National Company Law Appellate Tribunal

Principal Bench, New Delhi

COMPANY APPEAL (AT) (INSOLVENCY) No. 190 of 2021

(Arising out of Order dated 08th February, 2021 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh, in CA Nos. 600/2019 & 904/2019 in I.A. Nos. 506/2020, 508 of 2020 in C.P. (IB) No.- 174/Chd/Pb/2018).

IN THE MATTER OF:

Sumant Kumar Gupta,
Resolution Professional, M/s. International Mega Food Park Limited
Registration Number IBBI/IPA-001/IP-P00167/2017-2018/10336

Resident of C/O 2581/3, B-1,
Near Zoom Hotel Building,
Industrial Area-A, Transport Nagar,
Ludhiana – 141003. **...Appellant**

Versus

Schreiber Dynamix Diaries Private Limited,
215, Atrium Building, C Wing, Unit – 1018,
11th Florr, Andheri Kurla Road, Andheri East,
Mumbai – 400093
Email: jay.sharma@schrieberfoods.com; leon.verdes@schrieberfoods.com;
Through its Authorised Representative **...Respondent**

For Appellant: **None.**

For Respondent: **Mr. Udit Mendiratta, Mr. Nikhil Kumar Singh & Mr. Akshay Bhatia, Advocates.**

WITH

COMPANY APPEAL (AT) (INSOLVENCY) No. 245 of 2021

(Arising out of Order dated 08th February, 2021 passed by National Company Law Tribunal, Chandigarh Bench, Chandigarh in CA Nos. 600/2019 & 904/2019 in I.A. Nos. 506/2020, 508/2020 in C.P. (IB) No.- 174/Chd/Pb/2018.

IN THE MATTER OF:

Schreiber Dynamix Diaries Private Limited,
215, Atrium Building, C Wing, Unit – 1018,
11th Florr, Andheri Kurla Road, Andheri East, **...Appellant**
Mumbai – 400093
Through Mr. Jay Prakash Sharma
Email:jay.sharma@schrieberfoods.com;
leon.verdes@schrieberfoods.com;

Versus

Mr. Sumant Kumar Gupta,
Resolution Professional,
Manmohan House, 2581/3B/1,
Ghora Factory Road,
Industrial Area-A,
Ludhiana – 141001
Email: irp.sumantgupta@gmail.com **...Respondent**

For Appellant: **Mr. Udit Mendiratta, Mr. Nikhil Kumar Singh & Mr. Akshay Bhatia, Advocates.**

For Respondent: **None.**

J U D G E M E N T

[Per; Shreesha Merla, Member (T)]

1. *Appeal CA (AT) (Ins) No. 190 of 2021* has been preferred against the Impugned Order dated 08.02.2019 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench, Chandigarh) in CA Nos. 600/2019 and 904/2019 and IA Nos. 506/2020 and 508/2020 in C.P. (IB) No.- 174/Chd/Pb/2018 CA 600/2019 was filed by the Resolution Professional RP of M/s. International Mega Food Park Limited (hereinafter referred to as the 'Corporate Debtor') under Section 60(5) read with Section 25 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as 'The Code') read with Rule 11 of National

Company Law Tribunal (NCLT) Rules 2016 for issuance of directions to the Schreiber Dynamix Diaries Private Limited (hereinafter referred to as 'Schreiber Dynamix') to pay the lease rent of Rs.11,87,75,913/- along with interest and to initiate action under Section 71 of the Code for fabricating under the lease deed with an intent to make wrongful gains, in connivance with the promoters of the 'Corporate Debtor'.

2. CA 904/2019 has been filed by Schreiber Dynamix (hereinafter referred to as the 'Operational Creditor') against the RP, challenging the maintainability of CA 600/2019. By a common Order, the Adjudicating Authority has disposed of both the Applications observing as follows:

> *"10. In short, it is the case of the applicant-Resolution Professional that the corporate debtor raised the rental bills against the respondent from April 2016 to July 2019 for a total amount of ₹15,07,56,627/- @ ₹232.68 lakhs per month and out of which the respondent company deposited an amount of ₹28,96,04,624/- in the escrow account and did not deposit the amount of ₹6,11,52,003/- as detailed in Annexure G. It is also the case of the applicant that the actual agreed rent was ₹45.06 lakhs per month and hence, ₹5,76,23,910/- which is the difference of the rent and as detailed in Annexure 7 is also payable by the respondent.*
>
> *11. Per contra, it is the case of the respondent that the agreed rent was @ ₹32.68 lakhs per month only and that they are not liable to pay any amount more than the said agreed rate and that further they have paid the entire rental dues, at the said agreed rate, after adjusting the amounts/charges paid to various persons/authorities, in terms of the lease deed.*
>
> *12. It is the settled Principle of law that the proceedings before this Adjudicating Authority under the I&B Code 2016 are summary in nature. If the issues involved or complicated, disputed and ambiguous, the RP is required to agitate the same by filing an appropriate Petition/ Application/ Suit/*

Arbitration, before an appropriate Court, in accordance with law.

13. In the instant case, both sides are relying on the same registered lease deed and interpreting the various clauses of the same in their own way. The allegations and counter allegations cannot be decided in summary procedure and hence, the instant CA cannot be entertained by this Adjudicating Authority. Accordingly, the CA is disposed of with a liberty to the corporate debtor to agitate its rights by filing an appropriate Petition/ Application/ Suit/ Arbitration, before an appropriate Court, in accordance with law. in this view of the matter, we are not delving upon the various issues raised by both sides and observations made hereinabove, if any, on the merits of the case or on the contentions of the parties, shall not have any bearing on any proceedings to be initiated, if any, by the RP However. M/s Schreiber Dynamix Dairies Private Limited (SDDPL) shall continue to pay the monthly lease rentals, without any delay or default @ ₹232.68 lakhs per month i.e., at the rate at / on which the corporate debtor was raising bills, as on the date of initiation of CIRP. This is without prejudice to the rights of the corporate debtor as well as SDDPL, in the Petition/Application/Suit/Arbitration, as the case may be. that may be instituted by the corporate debtor.

14. In view of the disposal of the CA No. 600/2019, as aforesaid, no further orders are required in CA No. 904/2019 and accordingly, the same as also disposed of."

3. <u>Submissions of the Learned Counsel for the Resolution Professional (RP):</u>

- It is submitted that the 'Corporate Debtor' was operating a Mega Food Park under the aegis of the Mega Food Park Scheme of the Government of India. It is 'a Going Concern' and is mainly dependent on the accrual of rental income from M/s Schreiber Dynamics, which is the only lessee of the part of property of the 'Corporate Debtor' in terms of the registered Lease Deed dated 09.03.2016. It is submitted that there was a long-term lease based on a letter of intent, wherein there was an offer of Rs.34.92Lakhs/- per month payable towards rentals to the 'Corporate Debtor'. It is also submitted that this offer was declined by the 'Corporate Debtor' and consequently a Lease Deed was executed between the parties on 06.11.2015 and another Lease Deed on 09.03.2016, wherein the lease rent was fixed at Rs.45.06Lakhs/- payable per month in addition to applicable taxes.

- It is submitted by the RP that the original Lease Deed registered with the Registering Authority does not have any 'Annexure-2', which annexure, is neither attested by the Revenue Authorities nor attached to the Lease Deed.
- It is argued that M/s Schreiber Dynamix did not make payment of the lease rents on the pretext that the 'Corporate Debtor' did not raise the relevant bills. It is also submitted that Schreiber Dynamics and SBI entered into a Tripartite Agreement with the 'Corporate Debtor' whereby M/s Schreiber Dynamix agreed to pay lease rent of Rs.45.06Lakhs/- per month i.e., Rs.5.02Crores/- p.a. which shall be paid directly to an Escrow Account maintained with SBI. SBI had sanctioned the loan only on the basis of these Rental Incomes which is to be deposited into the Escrow Account.
- It is submitted by the RP that the total amount which has been withheld by M/s Schreiber Dynamics on account of lease rent for the period April 2016 to May 2019 is Rs.11,87,75,913/–. M/s Schreiber

Dynamics deposited only Rs.8,96,04,624/– into the Escrow Account and did not deposit any amounts for February, March and December 2017 to January 2019. Despite the fact that the 'Corporate Debtor' raised bills for the lease amount at Rs.32.68Lakhs/-, which is much lesser than the agreed rent of Rs.45.04Lakhs/- per month.

- It is submitted that M/s Schreiber Dynamics is a related party of the 'Corporate Debtor' which was declared vide Order dated 23.09.2019 by the Adjudicating Authority. Being a related party, their appears to be underhand payments from Schreiber Dynamics to the promoters of the 'Corporate Debtor'.
- The RP served a Demand Letter dated 04.06.2019 for the amount calculated up to 31.05.2019 but the Learned Adjudicating Authority has erroneously concluded that these are complicated issues and disposed of the Application with a liberty to the 'Corporate Debtor' to agitate its rights by approaching the appropriate forum, if so advised.

4. Submissions of the Learned Counsel appearing on behalf of the Respondent/ M/s. Schreiber Dynamix:

- Learned Counsel submitted that the Adjudicating Authority has rightly held that proceedings under the Code are of summary nature and as the issues are complicated, this Appeal is not maintainable. Learned Counsel placed reliance on the Judgement of the Hon'ble Apex Court in ***'Gujarat Urja Vikas Nigam Ltd.' Vs. 'Mr. Amit Gupta and Ors.', Civil Appeal No. 9241 of 2019*** dated 08.03.2021 wherein it was held that under Section 60(5) of the Code, the Tribunal must ensure that they do not usurp the legitimate jurisdiction and other Courts, Tribunals and Forums and the dispute is one which does not arise solely from or related to the Insolvency of the 'Corporate Debtor'.

- Learned Counsel also placed reliance on paras 37 to 53 of the Judgement of the Hon'ble Apex Court in *'Embassy Property Development Private Limited' Vs. 'State of Karnataka', (2020) 13 SCC 308,* wherein it was held that a dispute regarding payment under Section 60(5) of the Code can be adjudicated by the Adjudicating Authority only when the amount payable is 'crystallised' and what remains is only payment. Further, wherever the Resolution Professional has to exercise its right in any Judicial, Quasi-Judicial Proceedings, a Resolution Professional cannot short-circuit the same and bring the claim before the Adjudicating Authority taking advantage of Section 60(5) of the Code.
- It is further submitted that this Tribunal in *'Gautam Mittal, Resolution Professional, Sanwaria Consumer Ltd.' Vs. 'MP Warehousing and Logistics Corporation', Company Appeal (AT) (Ins.) No. 219 of 2021,* dated 23.03.2021, has categorically held that this Tribunal is not a 'Recovery Forum' and a party cannot file an Application for recovery of arrears of lease rent before the Adjudicating Authority or this Tribunal even if the Corporate Debtor is involved in the business of lease/rental.
- The 'Corporate Debtor' raised bills for an amount of Rs.32.67Lakhs/- per month for more than three years, accepted payment of the lease

rents without any demur or protest and later has raised a rental receipt @ Rs.32.67Lakhs/- per month. Under the Lease Deed the 'Corporate Debtor' agreed with the monthly lease rents payable would be the sum total of three components, the first two components were fixed and the third was directly linked with the additional investments to be made by the 'Corporate Debtor' or the premises. The possibility of increase or decrease in the amount of additional investment was envisaged under the Lease Deed and the figure of Rs.17Crores/- was merely an estimation provided under the Lease Deed. The actual additional investment made by the 'Corporate Debtor' shall only for Rs.9.77Crores/-. The Appellant is wrongly referring to the amount of Rs.17Crores/- is not based on any record of additional investment.

- A Lease Deed provides that if there is no rectification of disruption of utility services, then Schreiber Dynamics may carry out the necessary maintenance and rectification at the cost of the 'Corporate Debtor'. Therefore, the lease rentals payable to the 'Corporate Debtor' was adjusted towards the payments made for the utilities which were not provided for the 'Corporate Debtor'.

Assessment:

5. The brief point which falls for consideration in these Appeals is whether the Adjudicating Authority was justified in observing that Adjudicating Authority/NCLT has no jurisdiction to adjudicate the issue of lease rentals (which in the attendant case, is the 'Asset of the Corporate Debtor') as it involves complicated question of law and fact. It is the case of the RP that there are arrears of lease rent including GST for the period April 2016 to July 2019 to the extent of Rs.5,76,23,909.96/– calculated up to 31.07.2019. Learned Counsel for the RP drew our attention to 'Annexure-7', page 211 of the Appeal Paper Book wherein the differences of lease rentals from April 2016 to July 2019 has been tabulated. The Lease Agreement dated 09.03.2016 stipulates that the Agreement shall come into effect from the date of execution and shall be enforced and affect for a period of 20 years from 06.11.2015 till 05.11.2025 with a long period of 10 years from the possession date. The Clause regarding monthly lease rents is reproduced as hereunder:

> *"The monthly lease rent <u>payable by the LESSEE to the LESSOR shall be linked to the investment made by the LESSOR (net of refundable security deposits) for the purposes of this indenture and shall be an agreed percentage of Return on Investment (hereinafter referred to as the "ROI")</u>, The ROI shall be in tow slabs i.e. 13.6% on already existing investments as well as on the security deposit of Rs.5 Cores and on additional investments made, the ROI shall be Existing Bank Leading Rate plus 7% i.e. at 20.5%. Both parties are ad Idem that at the time of signing of this Deed, the LESSOR's existing investment on the Demised premises is Rs. 9,10,00,000 (Rupees Nine Crores ten lacs Only) and the security deposit given by the Lessee is Rs. 5Crores (Five Crores) both Parties are ad idem that the ROI on the above Investment shall be 13.60 percent per annum. Both Parties have already come to an understanding that the lessor shall make an estimated additional investment of Rs. 17 Crores (Rs. Seventeen Crores only) net of security deposit i.e., Total estimated additional investment of Rs. 22 cores less security deposit of Rs. 5 Crores for the purposes of this indenture, Pursuant of the discussions held, the Lessor is already in the process of making these additional investments. The aforesaid figure of Rs 22 Crores has been arrived at as per the discussions held between the parties and is an estimated figure The final figure shall be determined as per the actual investment made*

after completion of the work by the Lessor. For the additional investment made, the ROI on such additional investment has been agreed as 20.5% i.e., the Existing Bank Lending Rate plus 7% i.e., current bank lending rate of 13.5% plus 7%. Accordingly, in consideration of the rights conferred by the Lessor on the Lessee, the Lessee shall pay to the Lessor, monthly lease rental which shall be a sum total of the ROI on existing investment plus ROI on the additional investment. The monthly lease rental is as under:-

On the existing investment of Rs. 9,10,00,000/-. At an ROI of 13.65 the monthly lease rental payable by the lessor to the lessee works out to be
Rs. 10,31,000 (Rupees Ten lacs Thirty one thousand only) per month.

On the Security deposit of Rs. 5,00,00,000/-; At an ROI of 13.6% the monthly rental payable by the lessor to the lessee works out to be Rs.5,67,000/- (Rupees five lac sixty seven thousand) per month.

On the Additional Investment Estimated as Rs. 17 Crore i.e., Additional investment net of Security deposit (22 crs. less 5 crs.) annexed at the stage- THE ROI on the additional investment shall be at 20.55. Both parties are ad idem that the additional investment is estimated to be Rs.17 Chores. At the time of executing the lease deed, the monthly rental payable on the additional investment is being calculated at the estimated amount of Rs. 17 crores and the same works out to be Rs. 29,08,000/- (Twenty nine lacs and eight thousand only) per month. Upon competition of the additional work, if the investment made by the lessor increases/decreases the monthly rental shall be reworked by the parties based on the final figure of investment and on the above agreed upon lines. Accordingly, an addendum to the instant lease shall be executed.

6. It is the main case of the Appellant that SBI lent an amount of Rs.20 Crores/- to the 'Corporate Debtor' and entered into a Tripartite Agreement dated 09.03.2016, with the Corporate Debtor, and M/s Schreiber Dynamix whereby M/s Schreiber Dynamics is liable to make payment of lease rentals of Rs.44.06Lakhs/- into the Escrow Account and that M/s Schreiber Dynamics deposited only an amount of Rs.36.67Lakhs/- per month for a few months and thereafter did not deposit any amounts. At this juncture, it is relevant to see the terms of the Escrow Account Agreement dated 09.03.2016 entered into between the parties. For ready reference, the Escrow Account Agreement is being reproduced as hereunder:

ESCROW ACCOUNT AGREEMENT

This agreement is made at Chandigarh this 9th day of March, Two Thousand sixteen BETWEEN

(1) M/s INTERNATIONAL MEGA FOOD PARK LIMITED (IMFPL) House No. 3, Sector 5, Chandigarh (hereinafter called "The Borrower/Lessor" which expression shall, unless excluded by or repugnant to the context, be deemed to be included his/her/their heirs, executors, administrators and legal representatives) of the FIRST part

(2) M/s SCHREIBER DYNAMIX DAIRY PRIVATE LIMITED (SDDL) (hereinafter called "Lessee" which expression shall, unless excluded by or repugnant to the context, be deemed to be included his/her/their heirs, executors administrators and legal representatives) of the SECOND part

(3) STATE BANK OF INDIA, constituted under the State Bank of India Act, 1955 having its Central Office at Madame Cama Road, Nariman Point, Mumbai and its Local Head Office in Sector -17, Chandigarh and one of its branches known as Small and Medium Enterprises Branch (SME), SCO Nos 43-48, 3rd Floor, Bank Square, Sector 17-B, Chandigarh (hereinafter called the Bank/Escrow Agent which expression shall include its successors and assigns) of the THIRD PART.

SBI herein after referred to as "**the Lender**", which expression shall, unless it be repugnant to the subject or context thereof, include any one or more of their successors and assigns);

NOW THIS AGREEMENT TO WITNESSETH AS UNDER:

(a) The Borrower is in the process of constructing a building and installation of machinery on the piece of land, described in Schedule-I, to be leased out to the Lessee at Village: Dabwala Kalan, Dist. Fazilka (Punjab) ("the Project") and had requested the Lender to provide Rupee Term Loans for meeting part of the cost of the Project.

(b) The Borrower has agreed to Borrow and the Lender have agreed to lend Rupee Term Loans up to amounts in the aggregate not exceeding **Rs 20.00 Crores (Rupees Twenty crores only)**, described in Schedule-II, (the "Facility" which expression shall, as the context may permit or require, mean any or each of the Term Loan of the respective Lender, or so much thereof as may be outstanding from time to time), on the terms and conditions contained in the Term Loan Agreement(s) entered into with the Lender dated 19.02.2016 amount of Facility/ proportion of the respective Term Loan agreed to be provided/ provided by the Lender.

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(i) Lessee who is o :cupying area measuring 85000/- sq. ft. located in the Central Processing Centre (CPC) Village Dabwala Kalan, District Fazilka, Punjab confirms that he is aware of Lessor having availe l/having agreed to avail Term Loan whereof are set out in Schedule-II against hypothecatior of lease Rentals, payable by the lessee. The monthly lease rental has been worked out as under :-

(ii) On the existing investment of Rs 9.10 crores – At an ROI of 13.60% p.a.
(iii)On the securit deposit of Rs 5.00 crores – At an ROI of 13.60% p.a.
(iv)On additional i ivestment net of security deposit – At an ROI of 20.50%.

At present the minimi im lease rental to be received by the Lessor comes out at Rs 5.40 crores per year. The lease r ental would be payable by the Lessee from March 2016 onwards.

(d) One of the term s of the Term Loan Agreement is that the Borrower shall repay the Term Loan to the Lender i i accordance with the Repayment Schedules as mentioned in the Term Loan Agreement an l underlying security documents and for the purpose of discharge of its liability towards such repayment and effective utilization of fund for its operations, the Borrower has agreed that lease rentals payable by the Lessee shall be deposited to an account designated as the E scrow Account (as herein after defined) to be maintained with SBI, SME Branch, Chandigarh Escrow Agent) till revocation of Term Loan Agreement in writing so that amount of rent can b e appropriated towards the repayment of the term loan amount, it's interest and other incidental charges as per the agreed terms. The borrower/lessor further agrees to keep informed the B ank of changes that are taking place between the existing lessee or further lessee which are like ly to affect the amount of lease rent to be received by the Bank under the escrow account.

(e) Such amounts re ceived into the Escrow Account shall be utilized by the Borrower towards repayment of the pr ncipal and service of interest of the term loans & other incidental charges as per agreed term . and for the Borrower's day to day operations. The Escrow agent's sole responsibility shall b e to do, perform & exercise certain acts, deeds & powers, which the Escrow Agent is authorised & instructed to do, perform & exercise by this agreement. The utilization / operation of the Esc ow Account by the Borrower shall be under total supervision of the Escrow Agent. The Escrow . gent, while supervising the Escrow account, shall not do such thing or act that might affect the day to day operations of the Borrower.

Internatic al Mega Food Park Ltd.
Chairm an cum Managing Director

7. The aforenoted Escrow Account Agreement underlines that the lease rentals payable by the lessee shall be deposited in an account designated as an Escrow Account to be maintained by SBI and that Rs.20Crores/- loan has been extended to the 'Corporate Debtor' for meeting the cost of constructing the building and installation of the machinery of the 'Corporate Debtor Company'.

8. The Adjudicating Authority has observed that both parties were relying on the same registered sale deed. It is seen from the record that the Lease Deed is admitted & the Escrow Account Agreement is also admitted. It is the only case of M/s Schreiber Dynamics that the rental has been readjusted on the basis of certain annexures to the Lease Agreement. The contention of the Learned Counsel for the Schreiber Dynamics that the Appeal is not maintainable on the ground that the RP cannot short-circuit his rights and bring the claim before the Adjudicating Authority taking advantage of Section 60(5) of the Code has to be examined based on the facts of each case. The ratio of the Hon'ble Apex Court in *'Embassy Property Development Private Limited' (Supra)* is that a decision regarding payment under Section 60(5) of the Code can be adjudicated by the Adjudicating Authority only when the dues payable is crystallised and what remains is only payment. The Hon'ble Supreme Court in *'Embassy Property Development Private Limited' (Supra)* in Para 40 has observed as follows:

> *"40. If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(1)(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. This assumes significance in view of the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word "assets", while Section 20(1) uses the word "property" together with the word "vale". Sections 18 and 25 do not use the expression "property". Another important aspect is that under Section 25(2)(b) of the IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. Sections 25(1) and 25(2)(b) reads as follows:*

> *.........This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).*

9. To examine the applicability of this observation by the Hon'ble Apex Court, at the outset, what has to be ascertained is whether the arrears of lease rents receivable from Schreiber Dynamics is an asset of the 'Corporate Debtor'. It is only based on the lease rentals that a Tripartite Agreement was entered into between the 'Corporate Debtor' and 'Financial Creditor' and the Schreiber Dynamix, based on which a loan of Rs.20Crores/- was sanctioned. It is also the case of the RP that non-payment of lease rentals and non-deposit in the Escrow Account has led to the Insolvency of the 'Corporate Debtor'. It is the case of the Schreiber Dynamics that the terms and conditions of the Escrow Account were never breached and that the amount which is due and payable was adjusted towards the utility which was supposed to be provided for by the 'Corporate Debtor'. The facts and circumstances of the case and the documentary evidence establish that the 'lease rentals' are to be construed as an asset of the Corporate Debtor and hence RP seeking the dues, if any, and taking relevant steps, cannot be emphatically stated to be falling outside the purview of IBC. At this juncture it is relevant to reproduce Section 18 of the Code which reads as hereunder:

> ***"18. Duties of interim resolution professional.***— *The interim resolution professional shall perform the following duties, namely:—*
>
> *(a) collect all information relating to the assets, finances and operations of the corporate debtor for*

determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

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

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) <u>take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—</u>

(i) <u>assets over which the corporate debtor has ownership rights which may be located in a foreign country;</u>

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) <u>to perform such other duties as may be specified by the Board.</u>

Explanation.—For the purposes of this [section], the term "assets" shall not include the following, namely:—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator."

(Emphasis Supplied)

10. Having observed that lease rentals fall within the definition of 'asset' as defined under Section 18 of the Code, specifically keeping in view the facts of the attendant case, we are of the view that the RP is empowered to move an Application before the Adjudicating Authority seeking the differential lease amounts, if any. We are of the earnest view that the issue on hand does not require any elaborate evidence keeping in view the Lease Agreement and the Escrow Account Agreement filed by the parties.

11. Section 25 of the Code which deals with the duty of the RP is detailed as hereunder:

***"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:—

> *(a) take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;*
>
> *(b) represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;……………….."*

(Emphasis Supplied)

12. We are of the considered view that the issues can be decided by the Adjudicating Authority on the basis of the documents available on record. We hold that the issue on hand is not a complicated question of law and facts and can be decided under the summary proceedings. The Hon'ble Supreme Court in ***'M/s. Ammonia Supplies Corporation (P) Ltd.' Vs. 'M/s. Modern Plastic Containers Pvt. Ltd & Ors.', 1998 AIR (SC) 3153,*** observed as follows:

"An applicant cannot be driven to file civil suit only because one raises such dispute for dispute's sake to harass an applicant with an object to delay the proceedings. The Court has to examine its sustainability at least prima facie. By merely saying complicated questions of fact and law are involved and there being challenge of any document to be forged, a party should not be driven to file civil suit. Even if such a plea is taken the court should scrutinize the objections to reach to prima facie finding before drawing conclusion of jurisdiction."

13. This Tribunal in *'MAIF Investment India Pte Ltd.' Vs. 'M/s. Ind-Bharat Power Infra Limited' in Company Appeal (AT) (Ins.) No. 334 of 2018* held as hereunder:

> *"NCLT which exercises widest possible powers in a matter under Section 241, 242 of the Act; which even otherwise is expected to always keep interest of the Company in forefront, cannot be treated as unequipped only because the Petition is under Section 59 of the Act <u>In the present matter, firstly, we ore of the view that there were really no complex questions involved and even if it was to be said that there were any complex questions, the same had to be decided by the NCLT and in Appeal</u>, this Tribunal is bound to consider whether or not entry made in the Register of Members could be upheld."*
>
> *(Emphasis Supplied)*

14. The issue on hand has a direct nexus to the Insolvency Proceedings of the 'Corporate Debtor'. Section 238 of the Code reads as hereunder:

> ***"238. Provisions of this Code to override other laws****.—The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*
>
> *[238A. Limitation.—The provisions of the Limitation Act, 1963 shall, as far as may be, apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, as the case may be.]"*

15. Having regard to the facts of the instant case on hand, we are of the considered view that there is no *"interpretation"* of Clauses of Lease Deed involved and even if any Clause is being interpreted differently, the principle of *'Ejusdem Generis'* has to be seen. The Hon'ble Supreme Court in a catena of Judgements has laid down that once CIRP is invoked, Arbitration Clause in any deed/Lease Deed is not applicable. In the instant case, the issue involved is crystallisation of the amount as per the Lease Deed. The Adjudicating Authority could under Rule 43 of NCLT Rules, 2016, call for the documents required to adjudicate the issue, if so needed.

16. We are also conscious of the submissions made by the Resolution Professional that the 'Corporate Debtor' and M/s Schreiber Dynamics are 'related parties' and that as per the Forensic Audit conducted by SIDBI this factum is duly recorded that there may have been underhand payment involved which could be the reason for the 'Corporate Debtor' to have raised bills of a lesser amount. Learned Counsel for the Appellant/RP drew our attention to the copy of the Order dated 04.09.2019 passed by the Adjudicating Authority in CA 466/2019 and the letter dated 23.09.2019 classifying M/s Schreiber Dynamics as a 'related party'. It is pertinent to mention that after an expiry of more than 18 months of the Order, Schreiber Dynamix filed IA 59/2021 belatedly on 05.01.2021 challenging the Order. However, at this juncture, we are not inclined to make any observations regarding the issue of 'related party' or otherwise.

17. We are of the earnest view that the payment/non-payment of lease rentals into the Escrow Account, has a direct nexus with the duties of the RP and the Insolvency of the 'Corporate Debtor' as we hold that 'it is an asset of the Corporate Debtor' and the Respondent cannot be construed as any third party 'Sundry Debtor'. Having regard to the Agreements entered into and the facts of the case, we are of the earnest view that the issue is not a complicated issue of fact or law which cannot be decided by the Adjudicating Authority based on the documents filed.

18. For the aforenoted reasons, we are of the considered view that there are no complicated questions of facts involved in the instant case and *Company Appeal (AT) (Ins.) No. 190/2021* is allowed and the Order of the Adjudicating Authority is set aside. Both parties are directed to appear before the Adjudicating Authority on 25.09.2022 and the Adjudicating Authority shall proceed in accordance with law uninfluenced by any observation herein. It is to be noted that we have not expressed any opinion on the merits of the matter on hand.

Company Appeal (AT) (Insolvency) No. 245/2021

19. This Appeal is preferred by M/s Schreiber Dynamics Diaries Pvt. Ltd., aggrieved by the common Impugned Order passed by the Adjudicating Authority in IA 506/2020 filed by the RP seeking a direction to restrain the Respondent to vacate the lease premises except in accordance with the registered lease deed dated 09.03.2016; to restrain them from removing plant and machinery without permission of the Adjudicating Authority and in IA 508/2020 filed by M/s Schreiber Dynamics Diaries Pvt. Ltd. seeking a direction to the RP not to restrict shifting of the machinery from the leased premises. By way of this common Order, the Adjudicating Authority has *inter alia* directed the RP to appoint a registered valuer forthwith to assess the value of the machine line which M/s Schreiber Dynamics intended to shift from its lease premises owned by the lesser/'Corporate Debtor' and for Schreiber Dynamix to furnish a Bank Guarantee of the value of the machine to the RP. The Adjudicating Authority while disposing of the Applications observed as follows:

> *"21. A perusal of the submissions made on behalf of the parties shows that the corporate debtor is apprehending that SDDPL, with an intention to avoid payment of the rental dues and also future rental dues for the remaining lock-in-period, is trying to shift its entire plant and machinery from the leased premises of the corporate debtor to another place. On the other hand, SDDPL, submits that in view of its business considerations and in view of the production requirements, it only intends to move/shift only one machinery/line to its (an)other manufacturing unit at Kuppam in Andhra Pradesh to meet the demand at the said area.*
>
> *22. On 24.11.2020, when this IA was heard finally, the Managing Director and CFO of SDDPL were present in person before this court through virtual mode and submitted that they have no intention to vacate the premises of the corporate debtor, before the expiry of lock-in-period.*
>
> *23. In the circumstances and in view of the categorical submissions made by the Managing Director and CFO of SDDPL, the IA Nos 506 of 2020 and 508/2020 are disposed of as under:-*
>
>> *(i) The Resolution Professional shall appoint a registered valuer forthwith to assess the value of the machine/line which was intended to be shifted/moved by SDDPL from the leased premises and the said registered valuer shall submit the valuation report thereof within on week from the date of his appointment.*
>>
>> *(ii) SDDPL shall furnish a bank guarantee of the value of the said machine/line to the RP and the said Bank Guarantee shall be in force till the completion of the lock-in-period of the lease. On receipt of the bank guarantee from SDDPL, the RP shall facilitate SDDPL to remove/shift the identified machine/line to the place of its choice. This order is issued in the specific facts and circumstances of this case, Observations and enunciation herein shall not be seen as a*

precedent or considered as relevant in any other context.

(iii) IA Nos. 506/2020 and 508/2020 are disposed of accordingly."

20. It is seen from the aforenoted Order impugned that it is an Order of 'consent' and it is only based on the consent given by M/s Schreiber Dynamics that directions have been issued to them to give security by way of Bank Guarantee equal to the value of plant and machinery shifted by them. It is submitted by the RP that the consent Order has already been acted upon and the plant and machinery was removed by M/s Schreiber Dynamics on submission of a Bank Guarantee equal to the value of the plant and machinery.

21. Having regard to the fact that both parts of the Order has been complied with, this Appeal *CA (AT) (Ins) No. 245/2021* is hereby dismissed.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

NEW DELHI
05th September, 2022
Himanshu