

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 998 of 2021

(Arising out of Order dated 14.10.2021 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi (Bench-VI) in I.A. No.1612/(ND)/2021, Connected with C.P. No.(IB)-260/(ND)/2017)

IN THE MATTER OF:

New Okhla Industrial Development Authority,
Main Administrative Building,
Sector 6, Noida,
Uttar Pradesh-201301.

... Appellant

Vs

Abhishek Anand
Liquidator of Mega Soft Infrastructure
Pvt. Ltd.
E-103, Lower Ground Floor,
GK Enclave-I, New Delhi -110048.

... Respondent

Present:

For Appellant:

**Mr. Sourav Roy, Mr. Prabudh Singh
and Mr. Kaushal Sharma, Advocates.**

For Respondent:

**Mr. Mrityunjay Kumar, Advocate for
Liquidator.
Mr. Abhishek Anand (in person
Liquidator).**

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IB Code**”) has been filed against the order dated 14.10.2021 passed by National Company Law Tribunal, New Delhi (Bench-VI) in I.A. No.1612/(ND)/2021 in (IB)-260/(ND)/2017.

By the impugned order the Adjudicating Authority has allowed the Application filed by the Liquidator by issuing direction to the Respondent (New Okhla Industrial Development Authority) to transfer the plot in question in the name of auction purchaser and in event the Respondent Authority intends to recover any of its prior dues, it may prefer its claim in appropriate Form before the Liquidator. The Adjudicating Authority further directed that auction purchaser shall be liable to pay the ground rent and interest thereon and other charges, if any, to the Respondent arising after the date of auction of the purchase of the said institutional property.

2. The facts and sequence of events giving rise to this Appeal are:
 - (i) The Appellant had allotted the Plot No.02/2 admeasuring 4615.13 sq. mtrs located at Sector 154, Gautam Buddh Nagar, Noida in favour of Corporate Debtor M/S Mega Soft Infrastructure Pvt. Ltd.
 - (ii) The Adjudicating Authority in Company Petition filed by Neelam Singh against the Corporate Debtor initiated the Corporate Insolvency Resolution Process (“**CIRP**”) by an order dated 23.08.2017. The Adjudicating Authority vide order dated 28.02.2018 ordered the liquidation of the Corporate Debtor and appointed the Respondent as Liquidator.
 - (iii) Liquidator issued an E-Auction Sale Notice of the Plot. The Appellant had sent letter to the Liquidator that its total pending dues are Rs.20,50,000/- and also informed about the

pendency of the Original Suit No.184/2018 titled M/s. Mahavir Hanuman Developers Private Limited vs. M/s. Mega Soft Infrastructure Pvt. Ltd. Before the Court of Ld. Civil Judge (Senior Division) Gauttam Budh Nagar.

- (iv) Liquidator vide its letter dated 13.02.2021 informed the Appellant that Plot No.02/2 at Sector 154, Gautam Buddha Nagar, which was leased to the Corporate Debtor vide lease deed dated 22.07.2015 has been put to E-Auction on 04.01.2021 in which M/s. Groovy Structures LLP was ranked H1. The Appellant on 05.03.2021 again wrote to the Liquidator that amount due against the Plot No.02/2 is Rs.40,50,108/-.
- (v) The Liquidator filed an Application being I.A. No.1612 of 2021 before the Adjudicating Authority praying for following relief:

- a. Direct the Respondent to transfer the Plot No.02/2 at Sector 154, Gautam Buddha Nagar, Uttar Pradesh-201310 (“Noida Property”) in favour of Groovy Structures LLP, the Highest Bidder;*
- b. Issue directions to the Respondent to file Claim Form for payment of pending dues towards lease rent and interest as per provisions of the Insolvency and Bankruptcy Code, 2016;*
- c. Pass such other order/s as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the instant case.”*

(vi) The Application was objected by the Appellant. In the reply, the Appellant stated that there is policy for transfer of the institutional property, which also contemplate payment of transfer charges to the extent of 10% of the current allotment premium of the Plot and there are several other conditions of transfer. In the reply, however, it was stated that Respondent (Appellant before us) has no objection in transferring Plot No.02/2, Sector 154 Noida, in case the Applicant makes an Application in compliance with the terms and conditions of the Policy of the Respondent after adopting the procedure to be followed as per the Policy.

(vii) The Adjudicating Authority heard the parties on the Application and disposed of the Application by issuing following direction in paragraph 8:

- “a. Respondent shall transfer the said plot in the name of the auction purchaser in terms of provisions of IB Code, 2016 and the IBBI (LP) Regulations.*
- b. Respondent authority if it intends to recover any of its prior dues may prefer its claim in appropriate Form before the liquidator.*
- c. The auction purchaser shall be liable to pay the Ground Rent and interest thereon and other charges, if any, to the Respondents arising after the date of auction purchase of the said institutional property.”*

(viii) The Appellant aggrieved by the said direction has come upon in this Appeal.

3. We have heard Shri Sourav Roy, learned Counsel for the Appellant and Shri Mrityunjay Kumar, learned Counsel for the Liquidator.

4. Learned Counsel for the Appellant submits that there is Policy namely “The Policy & Procedure for Institutional Property Management – March, 2009” for transfer of Institutional Properties, under which an appropriate Application made by an Applicant/ Appellant, the Respondent is bound to consider the request for transfer. Learned Counsel further submits that Adjudicating Authority by impugned order has used the expression “*shall transfer the said plot in the name of the auction purchaser*”, which ties the hand of the Appellant to even consider the Transfer Application as per existing Policy. It is submitted that Adjudicating Authority at best could have directed for consideration of the Application for Transfer in the name of auction purchaser, which could have obliged the Appellant to consider the Application as per the Transfer Policy, however, issuing direction in the mandatory form is not in accordance with the legislative scheme. It is submitted that the Appellant is entitled to consider the transfer as per its Policy, which cannot be overridden by Adjudicating Authority in exercise of any power under IB Code. It is submitted that the Appellant cannot claim any pre-CIRP dues from the auction purchaser for which it has been granted liberty by the Adjudicating Authority to file its claim before the Liquidator. The learned Counsel submits that the observation of the Adjudicating Authority that under

Section 238, the provisions of the Code shall override any provisions of regulating the transfer of the subject Plot is not as per law. Section 238 of the IB Code does not override the relevant provisions of regulating the Transfer Policy by the Appellant, since there is no conflict between provisions relating to Transfer Policy and IB Code. Learned Counsel for the Appellant submits that the Appellant is ready to consider the Transfer Application in accordance with Policy as stated above. He further submits that although Application has been received for Transfer as per Transfer Policy, but the same was not considered and was rejected by the Appellant due to pendency of this Appeal.

5. Learned Counsel for the Respondent refuting the submissions of the learned Counsel for the Appellant submits that Appellant has been insisting for payment of their earlier dues amounting to Rs.40,50,148/-. The Appellant being an Operational Creditor for its dues prior to CIRP, they are entitled to file their claim before the Liquidator. It is submitted that the Respondent along with auction purchaser had already filed a Transfer Application in accordance with Transfer Policy on 16.02.2022, which however has been rejected by the Appellant on 03.03.2022 on the ground of pendency of Court cases. It is submitted that auction purchaser was clearly entitle for transfer of the Plot in his name and no error has been committed by the Adjudicating Authority in issuing direction to the Appellant to transfer the Plot in the name of auction purchaser.

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

7. The Appellant in the Appeal at paragraph 7.26 of the Appeal has come up with a case:

“7.26 That the Appellant filed its Reply in the aforesaid Application submitting that as per the Policy and Procedure for the Institutional Property Management (“Policy”), the transfer of the institutional property is permissible only after fulfilling the formalities as enshrined under the said Policy. The Appellant further submitted an amount of Rs.41,43,922/- (Rupees Forty-One Lacs Forty-Three Thousand Nine Hundred and Twenty-Two only) with respect to the Plot is due and payable to the Appellant as on 31st May, 2015 and the same is accruing on daily basis. The Appellant also stated that it has no objection in transferring the Plot in case the Respondent makes an application in compliance of the terms and conditions of the Policy after adopting the procedure to be followed as per the said Policy. A true copy of the Reply filed by the Appellant in IA No.1612 of 2021 is annexed herewith and marked as Annexure A – 15.”

8. Insofar as the dues of the Appellant of Rs. 40,50,108/- (claimed As Rs.41,43,922/- in Appeal), learned Counsel for the Appellant submits that in respect of the said dues, the Appellant is to take steps as permitted by the Adjudicating Authority in the impugned order by filing claim before the Liquidator. Parties are *ad idem* on the question with regard to prior dues of the Appellant in respect of the Plot, the same cannot be put as a

condition for transfer of the Plot. However, the transfer of Plot is to be considered by the Appellant as per the terms and conditions of the Transfer Policy of March 2009, which has been brought on record along with the Appeal paper-book.

9. The Respondent itself in its reply to the Appeal has come up with a case that Respondent is ready to comply with all the Policy in relation to transfer of the above property. In paragraph 40(a.) of the reply, following is pleaded by Respondent:

“40.(a). That it is to be submitted that the Respondent is ready to comply with all the Policy in relation to the transfer of the Noida Property and in this regards have signed the Transfer Memorandum of the Noida Property along with the Auction Purchaser. The copy of Transfer Memorandum is annexed herewith and marked as Annexure R/11.”

10. It is also been brought on record that Respondent has submitted a Transfer Application on 16.02.2022 in the format prescribed as per the Transfer Policy, which Noida Authority has rejected on 03.03.2022 on the ground of pendency of Court cases. The learned Counsel for the Appellant, however, submits that Appellant is ready to consider the said Application in accordance with the Transfer Policy. The learned Counsel for the Appellant submits that the direction issued by the Adjudicating Authority in the mandatory form, ought to be deleted with liberty to the Appellant to consider the Application in accordance with Transfer Policy.

11. The learned Counsel for the Appellant has also placed reliance on judgment of Hon'ble Supreme Court in ***Municipal Corporation of Greater***

Mumbai vs. Abhilash Lal and Ors. (2020) 13 SCC 234. In the above case, an Appeal was filed by the Municipal Corporation of Greater Mumbai (“Corporation”) against the order of the NCLAT. In the Appeal it was contended on behalf of the Corporation that direction of the Adjudicating Authority was in violation of Section 92 of the Municipal Corporation of Greater Mumbai Act, 1888 (“MMC Act”), which was the provision governing the disposal of municipal property. Section 92 of the MMC Act provided that with sanction of the corporation, the Commissioner may by lease, sell or otherwise convey any immovable property to the corporation. The Hon’ble Supreme Court after considering the provision of Section 238 of the IBC, laid down following in paragraph 42 and 43:

“42. Now, this Court proposes to deal with the contention that the provisions of the Code override all other laws and hence, that the resolution plan approved by NCLT acquires primacy over all other legal provisions. Facially, this argument appears merited. Section 238 enacts that:

“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.”

43. *The scope of this provision has been the subject-matter of debate in several judgments of this Court. In Employees Organization v. Jaipur Metals & Electricals Ltd. [Employees Organization v. Jaipur Metals & Electricals Ltd., (2019) 4 SCC 227], the correctness of a*

High Court's view [Jaipur Metals Electricals Ltd., In re, 2018 SCC OnLine Raj 1472] which refused to transfer winding-up proceedings pending before it and set aside NCLT's order admitting an insolvency resolution application at the behest of a financial creditor, was in issue. This Court held as follows, setting aside the judgment impugned in that case : (SCC pp. 235-36, paras 19-20)

“19. ... It is clear that Respondent 3 has filed a Section 7 application under the Code on 11-1-2018, on which an order has been passed admitting such application by NCLT on 13-4-2018. This proceeding is an independent proceeding which has nothing to do with the transfer of pending winding-up proceedings before the High Court. It was open for Respondent 3 at any time before a winding-up order is passed to apply under Section 7 of the Code. This is clear from a reading of Section 7 together with Section 238 of the Code which reads as follows:

‘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.’*

20. Shri Dave's ingenious argument that since Section 434 of the Companies Act, 2013 is amended by the Eleventh Schedule to the Code,

the amended Section 434 must be read as being part of the Code and not the Companies Act, 2013, must be rejected for the reason that though Section 434 of the Companies Act, 2013 is substituted by the Eleventh Schedule to the Code, yet Section 434, as substituted, appears only in the Companies Act, 2013 and is part and parcel of that Act. This being so, if there is any inconsistency between Section 434 as substituted and the provisions of the Code, the latter must prevail. We are of the view that NCLT was absolutely correct in applying Section 238 of the Code to an independent proceeding instituted by a secured financial creditor, namely, the Alchemist Asset Reconstruction Company Ltd. This being the case, it is difficult to comprehend how the High Court could have held that the proceedings before NCLT were without jurisdiction. On this score, therefore, the High Court judgment [Jaipur Metals Electricals Ltd., In re, 2018 SCC OnLine Raj 1472] has to be set aside.”

The Hon’ble Supreme Court further held that Section 238 cannot be read as overriding Municipal Corporation of Greater Mumbai’s right in its public duty to control and regulate how its properties are dealt with. In paragraph 47, following has been laid down:

“47. In the opinion of this Court, Section 238 cannot be read as overriding MCGM's right—indeed its public duty—to control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92-A of the

MMC Act. This Court is of the opinion that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like MCGM is involved. Therefore, in the absence of approval in terms of Sections 92 and 92-A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands. No doubt, the resolution plans talk of seeking MCGM's approval; they also acknowledge the liabilities of the corporate debtor; equally, however, there are proposals which envision the creation of charge or securities in respect of MCGM's properties. Nevertheless, the authorities under the Code could not have precluded the control that MCGM undoubtedly has, under law, to deal with its properties and the land in question, which undeniably are public properties. The resolution plan, therefore, would be a serious impediment to MCGM's independent plans to ensure that public health amenities are developed in the manner it chooses, and for which fresh approval under the MMC Act may be forthcoming for a separate scheme formulated by that corporation (MCGM).”

12. The above judgment of the Hon'ble Supreme Court fully supports the contention of the learned Counsel for the Appellant that Section 238 of the IB Code cannot be pressed to override the power of the Appellant as entrusted to it under the UP Industrial Area Development Act, 1976. We, thus, are of the opinion that the order of NCLT allowing the Application filed by the Liquidator regarding transfer of Plot in favour of auction purchaser does not obviate the consideration of transfer of Application as per the existent Policy namely the Policy & Procedure for Institutional Property Management – March, 2009. The Adjudicating Authority ought to have issued direction to consider the Transfer Application for transferring the auctioned Plot in accordance with the existent Policy. We, thus, are of the view that the direction of the Adjudicating Authority issued in paragraph 8(a) has to be read to mean that Adjudicating Authority directed the Appellant to consider the transfer of the Plot and expression “**shall transfer**” need not be read to mean that the Appellant has to transfer the Plot without the Respondent complying with the requirements of the Transfer Policy. The Respondent having already made an Application on 16.02.2022 in the prescribed proforma and is ready to comply all the terms and conditions of the Policy, the Appellant may consider the Application made on 16.02.2022 on merits and take an appropriate decision at an early date without considering its order dated 03.03.2022, by which the Application was rejected on the ground of pendency of Court case.

13. In view of foregoing discussions, we dispose of this Appeal with following directions:

- (i) The Application dated 16.02.2022 filed by the Respondent in terms of existent Transfer Policy be considered by the Appellant on merits in accordance with law.
- (ii) The Appellant to dispose of the Application dated 16.02.2022 at an early date preferably within a period of two months from the date of this order.

Parties to bear their own costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

**[Ms. Shreesha Merla]
Member (Technical)**

NEW DELHI

19th April, 2022

Ash/NN