

**IN THE NATIONAL COMPANY LAW
TRIBUNAL KOLKATA BENCH
KOLKATA**

**IA (IB) No.107/KB/2021
I.A. (IB) No.1302//KB/2020
I.A.(IB)429/KB/2022
in
CP (IB) No. 438/KB/2018**

In the Matter of

Vijaya Bank

... Financial Creditor

Versus

Castal Extrusion Private Limited

... Corporate Debtor

And

In the matter of

*Niraj Agrawal [Resolution Professional of
Castal Extrusion Private Limited (in CIRP)]*

... Applicant

Order reserved on: 14/06/ 2022

Order pronounced on: 29/06/2022

Coram:

Mr. Rohit Kapoor : Member (Judicial)

Mr.Harish Chander Suri : Member (Technical)

Counsel/Authorised Representative appeared physically /through video conference;

- For RP : Mr. Joy Saha, Sr. Adv.
Mr. Kumarjit Banerjee, Adv.
Ms. Sanchari Chakraborty, Adv.
Ms. Tanishka Khandelwal, Adv.
Mr. Niraj Agarwal, RP in person
- For CoC : Mr. Avishek Guha, Adv.
Mr. Chitresh Saraogi, Adv.
- For T-RMC : Ms. Manju Bhuteria, Adv.
Mr. A. Chakraborty, Adv.
Ms. Tanvi Luhariwala, Adv.
- For R-2 & R-4 : Mr. Rishav Banerjee, Adv.
- For R-3 : Ms. Urmila Chakraborty, Adv.
Ms. Indrani Basak, Adv.
- For Resolution Applicant : Mr. Jishnu Chowdhury, Adv.
Mr. Kaushik Banerjee, Adv.
Ms. Rashmita Sen, Adv.

ORDER

Per: Harish Chander Suri , Member (Technical)

1. This Interlocutory Application being **IA (IB) No. 107/KB/2021** has been filed by Mr. Niraj Agrawal, Resolution Professional/Applicant under section 45 read with section 49 of the Insolvency and Bankruptcy Code, 2016 along with Rule 11 of the National Company Law Tribunal Rules, 2016 for the following reliefs:-
 - a. *That this Adjudicating Authority be pleased to allow the present application;*
 - b. *An order be passed declaring the so called agreement dated 26.07.2019 between the Corporate Debtor and T-RMC Private Limited as void and reverse the effect of such transaction in accordance with the provisions of the Code;*
 - c. *An order be passed directing Respondent No. 1 (T- RMC Private Limited) to immediately vacate the said land (parcel of land admeasuring 2.209 acres in RS Dag No. 3203, 3205, 3206, and 3208 lying and situated at Narayanpur, Mouza and P.O. R-Gopalpur, P.S. Rajarhat, District-24-*

Parganas (North), West Bengal out of which 1.90 acres is occupied by Respondent No.1) transferred as part of the transaction and the same be vested in the Corporate Debtor;

- d. *An order directing the respondents not to obstruct the sole and exclusive physical possession of the said land by the RP, the Applicant herein;*

Direction upon the local district administration being the officer-in-charge of concerned police station Rajarhat a SRCM Road, Rajarhat and Bidhannagar Police Commissionerate, to give proper assistance to the Applicant in taking possession of the said land so as to discharge his duties under the Code in furtherance of the CIRP of the Corporate Debtor;

An order be passed directing and/restricting to remove any material or assets which is kept at the said land of the Corporate Debtor;

- e. *An order directing the respondents to pay Rs. 292.40 lakhs in respect of benefits received by T-RMC Private Limited from the Corporate Debtor during the period from 27.07.2014 to Insolvency Commencement Date on 18.03.2020, to the Resolution Professional;*
- f. *An order under section 49 of the Code restoring the position as it existed before any so called rent agreement was entered into as if the transaction has not been entered into;*
- g. *Such other order providing relief under section 49 of the Code protecting the interests of the creditors of the Corporate Debtor including Vijaya Bank (now Bank of Baroda) who are victims of such transaction;*

2. This Interlocutory Application being **IA (IB) No. 1302/KB/2020** has been filed by Mr. Niraj Agrawal, Resolution Professional/Applicant under section 18(1)(f)(ii) read with section 25(2) and 60(5) of the Insolvency and Bankruptcy Code, 2016 and under Regulation 30 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulation, 2016 for the following reliefs;

- a. *An order be passed directing the respondent to obey the order dated 18th March, 2020 passed by this Adjudicating Authority in C.P.(IB) No. 438/KB/2020 towards its implementation;*
- b. *An order directing the respondent not to obstruct the sole and exclusive physical possession of the said property by the RP, the applicant herein;*
- c. *Direction upon the local district administration being the officer-in-charge concerned police station Rajarhat at SRCM Road, Rajarhat Bidhannagar Police Commissionerate, to give proper assistance to the applicant in taking possession of the said property so as to discharge his duties under the Code in furtherance of the CIRP of the Corporate Debtor;*
- d. *An order be passed directing and/restricting to remove any material or assets which is kept at the said property of the Corporate Debtor;*

3. Both these applications are being disposed of by way of this common order.

4. The underlying company petition in CP (IB) No.438/KB/2018 was filed by Vijaya Bank against Castal Extrusion Private Limited, the Corporate Debtor, under section 7 of the Insolvency and Bankruptcy Code 2016 (“the Code” or “IBC”) which was admitted vide order dated 18.03.2020 in CP (IB) No. 438/KB/2018.
5. Initially, the Applicant/RP (Reg. No. IBBI/IPA-001/IP-P00130/2017-18/10272) was appointed as the Interim Resolution Professional. He was later confirmed as the Resolution Professional of the Corporate Debtor at the first meeting of the Committee of Creditors (CoC) on 18.08.2020, adjourned and concluded on 19.08.2020.
6. The IRP made public announcements on 20.03.2020 in Business Standard (English) and Ekdin (Bengali) newspapers regarding initiation of CIRP and called for proof of claims from the financial and operational creditors, workers and employees of the Company in the specified forms till 01.04.2020.
7. The RP has filed these two interlocutory applications being I.A. (IB) 107//KB/2021 and I.A. (IB) 1302//KB/2020 IN C.P. (IB) No. 438/KB/2018 seeking eviction of T-RMC Private Limited from the land/premises of the Corporate Debtor inter alia on the ground that the Corporate Debtor had entered into purported tenancy agreements in favour of T-RMC at a grossly undervalued monthly rent of Rs.55,000/- to defraud the secured creditors and to create third party interest after issuance of Notice under SARFAESI by the Secured Creditor.
8. In support of the said two interlocutory applications, the RP has argued that -
 - (a) Castal Extrusion Pvt. Ltd. (“CEPL”), the Corporate Debtor (“CD”), had provided Corporate Guarantee on 06.05.2013 securing repayment of the loan availed by Tanta Construction Limited (“TCL”) from Vijaya Bank (now Bank of Baroda). Due to failure by TCL to meet its liability, the Financial Creditor (“FC”) invoked the Corporate Guarantee. In March 2018, the FC had filed an application u/s 7 of IBC, 2016 against CEPL. The said application was admitted on 18.03.2020 directing insolvency commencement in respect of CEPL and Applicant was appointed as Interim Resolution Professional (“IRP”), later confirmed as the Resolution Professional (“RP”) in the first Committee of Creditor (“CoC”) meeting dated 18.08.2020 and concluded on 19.08.2020).
 - (b) The principal asset of CEPL is an industrial freehold land admeasuring 2.209 acre comprised in Plot Nos. R.S. 3205, 3206, 3208 and 3203/4633 situated at Mouza-Gopalpur, J.L. No. 2, P.S. Rajarhat, in the district of 24 Parganas (North)

within Rajarhat-Gopalpur Municipal Corporation (the “subject land”), which was furnished as security for repayment of the financial debt of TCL being the Corporate Guarantor of TCL.

- (c) Records of the Corporate Debtor revealed that much after filing the said application u/s 7 of IBC, 2016 before this NCLT for initiation of the Insolvency Proceedings, CEPL had entered into a purported unstamped & unregistered Rent Agreement on 26.07.2019 with one T-RMC Pvt. Ltd. (T-RMC), whereby a leasehold interest over 1.90 acres out of 2.209 acres was created in favour of T-RMC for a period of 5 years at a monthly rent of Rs.55,000/- (Rupees Fifty five thousand only). It further appears from the records that the said Agreement was preceded by another unstamped and unregistered Rent Agreement dated 27.07.2014 on identical terms, which expired on 26.07.2019.
- (d) The T-RMC claimed to be in possession of the said area of the subject premises since 27.07.2014. It is pertinent to note that both the above agreements were envisaged to be determinable prior to expiry of the terms thereof.
- (e) It is evident from the claim filed by Vijaya Bank in Form C that the principal borrower TCL’s account with Vijaya Bank was declared as “Non Performing Asset” (“NPA”) in the first quarter of 2014, and subsequently, a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter “SARFAESI Act”) was issued by the bank on 10.03.2014 for enforcement of the security interest held over the subject land.
- (f) The purported tenancy was created in favour of T-RMC on 27.07.2014, i.e. after receipt of notice under Section 13 (2) of SARFAESI Act, and 4 days prior to receipt of notice dated 01.08.2014 under Section 13 (4) of SARFAESI Act, and as such, in patent derogation & contravention of the bar under Section 13(13) of the SARFAESI Act. No NOC was sought from the FC prior to creation of the lease over the subject land, and the said purported Rent Agreements falsely mentioned that the said land was free from all encumbrances in any manner whatsoever.
- (g) By way of the present applications, RP sought to assail the purported tenancy entered into by and between the CD and T-RMC under, inter alia, the provisions of Section 45 and 49 of the Insolvency and Bankruptcy Code, 2016 (“IBC” and/or the “Code”). The RP submitted opined that the purported lease was created (i) to defraud the creditors so as to keep the subject land beyond the reach of the creditor of the CD and (ii) at a gross undervalued, and therefore constitutes a

transaction defrauding the creditors within the meaning of Section 49 of IBC and an “undervalued transaction” within the meaning of Section 45 (2) of the IBC. To audit and confirm such apprehended PUFEE transaction as per the Code, the RP had appointed Chartered Accountant to conduct Transaction Audit of the books of accounts of the CD on 09.10.2020. The said Transaction Auditor submitted its Report on 23.12.2020 confirming undervalued transaction.

- (h) As per the Audit Report, the fair rent of the said land was determined at Rs. 4.85 lakhs per month against Rs.55,000/- per month as stipulated & charged under the Rent Agreement. It has been pointed out that the period beginning from 18.03.2018 to 17.03.2020 falls within look back period u/s. 46(1)(ii) of the Code for the purpose of Section 45 of the Code, resulting in the undervalued transaction of Rs.1.032 crore for the period under reference.
- (i) The present proceeding for declaring the said agreement between CD and Respondent void, and reverse the effect of such transaction under the Code, owing to the same being an undervalued transaction perpetuated with mala fide intention to defraud the secured creditors, by keeping the asset beyond their reach.
- (j) The impugned transaction vide 2014 Agreement was covered within the purview of Section 46 (1) (ii) of IBC.
- (k) The RP has further contended that It has been brought on record by the RP that at the relevant time of execution of the 2014 Agreement, the CD and T-RMC were related parties within the meaning of Section 5 (24)(d) of IBC. This is since Harshvardhan Tantia, one of the promoters of both the CD and T-RMC, was a director of T-RMC and held more than 2% shares in the CD at the time of the execution of the purported 2014 Agreement. In this regard, the RP has drawn our attention to the following relating to Shareholding pattern:
- Shareholding of T-RMC in FY 2014-15 at page 43 of the Application states that Harshvardhan Tantia held 50% shares of and in T-RMC at the relevant date.
 - Shareholding of CD in FY 2014-15 at page 107, Application: Harshvardhan Tantia personally held 6.22% shares of and in the CD at the relevant date at the time of execution of the 2014 Agreement.
 - Details of appointment and resignation of Harshvardhan Tantia from T-RMC (Form No. DIR-11) at pages 105-106: Harshvardhan Tantia was the director of

T-RMC since 17.07.2014 to 14.03.2016.

- (l) The said tenancy arrangement was subsisting, and being acted upon, as on 18.03.2018, i.e. two years preceding the date of insolvency commencement.
 - (m) Accordingly, the arrangement pursuant to the 2014 Agreement was continuing within 2 years preceding the Insolvency Commencement Date, 18.03.2020, and as such, falls within the purview of Sections 46 (1) (ii) of IBC.
 - (n) The valuation report submitted by the RP shows that the fair monthly rent should have been Rs.4.85 lakh instead of Rs.55,000/- and as such there was a shortfall of Rs.4.30 lakh per month.
9. The RP has further submitted as under referring to various provisions of the CODE and Judgments:
- (a) The impugned transaction of the subject land of the CD has been divested to T-RMC by way of the purported Agreement was a transaction to defraud the secured creditor having a security interest over the subject land.
 - (b) The said transaction was undertaken in the following backdrop:
 - The principal borrower TCL, defaulted to repay the loan to Vijaya Bank as a result of which the loan account was declared as NPA on 10.03.2014.
 - The CD was the Corporate Guarantor of TCL and had furnished the subject land as security for repayment of TCL's loan to Vijaya Bank.
 - At the relevant time, CD was under the common control and management of the Tantia Family, the promoters of TCL, the principal borrower.
 - Upon declaration of TCL's account as NPA, the creditor issued notice under Section 13(2) of SARFAESI Act on 10.03.2014.
 - Soon after issuance of the notice under Section 13(2) of the SARFAESI Act, T-RMC (initially named Tantia RMC Pvt. Ltd.) was incorporated on 17.07.2014, wherein Harshvardhan Tantia was its director having 50% shareholding therein.
 - Immediately upon incorporation of T-RMC, the purported Agreement was entered into by and between CD and T-RMC on 26.07.2014, whereby possession of 1.90 acres out of the total 2.209 acres of the subject land was

divested to T-RMC. The said Agreement misrepresents that the subject land was “free from all encumbrances in any manner whatsoever.

- (c) It would be evident from the above course of event that the impugned arrangement was created with a motive to encumber the subject land post-receipt of a Section 13(2) notice with the sole mala fide intention of defrauding its creditors by keeping the said asset out of the clutches of Vijaya Bank.
- (d) The purported transaction was in patent derogation and contravention of Section 13(13) of SARFAESI Act, rendering such transaction a nullity and void ab initio as held by the Hon’ble Apex Court in the matter of **Bajrang Shyamsunder Agarwal v. Central Bank of India, (2019) 9 SCC 94 @ prs. 12, 19-20, 24, 32.**
- (e) It is also pertinent to note that claim of tenancy to safeguard possession in the face of proceeding under SARFAESI Act, without any registered instrument creating such tenancy, is considered impermissible and such purported tenant without any registered instrument creating tenancy is considered to be a “tenant at sufferance” akin to a trespasser who has no right to possession of the property. **(Bajrang Shyamsunder Agarwal v. Central Bank of India (supra.), @ pr. 20 [quoting Harshad Govardhan Sondagar v. International Asset Reconstruction Co. Ltd., (2014) 6 SCC 1 @ pr. 36.]; confirmed in Hemraj Ratnakar Salian v. HDFC Bank Ltd. And Ors., 2021 SCC OnLine SC 611 @ prs. 12-13).**
- (f) The look back period stipulated under Section 46(2) of IBC does not apply for impugning a transaction under Section 49 of IBC as held by the Hon’ble Apex Court in **Aditya Kumar Tibrewal v. Om Prakash Pandey, 2022 SCC OnLine NCLAT 142 @ pr. 12 (iv)-(vii), p. 12-14.**
- (g) The purported undervalued lease created in favour of T-RMC constitutes a transaction for “transfer of one or more assets of the corporate debtor attracts the provision of Section 45 (2) of IBC.
- (h) The impugned lease arrangement was created at a gross undervalue considering the value of the land and the expected rate of return.
- (i) The fair value of annual rent, arrived at on the basis of rate of return on the current bank rate on G-Sec of 6.86% is found to be Rs. 4.85 Lakhs/ Month, thereby leaving a shortfall of Rs. 4.30 Lakhs/ Month on account of the undervalued transaction.

- (j) The impugned transaction cannot be deemed to have been entered into the ordinary course of the business of the CD as the CD is not a property company earning revenue from the business of leasing/renting out its premises. As such, any contention to the effect that an arrangement of lease/tenancy in relation to its principal asset is a transaction in ordinary course of the business of CD is a non-starter.
- (k) A transaction designed to vest unwarranted benefit to a related third party under common control of the promoters of CD can in no circumstance fall within the exception to Section 45 (2) of IBC. Only a bona fide transaction intended to enhance the value/ worth of the CD without any taint of favour to any party could come within the purview of the exception as held in by the Hon'ble Supreme Court of India in **Anuj Jain v. Axis Bank Ltd. & Ors., (2020) 8 SCC 401 @ prs. 28.2-28.6.**
- (l) The applications filed correctly within the purview of IBC and CIRP Regulations for the following reasons:
- The IBC does not stipulate any timeline for filing an Application under Sections 43 to 51 and/or Section 66 of the Code.
 - The wordings of Regulation 35A of CIRP Regulations are not mandatory but directory in nature. Accordingly, timeline stipulated under Regulation 35A of the CIRP Regulations are directory in nature and does not render any application filed beyond the prescribed time frame to be invalid, non-est and/or un-actionable. (Refer **Aditya Kumar Tibrewal v. Om Prakash Pandey, 2022 SCC OnLine NCLAT 142 at paragraph 11 (xiii), page 11.**

10. In counter to the submissions of the RP, the principal defence of the Respondent T-RMC has been three-fold: (i) that the allegations have been filed in contravention to the timelines stipulated under Regulation 35A of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 ("CIRP Regulations"), (ii) the Transaction Audit Report is erroneous in nature and should not be relied upon, owing to its inconclusiveness, and (iii) the application is not maintainable as the said 26.07.2019 agreement is not a standalone agreement, merely a renewal of the old Agreement from July 2014.

11. Upon perusing the documents filed by the RP, judgments referred and considering

submissions by the parties, it is ordered that the T-RMC Private Limited and other entities, if there be any, is directed to remove its establishment along with all its employees, staffs, officers, workmen engaged by them including all its machineries from the subject land/ premises of CEPL within 30 days from the date of approval of the Resolution Plan and handover vacant peaceful possession of the land/premises to the Resolution Applicant.

12. It is further directed that the Resolution Applicant shall not be in any manner liable to take any responsibility and/or liability in respect of the said T-RMC including its suppliers / contractors / vendors / employees / workers / staffs or any other entities whatsoever.
13. It is further directed that in the event the said T-RMC fails and/or neglects to remove its entire set-up along with all officers, employees, staffs and workmen engaged by them including all its machineries from the subject land/premises of CEPL as stated above within the stipulated period, the concerned District Administration, Police Authorities, Local Authorities and all other Statutory Authorities to provide full co-operation and assistance as may be required and sought for by the Resolution Applicant.
14. Though the Valuation Report shows that the fair rent for the subject land/premises of the Corporate Debtor should be Rs.4.85 lakh but for the ends of justice, it is ordered that the said T-RMC shall make a further payment to the Corporate Debtor at the rate of Rs.2,00,000/- per month to be calculated from the date of creation of such tenancy in its favour till the date of handing over peaceful vacant possession of the land to the Resolution Applicant within the period stipulated above. In the event of failure to make such payment within the stipulated period, the Corporate Debtor and/or the Resolution Applicant shall be at liberty to claim and realise mesne profit from T-RMC at such rate as may be reasonably decided by the Corporate Debtor and/or the Resolution Applicant. The Corporate Debtor and/or the Resolution Applicant shall be at liberty to take appropriate step against T-RMC for their eviction and realisation of the said dues in the event their failure to comply this order. The said I.A. (IB) 107/KB/2021 and I.A. (IB) 1302/KB/2020 are thus allowed with the directions as above.

I.A.(IB)/429/KB/2022

15. This application has been moved by one Mahesh Kumar Khaitan, applicant who sought a complete copy of all the Resolution Plans that had been submitted by the prospective resolution applicants with the Resolution Professional in the CIRP of the

Corporate Debtor. It is submitted that the Resolution Professional, however, had categorically refused to provide a copy of the Resolution Plans on the ground that the Resolution Plans have been placed before the CoC in its meetings and since suspended board did not attend such meetings and that a Resolution Plan has been approved by the CoC, which is pending for approval before this Adjudicating Authority. Therefore, the applicant had moved this application.

16. We have considered the submissions made by the applicant in the application and heard the Ld. Counsel appearing for the applicant, we do not find any substance in the application.
17. The Resolution Plan has already been approved by the CoC and the application for approval has also been heard by this Adjudicating Authority for its approval.
18. By way of separate orders, the said Resolution Plan has been approved by this Adjudicating Authority. Therefore, **I.A. (IB)429/KB/2022** even otherwise has become infructuous and is dismissed as such.
19. Certified copy of this Order be issued on demand to the concerned parties, upon due compliance.

Harish Chander Suri
Member (Technical)

Rohit Kapoor
Member (Judicial)

Order Signed on this, the 29th day of June, 2022

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