate possession. Therefore, on that basis, the applicant is an allottee.

9. The further claim of the applicant is that since the definition of an allottee was a bit unclear prior to the decision in the case of Manish Kumar & Ors. Vs. Union of India & Ors. in WP (C) No. 26/2020, the applicant instead of submitting its claim in Form CA, had submitted the claim in Form B on 19.09.2019.

10. We further notice that the ground taken for filing this application for amendment in CA no. 1442/ND/2020 is the judgement dated 19.01.2021 of the Hon'ble Supreme Court in the case of Manish Kumar & Ors. Vs. Union of India & Ors. in WP (C) No. 26/2020 (hereinafter referred to as 'Manish Kumar Case') and the clarified definition of an allottee. That is the reason, the applicant has filed this application seeking amendment in the earlier application filed by the applicant referred to above.

11. The objection of the RP is that the MoU between Applicant and Mr. Paramjit Gandhi was executed on 19.04.2018, whereas the application for initiation of CIRP was admitted on 09.03.2018 and on this ground, the Ld. Counsel for RP contended that the MoU was entered during the pendency of the moratorium period.

12. In reply, the contention of the applicant is that, as per the public announcement made by the RP, the date of commencement of the insolvency was 22.06.2018 i.e. date of receipt of order by the RP and in support of this, the applicant has also placed reliance upon order dated 30.07.2018 passed by this Bench, by which the IRP was changed.



13. In view of the claim and counter-claim made by the parties in support of their contention, at this juncture, we would like to refer to the order dated 30.07.2018 passed by this Adjudicating Authority which is also enclosed by the applicant (at page 5 of the written submissions) and the scanned copy of same is reproduced below: -

**NATIONAL COMPANY LAW TRIBUNAL**  
**NEW DELHI BENCH**

(IB)-470(ND)/2017

**CORAM:**

**PRESENT: MS. DEEPA KRISHAN**  
**HON'BLE MEMBER(T)**

**MS. INA MALHOTRA**  
**HON'BLE MEMBER (J)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE NEW DELHI BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 30.07.2018**

**NAME OF THE COMPANY: Sh. Amit Kumar Malik V/s. M/s. Kindle Developers Pvt. Ltd.**

**SECTION OF THE COMPANIES ACT: 7 of IBC, 2016**

<b>S.NO.</b>	<b>NAME</b>	<b>DESIGNATION</b>	<b>REPRESENTATION</b>	<b>SIGNATURE</b>
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<b>Present for the Petitioner:</b>	Mr. M.Yasir Khan, Mr. Mukesh Sinha & Ms. Priyanka Kakkar, Advocates
<b>Present for the Respondent:</b>	Mr. Parth Goswami, Advocate for IRP/Applicant

**ORDER**


Pursuant to the notice issued, the Financial Creditor is present in Court along with his counsel. It is submitted that despite various communication by the applicant addressed to his lawyer Mr. Ajay Katyal, no communication was received in respect of the status of the case or its being admitted. The applicant's petition was admitted on 09.03.2018. However since the same was not uploaded till 22<sup>nd</sup> June of 2018 and therefore subsequent steps could not be taken. It appears that there was negligence on the part of the Court staff who had failed to take appropriate steps. Mr. Parth Goswami, Advocate along with the IRP is present in Court. He has expressed his inability to proceed with this matter given

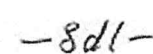


the dissension arisen both the parties on account of the aforesaid present situation. Ld. counsel appearing for the Financial Creditor also prays for a change of the IRP. She has proposed the name of Mr. Anurag Nirbhay IBBI registration No. IBBI/IP-001/IP-P00870/2017-18/11468 as a new IRP. Accordingly we confirm Mr. Anurag Nirbhary as the IRP in this case. He is directed to proceed as expeditiously as possible. The Financial Creditor shall communicate his appointment to him.

The earlier IRP Mr. Yogesh Tyagi is discharged. To come for filing interim report on 31<sup>st</sup> of August, 2018.

CA stands disposed off.

  
(Deepa Krishan)  
Member (T)

  
(Ina Malhotra)  
Member (J)

14. A bare perusal of the order shows that, though the petition was admitted on 09.03.2018 but the order could not be uploaded till 22.06.2018. Therefore, the subsequent steps could not be taken up.

15. It is also seen, by this order, the IRP Mr. Yogesh Tyagi, who was appointed earlier, was changed and discharged.

16. At this juncture, we would like to refer to the arguments advanced by Ld. Counsel on behalf of the applicant, who in para (iii) of his written submissions contended that proviso to Section 5(12) was omitted w.e.f. 28.12.2019 and prior to that, where the IRP is not appointed in the order admitting an application under Section 7, 9 or



Section 10 of IBC, the “insolvency commencement date” shall be the date on which such IRP is appointed by the Adjudicating Authority.

17. In terms of this proviso, the applicant has placed reliance upon the order dated 30.07.2018.

18. We have already referred to the order dated 30.07.2018 and on the basis of that, we are of the considered view that it is not the case that on 09.03.2018, while admitting the application, the IRP was not appointed by the Bench, rather on 30.07.2018, the earlier IRP Mr. Yogesh Tyagi was discharged and a new IRP Mr. Anurag Nirbhay was appointed. Therefore, we find, no force in the contention raised on behalf of applicant that since the IRP was not appointed on the date of admission of the application, therefore, the insolvency commencement date will shift to the date, when the IRP was appointed.

19. At this juncture, we would like to refer to the public announcement upon which the applicant has placed reliance and submitted that since in the public announcement, the date of insolvency commencement date was mentioned as 22.06.2018, therefore, the insolvency commencement is 22.06.2018.

20. In our considered view, mere mentioning of an incorrect insolvency commencement date by the IRP/RP in Form A i.e. Public Announcement cannot change the position of law as referred to in Section 5(12) of IBC, 2016.



21. Hence, on this ground too, the contention of the applicant is not liable to be accepted.

22. Now, coming to the next contention, on the basis of which the applicant has prayed for amendment in the earlier application. The only ground for seeking amendment is that the definition of the word "allottee" was not clear prior to pronouncement of the Judgment by the Hon'ble Supreme Court in the Manish Kumar Case.

23. Therefore, at this juncture, we consider the Section 5(8) of IBC, 2016 and the relevant portion of definition of "financial debt" given in Section 5(8) of IBC, which is quoted below: -

**5(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—**

- (a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

**2[Explanation. -For the purposes of this sub-clause,-**

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the

**Real Estate (Regulation and  
Development) Act, 2016 (16 of 2016);]**

- (g)** .....
- (h)** .....
- (i)**.....

24. A bare perusal of the aforesaid provision shows that there is no “if and but” regarding the meaning of “financial debt” so far as the expression allottee is concerned. By an amendment w.e.f. 06.06.2018, which is prior to the submission of claim by the applicant before the RP, it was crystal clear that any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing and the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016).

25. Hence, in view of this provision, we are unable to accept the contention of the applicant that definition of “allottee” was not clear prior to the judgement of the Hon’ble Supreme Court in the Manish Kumar Case.

26. Hence, we find, no force in the contention raised by the applicant that the amendment is sought only in the light of the decision of Hon’ble Supreme Court in the Manish Kumar Case (supra).

27. Now, coming to the merit of the amendment proposed, since the applicant has already submitted his claim in Form B and so far as the reference to the MoU is concerned, that reference was already made in para 5 of the application IA/1442/2020 filed by the applicant, it cannot be said that these facts were not within the knowledge of the applicant at the time of filing of the earlier application.





28. For the reasons discussed above, in our considered view, these are not the new facts, which were not within the knowledge of the applicant at the time of filing of the earlier application i.e. IA/1442/2020.

29. So, under such circumstances and in view of the discussion made above, we are unable to accept the prayer of the applicant to permit him to make necessary amendment in the IA/1442/2020.

30. Hence, we have no option but to reject the prayer of the applicant.

31. **Accordingly, the prayer of the applicant is hereby rejected and the IA stands Dismissed.**

- Sd -

(L.N. GUPTA)  
Member (T)

- Sd -

(ABNI RANJAN KUMAR SINHA)  
Member (J)