

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 206 of 2021

(Arising out of Order dated 02.02.2021 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, in IA(IB) 1079/KB/2020 in CP(IB) No.338/KB/2018)

IN THE MATTER OF:

Cotton Casuals (India) Private Limited
12, Ho Chi Minh Sarani,
Kolkata – 700071

.... Appellant

Vs

1. Kanchan Dutta,
Liquidator,
19, Himangshu Mohan Chakraborty Road,
Kolkata 700108.
Office at : Chatterjee International Centre,
17th Floor, Flat No. – 13A, 33A,
J.L. Nehru Road, Kolkata 700071.

2. West Bengal Industrial Development
Corporation Limited,
Protiti, 13, Abanindra Nath Tagore Sarani,
(Camac Street), Kolkata – 700017.

.... Respondents

With
Contempt Case (AT) No.17 of 2021 in
Company Appeal (AT) (Insolvency) No. 206 of 2021

IN THE MATTER OF:

Cotton Casuals (India) Private Limited
12, Ho Chi Minh Sarani,
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.... Appellant

Vs

1. Kanchan Dutta,
Liquidator,
19, Himangshu Mohan Chakraborty Road,
Kolkata 700108.
Office at : Chatterjee International Centre,
17th Floor, Flat No. – 13A, 33A,
J.L. Nehru Road, Kolkata 700071.

2. P. Kamalakanth,
Executive Director of West Bengal
Industrial Development Corporation Limited,
'Protiti', 13, Abanindra Nath Tagore Sarani,
(Camac Street), Kolkata – 700017. Respondents

Present:

For Appellant:

**Mr. Debal Kr. Banerji, Sr. Advocate
with Mr. Debojyoti Bhattacharya,
Mr. Deepnath Roy Chowdhury and
Mr. Debdeep Sinha, Advocates.**

For Contemnor/Respondents:

**Mr. Rahul Auddy, Advocate for R- 1.
Mr. Jayant Mehta, Sr. Advocate with
Mr. Nikhil Parikshit, Advocate for R-
2.**

J U D G M E N T

ASHOK BHUSHAN, J.

The Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'IBC') has been filed against judgment order dated 2nd February, 2021 passed in IA(IB) 1079/KB/2020 in Company Petition (IB) No.338/KB/2018. Brief facts necessary to be noted for deciding this Appeal are :

- (i) Liquidation proceedings against Corporate Debtor, Enfield Apparels Limited was initiated under the IBC.
- (ii) Invitation for Expression of Interest for acquisition of Corporate Debtor was published by the Corporate Debtor on 24th May, 2019.
- (iii) E-Auction was held on 11th June, 2019 in which the appellant could not participate.

- (iv) A letter dated 26th June, 2019 was written by the Appellant to the Liquidator, requesting for purchase of one of the four modules at prevailing bid value.
- (v) An application was filed by the Appellant before the Adjudicating Authority for cancelling the E-Auction held on 11th June, 2019
- (vi) Appellate made an offer to pay Rs.15.50 crores as compared to the auction price of Rs.14.37 crores.
- (vii) The Adjudicating Authority passed an order dated 24th February, 2020 directing the Appellant to deposit 25% of the proposed bid amount.
- (viii) By subsequent order dated 12th March, 2020 of the Adjudicating Authority, Appellant's bid for Rs.15.50 crores was accepted and Adjudicating Authority directed the Appellant to deposit the entire amount.
- (ix) Liquidator also filed an Application before the Adjudicating Authority praying that transfer fee demanded is not applicable in the transfer by the Liquidator.
- (x) An Application was filed by the Appellant again seeking time for depositing the remaining amount. The Application filed by the Appellant was allowed, giving time and the Adjudicating Authority further directed that Appellant/ purchaser shall bear and pay the applicable stamp duties, registration fees and all fees and expenses payable for registration of documents,

Taxes, GST, etc. and all other duties payable inclusive of transfer fee in connection with purchase of Sale Assets.

- (xi) An Application was filed by the Appellant to modify the order dated 12th March, 2020 and 22nd June, 2020, which too was rejected by the Adjudicating Authority by order dated 29th July, 2020.
- (xii) Respondent No.2 i.e. West Bengal Industrial Development Corporation Limited wrote a letter dated 3rd September, 2020, asking for a deposit of Rs.2,96,69,215/- as transfer fee.
- (xiii) The Appellant again filed an Application before the Adjudicating Authority, questioning the liability of transfer fee, challenging the letter dated 3rd September, 2020 of West Bengal Industrial Development Corporation Limited.
- (xiv) The said Application was heard by the Adjudicating Authority and by the impugned order dated 02.02.2021 the application of the Appellant was rejected. The Adjudicating Authority directed the Appellant/ Applicant to pay the transfer fee to the West Bengal Industrial Development Corporation Limited.
- (xv) This Appeal has been filed by the Appellant challenging the order dated 02.02.2021.

2. We have heard Shri Debal Kr. Banerji, learned Senior Counsel for the Appellant, Shri Jayant Mehta, Learned Senior Counsel for Respondent No.2 and Shri Rahul Auddy, learned Counsel for Respondent No.1.

3. Shri Debal Kr. Banerji, learned Senior Counsel for the Appellant submits that only issue to be considered in the present Appeal is with regard to liability of transfer fee. Shri Banerji submits that sale by Liquidator is involuntary on which no transfer fee is payable. He further submits that Adjudicating Authority has wrongly assumed that Appellant is claiming for any waiver of transfer fee, whereas this was not the case for any claim of waiver. Shri Banerji submits that transfer of fee could have been charged only when it was voluntary transfer, but since the transfer in the present case is by operation of law, there is no liability to pay transfer fee by the Appellant. He further submits that in the Invitation for Expression of Interest issued by Liquidator on 24th May, 2019 under Clause 7.1.12, although stamp duties, registration fees and all fees and expenses payable for registration are mentioned therein, but there is no mention of transfer fee and hence, there is no liability on the Appellant to pay the transfer fee.

4. Shri Jayant Mehta, learned Senior Counsel appearing for Respondent No.2 submits that the Appellant is liable to pay transfer fee. Shri Mehta refers to letter dated 26th June, 2019 written by the Appellant to the Liquidator, where he prayed that he may be permitted to bid and he has undertaken to pay transfer fee. Shri Mehta further submits that under Clause 12.28 of sub-lease Deed there is a clear mention of payment of 10% of transfer fee. Shri Mehta further submits that Clause 7.1.12 on which learned Counsel for the appellant has placed reliance has to be read in

business efficacious manner and expression “*all other duties payable in connection with purchase of Sale Assets*” are wide enough to include transfer fee. Shri Mehta further submits that by order dated 23rd June, 2020, Adjudicating Authority has clearly directed that purchaser shall be liable to pay transfer fee, which order was again reiterated on 29th July, 2020 by Adjudicating Authority and the Appellant having never challenged those orders is bound by the principles of *res-judicata* and should not have raised the issue again and again.

5. Shri Rahul Auddy, learned Counsel for Respondent No.1 also submits that by virtue of Clause 12.28 of sub-lease Deed dated 6th August, 2010, the Appellant is liable to pay transfer fee. It is submitted that sale by Liquidator is nothing but sale by Company and the sale cannot be said to be involuntary sale. It is submitted that Liquidator has initially filed an Application that there is no liability to pay transfer fee, but the said Application was not pressed and withdrawn.

6. We have considered the submissions of the learned Counsel for the parties and have perused the record.

7. The main issue to be considered and answered in this Appeal is, as to whether the Appellant was liable to pay transfer fee as demanded by the West Bengal Industrial Development Corporation Limited.

8. The first ground of attack on the payability of transfer fee as mounted by Shri Debal Kr. Banerji, learned Senior Counsel for the Appellant is that

the transfer by Liquidator is involuntary transfer and there is no payability of transfer fee and transfer fee could have been asked for as per sub-lease Deed dated 6th August, 2010 in event a voluntary transfer was made by the Company. Learned Senior Counsel for the Appellant in support of his submission has placed reliance on judgment of Calcutta High Court in **1958 SCC OnLine Cal 213 – Krishna Das Nandy v. Bidhan Chandra Roy**; the judgment of the Hon'ble Supreme Court in **(1980) 3 SCC 565, M/s Parasram Harnand Rao vs. M/s Shanti Parsad Narinder Kumar Jain and Anr.**; and **B. Arvind Kumar vs. Government of India, (2007) 5 SCC 745**.

9. In Krishna Das Nandy case (supra), the question was as to whether the defendant's purchase came within Clause (a) and (b) of proviso to Section 13 of West Bengal Rent Control Act, 1950. The question which arose in the above case was as to whether the tenant i.e. the Company has transferred the Company within the meaning of proviso (a). In the above case in liquidation proceeding the defendant has purchased the tenancy through public auction. The Calcutta High Court in the above case held that in winding up, the Company is put into liquidation and sale is made by the Liquidator acting under the control of the Court and sale, therefore, is really by the Court acting through Liquidator. In paragraph 38 and 39 following was laid down:

“38. In a compulsory winding up, the company is put into liquidation against its will by force of law and the order of the court and the sale is made by the liquidator,

acting under the control of the court and with its sanction. That is the dictate of law. The sale, therefore is really by the court, acting through the liquidator. End the company has no hand in the matter. It is thus a sale against the company's will or a sale in invitum. This is particularly so under the Indian law where the Companies Act differs in an important particular in this respect from its English counterpart, vide section 179(C) of the Indian Act, under which the liquidator can sell only with the sanction of the court, thus contemplating prior sanction, while, in the English Act [Companies (Consolidation) Act, 1908 which was considered in (1921) 2 Ch. 164 (12). (supra)] the corresponding section 151(2), even when read with section 151(3), does not seem to require at least prior sanction of court in case of the liquidator's sale. The court directs the winding up and, as soon as the order is made, the assets of the company are placed by law in the custody and control of the court (vide section 178) which eventually orders and sanctions the sale, acting under the imperative provisions of the statute [vide section 179(c)]. In essence, therefore, it is a transfer by the court or by operation of law and, looking to the substance of the matter, we do not find any difference in the character of this sale (which, as we have said above, is really a sale in invitum) from a sale in execution or any other compulsory sale, to which, it is not disputed, the provisos will not apply.

39. *The Rent Control Act, it must be remembered here, was passed for the protection of tenants. The main part of section 12(1) gave absolute immunity to tenants from eviction and the provisos only mentioned the exceptions*

to that immunity. In this context, when proviso (a) speaks of a transfer by the tenant, it refers, in our opinion, to a transfer in substance at least if not in form also by the tenant, and it will not apply where the transfer is by operation of law and the tenant has no hand in it, although, technically or in form, it is and appears to be a transfer by him. Whether the same principle ought to apply when construing a covenant against alienation is an entirely different matter which does not arise for consideration in this appeal and we prefer to express no opinion on the point and necessarily therefore, on the English case cited, namely, (1921) 2 Ch. 164 (12) (supra), and the Allahabad decision (I.L.R. 12 All. 192??? (11) (supra) too. We hold, accordingly, that provisos (a) and (b) of section 12(1) would nor apply to this case and the defendant would not be deprived of protection under the Rent Control Act unless the plaintiff can succeed on the other provisos, pleaded by him, viz. proviso (h).”

10. The next case referred to by Shri Banerji is **(1980) 3 SCC 565, M/s Parasram Harnand Rao vs. M/s Shanti Parsad Narinder Kumar Jain and Anr.**, in which the Hon’ble Supreme Court has referred to Calcutta High Court judgment in Krishna Das Nandy (supra). The Supreme Court held that on account of transfer made by the Official Liquidator the purchaser stepped into the shoes of the Corporate Debtor i.e. the original tenant and the sale on behalf of the Liquidator was held to be voluntary sale. In paragraph 6 of the judgment following was laid down:

“6. In the instant case it was appellant who brought the previous suit which resulted in a decree for eviction of the tenant on July 31, 1961 — a date when Respondent 1 had already taken possession of the premises by virtue of transfer made by the Official Liquidator. Thus the identity of the subject-matter being substantially the same, this case clearly falls within the ambit of the ratio in the case supra. On this ground alone therefore the appellant is entitled to succeed because the High Court with due respect does not appear to have properly construed the scope of Order 9, Rule 9 CPC. There is however nothing to show that Respondent 1 was a tenant within the meaning of Rent Control Act so as to maintain an application under Section 25 of the Act when in fact he was an unlawful sublessee. As regards Point 3, the High Court relying on a decision of Calcutta High Court in Krishna Das Nandy v. Bidhan Chandra Roy [AIR 1959 Cal 181 : 63 CWN 29] has found that as the transfer in favour of Respondent 1 by the Official Liquidator was confirmed by the court, the status of the tenant by Respondent 1 was acquired by operation of law and therefore the transfer was an involuntary transfer and the provisions of Rent Control Act would not be attracted. After a careful perusal of the Calcutta case [AIR 1959 Cal 181 : 63 CWN 29] , in the first place it appears that the section concerned has not been extracted and we are not in a position to know what was the actual language of the section of the Bengal Act. Secondly, in our opinion, the Official Liquidator had merely stepped into the shoes of Laxmi Bank which was the original tenant and even if the Official Liquidator had

transferred the tenancy interest to Respondent 1 under the orders of the court, it was on behalf of the original tenant. It was undoubtedly a voluntary sale which clearly fell within the mischief of Section 14(1)(b) of the Delhi Rent Control Act. Assuming that the sale by the Official Liquidator was an involuntary sale, then it undoubtedly became an assignment as provided for by Section 14(1)(b) of Delhi Rent Control Act. Section 14(1)(b) runs thus:

“That the tenant has, on or after the 9th day of June, 1952, sublet, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord.”

11. The judgment of the Hon’ble Supreme Court in M/s Parasram Harnand Rao (supra) does not support the submission of the learned Counsel for the Appellant. Sale on behalf of Corporate Debtor by Liquidator was held sale by the Company and was held to be voluntary sale.

12. Now we come to another judgment of the Hon’ble Supreme Court in **Cox & Kings Ltd. vs. Chander Malhotra, (1997) 2 SCC 687**. In this case, the Hon’ble Supreme Court relied on its earlier judgment in Parasram Harnand Rao (supra). It is useful to ascribe paragraph 6 of the judgment where a passage from Parasram Harnand Rao was quoted with approval:

“6. The respondent-landlord is not bound by such assignment, induction of the appellant-Company against her wishes. Her written consent is a precondition, as

envisaged under sub-section (1)(b) of Section 14 which was not obtained. Therefore, it is a clear case of sub-letting. Even otherwise, it would be an assignment, as admittedly agreed in the agreement referred to hereinbefore between the Foreign Company and the Indian Company. In Parasram Harnand Rao v. Shanti Parsad Narinder Kumar Jain [(1980) 3 SCC 565 : (1980) 3 SCR 444] , the landlord had executed a lease in respect of the demised premises in favour of Laxmi Bank on 1-4-1942; the Bank went into liquidation. The liquidator sold leasehold right to the respondent and the court confirmed the same. An application for eviction came to be filed and it was contended that it being an involuntary transfer it was not a case of sub-letting under Section 14(1)(b) of the Act. This Court had negated the contention holding thus:

“As regards point No. 3, the High Court relying on a decision of the Calcutta High Court in Krishna Das Nandy v. Bidhan Chandra Roy [AIR 1959 Cal 181 : 63 CWN 29] has found that as the transfer in favour of Respondent 1 by the official liquidator was confirmed by the Court, the status of the tenant by Respondent 1 was acquired by operation of law and therefore, the transfer was an involuntary transfer and the provisions of Rent Control Act would not be attracted. After careful perusal of Calcutta case [AIR 1959 Cal 181 : 63 CWN 29] , in the first place it appears that the section concerned has not been extracted and we are not in a position to know what was the actual language of the section of the Bengal Act. Secondly, in our opinion, the official liquidator had merely stepped into the shoes of Laxmi Bank which was the original tenant and even if the official liquidator had transferred the tenancy

interest to Respondent 1 under the orders of the Court, it was on behalf of the original tenant. It was undoubtedly a voluntary sale which clearly fell within the mischief of Section 14(1)(b) of the Delhi Rent Control Act. Assuming that the sale by the official liquidator was an involuntary sale, then it undoubtedly became an assignment as provided for by Section 14(b) of the Delhi Rent Control Act. Section 14(b) runs thus:

‘14. (b)—that the tenant has, on or after the 9th day of June, 1952, sub-let, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord.’

The language of Section 14(b) is wide enough not only to include any sub-lease but even an assignment or any other mode by which possession of the tenanted premises is parted. In view of the wide amplitude of Section 14(b) we are clearly of the opinion that it does not exclude even an involuntary sale. For these reasons therefore we are unable to agree with the view taken by the High Court. The appeal is accordingly allowed, the judgment and decree of the High Court are set aside and the plaintiff's application under Section 25 of the Delhi Rent Control Act is dismissed.”

13. The above judgment of Hon’ble Supreme Court clearly indicates that transfer made by a Liquidator is transfer on behalf of the Company and sale by Liquidator cannot be said to be involuntary sale.

14. Section 35 of the IBC, which deals with powers and duties of liquidator, sub-section (f) and (g) clearly indicate that the actions taken by

Liquidator are on behalf of the Corporate Debtor. Section 35 sub-section (f) and (g) are as follows:

“35 (f) subject to section 52, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified: 1

[Provided that the liquidator shall not sell the immovable and movable property or actionable claims of the corporate debtor in liquidation to any person who is not eligible to be a resolution applicant.]

(g) to draw, accept, make and endorse any negotiable instruments including bill of exchange, hundi or promissory note in the name and on behalf of the corporate debtor, with the same effect with respect to the liability as if such instruments were drawn, accepted, made or endorsed by or on behalf of the corporate debtor in the ordinary course of its business;”

15. The scheme in the IBC, thus also reinforce the principle that sale by a Liquidator under the IBC is a sale on behalf of the Corporate Debtor. Such sale cannot be termed to be involuntary sale. The Appellant submission that transfer fee cannot be levied when sale is made by a Liquidator under the IBC, cannot be accepted.

16. Now we come to the second submission of the learned Senior Counsel for the Appellant is that Invitation for Expression of Interest, Clause 7.1.12

does not contain payment of transfer fee. Clause 7.1.12 of the Invitation for Expression of Interest is as follows:

“7.1.12 The purchaser shall bear and pay the applicable stamp duties, registration fees and all fees and expenses payable for registration of documents, Taxes, GST, etc. and all other duties payable in connection with purchase of Sale Assets.”

17. The Invitation for Expression of Interest and the clauses contained therein cannot be interpreted like a statute. The intendment of Invitation for Expression of Interest has to be looked into. We are inclined to accept the submission of the learned Counsel for the Respondent No.2 that last expression in Clause 7.1.12 *“all other duties payable in connection with purchase of Sale Assets”* has to be read in business efficacious manner. Furthermore, when we look into the terms and conditions of sub-lease Deed dated 6th August, 2010 executed in favour of Corporate Debtor by West Bengal Industrial Development Corporation Limited contain clause 12.28, which referred to 10% of prevailing market value of the property as transfer fee. Relevant part of the clause 12.28 is as follows:

“No Assignment/ Transfer of Sub-Lease hold right: The Sub-Lease shall not assign/ transfer the Demised Premises or any part thereof without obtaining any prior approval and/ or consent in writing from the Sub-Lessor. Such permission shall be granted by Sub-Lessor will be given after payment by the Sub-Lessee to the Sub-Lessor 10% of the prevailing market value of the scheduled

property as shall be assessed by the Registering Authority of the Government of West Bengal as transfer fees.....”

18. We thus are of the view that transfer fee in respect of transfer made by Liquidator of the lessee assets is liable to be paid and transferee cannot absolve himself from payment of liability to pay transfer fee.

19. Now we come to the orders passed by Adjudicating Authority on 23rd June, 2020 and 29th July, 2020. Before the Adjudicating Authority, an Application was filed by the Appellant seeking further time to make the balance payment. In that connection, while allowing the Application of the Appellant, certain directions were issued by the Adjudicating Authority, including a direction to pay transfer fee by the Appellant. Paragraph 13(iii) is as follows:

“13(iii). It is made clear that the applicant/ purchaser shall bear and pay the applicable stamp duties, registration fees and all fees and expenses payable for registration of documents, Taxes, GST, etc. and all other duties payable inclusive of transfer fee in connection with purchase of Sale Assets, in addition to the balance bid amount.”

20. An Application was filed by the Appellant to modify the aforesaid order dated 23rd June, 2020 praying that direction for payment of transfer fee by the Appellant should be modified. The said Application was specifically rejected by the Adjudicating Authority vide order dated 29th July, 2020. There being specific direction by the Adjudicating Authority

for payment of transfer fee by the Appellant and the Appellant having not challenged those orders, cannot be heard in contending that he is not liable to pay transfer fee.

21. Lastly, we may notice the letter dated 26th June, 2019, on the basis of which letter the Appellant was permitted to participate in the bid of the assets. The letter having filed at page 183 of the paper book, is reproduced below:

“Date: 26th June, 2019

*To
Mr. Kanchan Dutta
Liquidator of Enfield Apparels Limited*

*Subject: Request for purchase of the one of the said 4
Modules at Prevailing Bid Value.*

Dear Sir,

*With reference to above, we would like to bring under
your kind attention to the fact that our legal
representative J.K. Dwivedi has been late to contact you
regarding above mentioned E-Auction sale, that is why
we could not avail the opportunity to bid for one of the
said 4 Modules.*

*From the reliable source, we came to know that the deal
might be cancelled and in such Case, we will be highly
obliged if you kindly provide me with the opportunity to
bid for one of the said 4 modules along with adjacent
garage at the Reserved price of the said property.*

*We promise to follow all the conditions of your Auction
and we are also ready to pay the transfer charges to
WBIDC.*

You are therefore requested to please provide us with the opportunity and oblige.”

22. Auction of the Sale Assets was already completed on 11th June 2019 and thereafter the Applicant made a request and submitted the higher bid. In the letter quoted above, there was specific submission “*We promise to follow all the conditions of your Auction and we are also ready to pay the transfer charges to WBIDC*”. The Appellant cannot be now allowed to go back from his statement that he will pay the transfer charges also.

23. We thus do not find any merit in any of the submissions made by learned Counsel for the Appellant. There is no merit in Appeal. The Appeal is dismissed.

24. We having dismissed the Appeal, the Contempt Case (AT) No.17 of 2021 is closed. No order as to costs.

[Justice Ashok Bhushan]
Chairperson

[Justice Jarat Kumar Jain]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI

17th December, 2021

Ash/NN