

In the National Company Law Tribunal
Mumbai Bench
Court-II.

MA 3031/2019 in C.P.(IB)-3603/(MB)/2018

Under Section 19(2), 43, 44, 46 and 60(5) of
the Insolvency & Bankruptcy Code, 2016

In the matter of

Mr. Mahesh Sureka : Resolution Professional/
Applicant

V/s.

Marathe Hospitality & Ors. : Respondents

In the matter of

Union Bank of India, Mumbai : Petitioner/ Financial
Creditor

V/s

Phadnis Resorts & Spa India Ltd. : Respondent/ Corporate
Debtor

Order delivered on: 20.03.2020

Coram:

Hon'ble Smt. Suchitra Kanuparthi, Member (Judicial)
Hon'ble Shri Chandra Bhan Singh, Member (Technical)

Per: Chandra Bhan Singh, Member (Technical).

ORDER

1. The Applicant is the IRP in C.P.(IB)3603/MB/2018 which was 'Admitted' under CIRP on 14.03.2018. This Petition was filed by M/s. Union Bank of India (UBI) in the capacity of Financial Creditor by invoking the provisions of Section 7 of IBC read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority)

Rules, 2016 against the Corporate Debtor M/s. Phadnis Resorts & Spa India Limited (PR&SIL).

2. The relief sought by the IRP in MA 3031/2019, *inter alia*, is for the

following:-

"

- A. *Necessary direction shall be provided allowing the applicant to take possession of fixed assets and all documents available in the office and other premises of the Corporate debtor.*
- B. *The instructions pertaining to carry out the necessary actions by the resolution professional shall be provided to the Economic offences Wing.*
- C. *The past directors of the Corporate Debtor should be directed to assist in the present proceedings.*
- D. *Public announcement in newspaper shall be allowed to be issued for appearance of the Directors before this Hon'ble Bench.*
- E. *The Jailor of Nashik Jail shall be directed to allow meetings with the Director Mr. Vinay Phadnis for obtaining necessary information from him.*
- F. *The Economic Offices Wing shall be directed to release the attachment carried out in the property of the Corporate Debtor situated at Lonavala, Tungarli as it has not been done in name of Corporate Debtor but done in the name of Mr. Balvant Arvind Marathe of Marathe Hospitality.*
- G. *The lease agreement entered in between Corporate Debtor and Marathe hospitality shall be declared as cancelled as it was entered into in a malafide manner and without consent*

of the Union Bank of India who are having first charge on the property and is against the interest of the Creditors of the Corporate Debtor.”

3. Submissions by the IRP/ RP :

3.1.1. The Corporate Debtor was carrying out business of running resorts and one of the properties is based at Lonavala. The resort situated at Lonavala has been mortgaged to Union Bank of India (UBI) in 2015 for availing the loan from the Bank. A copy of the Mortgage Deed has been attached by the IRP/ RP in his Application. After mortgaging the property to UBI, the Directors of the Corporate Debtor without taking any consent from UBI, provided this property on lease on a long-term basis at a very small amount to Marathe Hospitality vide lease deed dated 18.05.2016.

3.1.2. The IRP/ RP, through his Associate, had tried to contact the Directors of the Corporate Debtor at the registered office address and the residence address. However, it was closed and even after all possible enquiries no contact could be established. The Applicant visited the Partners of Marathe Hospitality, Mr. Anup Naik, who as per the IRP/ RP, is the Tax Advisor to the Corporate Debtor. Mr. Naik informed the Applicant that he is not in possession of any paper/ document as the registered office of the Corporate Debtor is under attachment by Government authorities.

3.1.3. Subsequently based on information, the CoC and the IRP/ RP came to know that one of the Directors of the Corporate Debtor

i.e. Mr. Vinay Phadnis is under Judicial custody at Nasik Central Jail and, therefore, information was sent to him regarding all the developments of the CIRP through the Jailor of Nasik Central Jail. It was requested by the CoC to Shri Vijay Phadnis to furnish details of all other directors who can help in providing all necessary details.

3.1.4. The Economic Offences Wing (EOW) has attached several of the properties of the Corporate Debtor which includes the registered office of the Corporate Debtor. The IRP mentions that due to attachment of the registered office of the Corporate Debtor and unavailability of Directors and other staff members it has become impossible to prepare essential details of the assets and liabilities of the Corporate Debtor's Company.

3.1.5. Economic Offences Wing has also attached the premises of the Lonavala Resort situated at Tungarli, Lonavala the attachment has been done in name of Mr. Balwant Arvind Marathe though the property belongs to corporate debtor. Mr. Balwant Arvind Marathe is the partner of Marathe Hospitality and don't own this property situated at Lonavala of the Corporate Debtor.

3.1.6. The Applicant i.e. IRP/ RP mentions that Corporate Debtor has failed to take consent from UBI before the execution of lease deed in favour of Marathe Hospitality. The said deed, therefore, has been executed without permission of UBI, who is having the first

charge on the property. The deal, therefore, as per the Applicant, has been executed in a fraudulent manner and may be cancelled.

3.1.7. The IRP/ RP also mentions that the lease rent of the premises at Lonavala has been fixed at only Rs.25,000 per month for a property which is valued at about Rs.12 crore and Banks have provided finance of more than Rs.10 crore on the said property.

3.1.8. The IRP/ RP in the oral submission has mentioned that Shri Anup Naik is one of the partners in the Partnership firm M/s. Marathe Hospitality, which runs the Phadnis Resorts and Spa India Limited. Shri Anup Naik, Partner of Marathe Hospitality, was also the Tax Adviser of the Corporate Debtor and was associated with the Corporate Debtor. Therefore, as per the IRP/ RP, this transaction of giving the property owned by PR&SIL on lease to Marathe Hospitality is a preferential and fraudulent transaction.

4. Submissions by the Respondent No.4, Mr. Anup Naik, for self and on behalf of M/s. Marathe Hospitality (R5).

4.1. The Respondent mentions that the Corporate Debtor and R5 had entered into a Registered Lease Agreement on 18.05.2016 at a monthly lease rental of Rs.25,000 for a period of 10 years with a right to renew the lease for further period of time.

4.2. The Respondent mentions that it was the duty of the Corporate Debtor before giving the said property on lease to seek prior

permission of the UBI. Therefore, the Respondent submits that for the wrong doings of the Corporate Debtor, the rights and privileges of Respondents should not be prejudiced. The Respondent also mentions that since May 2017 UBI is in knowledge of existence of the said Agreement. However, the Respondent also mentions that in May 2017 the Respondent had learnt that UBI is taking action against the Corporate Debtor under the provisions of SARFAESI.

- 4.3.** The Respondent mentions that as per Section 46 of the Code, the relevant time for avoidance of under value transaction is one year prior to commencement of the CIRP of the Corporate Debtor. Therefore, as per the Respondent, since the said Agreement was entered into on 18.05.2016, therefore, is beyond one year from the CIRP commencement date, therefore, cannot be covered u/s.46 of the Code.
- 4.4.** Regarding applicability of section 43 and 44 of the Code which provides for avoidance of preferential transaction, the Respondents submit that since they are not a creditor of the Corporate Debtor before executing the said Agreement the provisions of section 43 and 44 of the Code will not apply on them.

5. **FINDINGS:-**

5.1.1. The Lonavala Resort, situated at Tungarli in Lonavala, has been mortgaged by the Corporate Debtor to Union Bank of India since 30.06.2015. Subsequently the Corporate Debtor has executed a long-term lease agreement in 2016 with Marathe Hospitality. The relevant portion of the Lease Deed of 2016 signed between the parties is reproduced below:-

"1) In pursuance of the said Agreement and in consideration of the Rent hereby reserved and of the covenants, conditions and stipulations hereinafter contained the Lessor hereby demises unto the Lessee the said premises bearing Sub Plot Nos. 1 & 2 out of Final Plot No.; 59 old S. No. 118/1/A/1/2, Corresponding CTS No. 28/59, total adm. about 2309.93 Sq.mtrs. along with the two storeyed building structure and other structures in all adm. 1834.84 Sq.mtrs. built up standing thereon, and along with garden area adm. 200 Sq.mtrs. and access road adm. 109 Sq.mtrs (more particularly specified in Schedule I written hereunder) situated at Village Tungarli, Lonavala, within the limits of the Lonavala Municipal Council, Tal. Maval, Dist.Pune and known as "SAHIL SAROVAR PORTICO" (More particularly described in Schedule – I written hereunder) and together with right for Lessee, it's employees, servants, agents, customers and persons authorized by the Lessee and to use the said premises, to hold the said premises unto the Lessee for the period of 10(Ten) years commencing from 09/05/2016 to 08/04/2026, with right to renew the lease for the further period provided the Lessee paying the rent the Lesser during the said terms for Rs. 25,000/-for month before 10th of each calendar month."

Two things are clear from this: (i) The Lease rental for a period of 10 years was a paltry sum of Rs.25,000 per month payable by 10th of the subsequent month and (ii) the lease can be renewed for a further period by the Lessee as per the said Agreement.

5.1.2. Shri Anup Naik is the Partner of Marathe Hospitality and also Tax Advisor to the Corporate Debtor, therefore, associated with the Corporate Debtor. This is pointer to the fact that it is a case of preferential transaction. That it is also a fraudulent transaction is clear from the fact that after 10 years of lease rental @ Rs.25,000 per month with no annual increment in rent provision. It is only the prerogative of the Lessee for the extension of the lease agreement. What is to be noted is that the Lessor, as per the agreement, does not have any say in the matter and it cannot object to any extension after 10 years but has to accept the extension in case it is so proposed by the Lessor, i.e. Marathe Hospitality.

5.1.3. As per Section 65-A(2)(c) of the Transfer of Property Act, 1882 as amended from time to time, no lease shall contain a covenant for 'renewal'. In the lease agreement of the Corporate Debtor, in a related party transaction with Marathe Hospitality, the total rent for a huge Commercial property measuring about 2310 sq. mtr. along with two-storeyed building structure, is only Rs.25,000 per month with no increase in rental for a period of 10 years. In

addition, as per the Lease Agreement, there is a provision for further extension at the sweet will of Lessee. In view of this, the Lease Agreement entered into between Phadnis Resorts and Spa India Limited and Marathe Hospitality is illegal as per the relevant provisions of the Transfer of Property Act, 1882.

5.1.4. A mortgage deed was executed on 30.06.2015 between Phadnis Resorts and Spa India Ltd., the Corporate Debtor and Union Bank of India, the Financial Creditor, for a financial loan of Rs.10 crore extended by Union Bank of India. The Section 6(a) of the Mortgage Deed reads as under:-

"a) So long as this mortgage shall be subsisting on the loan account, the Mortgagor shall not create, execute or concur in this creation or execution of any other security or encumbrance of any kind over or affecting the mortgaged premises for any part thereof in favour of any person, firm or company whatsoever or otherwise transfer the mortgaged premises or Said Property to transfer anywise, let or license its interest in the same or part with the possession thereof save with the prior written permission of the Mortgagee and save to the extent and in the manner permitted hereby."

It is clear from the above that the lease agreement entered into between Corporate Debtor and Marathe Hospitality in 2016 without the consent of Union Bank of India who are having First charge on the property is *mala fide* and is invalid.

5.1.5. It is also clear that the Union Bank of India, after going through all records and title report of the property, have financed the Corporate Debtor and, therefore, the property which was acquired in 2004 has not been acquired by the Corporate Debtor fraudulently. The attachment of the assets of the Corporate Debtor by the Economic Offences Wing will hamper the claim of the Creditors of the Corporate Debtor and therefore to protect the interest of the Bank and the present Creditors, this Bench directs the Economic Offences Wing and other Government Departments to release the property and assets of the Corporate Debtor currently attached with them so that the Corporate Insolvency Resolution Process of the Corporate Debtor could be conducted in the substantial public interest.

5.1.6. Section 238 of the Code provides for non-obstante clause to the effect that "Code shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force for any instrument having effect by virtue of such law". The Hon'ble Supreme Court in the case of *Solidaire India Ltd. Vs. Fairgrowth Financial Services Pvt. Ltd.* has held that where two statutes contain non-obstante clause, latest statute would prevail. Therefore, in terms of Section 238 of IBC and considering the overriding effect of IBC u/s 238 of the Code this Bench is of the considered view that the attachment order of the Economic

Offences Wing is a nullity and non-est in law and therefore will not have any binding force.

6. In view of the above, this Bench directs the following:-

- a) The Resolution Professional who is the Applicant in this Miscellaneous Application to take possession of fixed assets and all documents available in the office and other premises of the Corporate Debtor.
- b) The Jailor of Nasik Jail to allow meetings of the Resolution Professional and his associates with the ex-director Mr. Vinay Phadnis for obtaining necessary information about the Corporate Debtor Company and its activities.
- c) The Economic Offences Wing to release the attachment carried out on the property of the Corporate Debtor, i.e. Phadnis Resorts & Spa India Limited.
- d) The lease agreement between Corporate Debtor and Marathe Hospitality situated at Village Tungarli, Lonavala is declared as null and void as it has been entered in a mala fide manner without consent of Union Bank of India, the Financial Creditor in this case.

7. **MA 3031/2019** is "**Allowed**" as ordered at para 6 above.

Sd/-
CHANDRA BHAN SINGH
Member (Technical)
Date: 20.03.2020
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Sd/-
SUCHITRA KANUPARTHI
Member (Judicial)