NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1057 of 2021

(Arising out of Order dated 04.10.2021 passed by National Company Law Tribunal, New Delhi (Court No. IV) in I.A. No. 3175 of 2020 in (IB)-1731/(ND)/2019.

IN THE MATTER OF:

M/s. Adriatic Sea Foods Pvt. Ltd.
A company incorporated under the
Companies Act, 1956.
Having registered office at
87, Sant Savta Marg, Mustafa Bazar, **...Appellant**
Mumbai - 400010

Versus

Suresh Kumar Jain,
Appointed as Resolution Professional
Having office situated at B-1/12, 2nd Floor,
Safdurjung Enclave, New Delhi - 110029 **...Respondent**

Appellant: Mr. Salim A. Inamdar, Mr. Akhil Kumar Gola, Mr. Sanat Tokas, Mr. Modassir Husain Khan, Mr. Vedanta Varma, Advocates.
Respondent: Mr. Anoop Prakash Awasthi, Advocate with Mr. Suresh Kumar Jain, RP in person.

J U D G E M E N T

Ashok Bhushan, J:

1. This Appeal has been filed against the Order dated 04.10.2021 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court No. IV) in I.A. No. 3175 of 2020 in (IB)-1731/(ND)/2019 filed by the Resolution Professional-Respondent. The Adjudicating Authority vide an Order dated 19.09.2019 admitted the Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 to initiate the Corporate Insolvency

Resolution Process (CIRP in short) against the Corporate Debtor-"M/s. MK Overseas Private Limited". One of the assets of the Corporate Debtor was Plant at Plot M-6, Taloja Industrial Area, Village Pale Khurd, Taluka Panvel, Distt Rajagd, Maharashtra. The plant was mortgaged to Yes Bank for availing Credit Facilities. Yes Bank on 01st August, 2019 had granted a conditional No Objection Certificate (NOC in short) to the Corporate Debtor for sale of the said property for at least Rs. 17.86 Crore. By a Resolution passed by the Board of Directors of the Corporate Debtor dated 15th April, 2019, a decision was taken by the Corporate Debtor to sell the plant located at Taloja Industrial Area, Village Pale Khurd, Taluka Panvel, Distt Rajagd, Maharashtra. There were several transactions made by the Corporate Debtor within the relevant period which came to be examined under the Transaction Audit conducted by Transactional Auditor after initiation of Insolvency Resolution Process. Transactional Auditor submitted a Report dated 02nd July, 2020 where reference of several preferential and undervalued transactions was enumerated. The Resolution Professional filed an Application being I.A. No. 3175 of 2020 praying for reversing the preferential transactions, undervalued transactions and vesting into the assets of the Corporate Debtor. In the Application, details of various transactions including the sale of Plot M-6, Taloja Industrial Area, Village Pale Khurd, Taluka Panvel, Distt Rajagd, Maharashtra was also mentioned. In the Application, notices were issued to Suspended Board of Directors namely Mohd. Shakeel Ahmed, Mohd, Kamil and Mohd Nasira Begum. The Application was opposed by the Suspended Directors of the Corporate

Debtor. The Adjudicating Authority after hearing the parties and after relying on the Transaction Audit Report passed an Order for cancelling the sale of Plot M-6, Taloja Industrial Area, Village Pale Khurd, Taluka Panvel, Distt Rajagd, Maharashtra and directing the possession of the said Plant to be handed over to the Resolution Professional.

2. The Appellant aggrieved by the above Impugned Order of the Adjudicating Authority dated 04.10.2021 has filed this Appeal. We have heard Shri Salim A. Inamdar, Learned Counsel for the Appellant and Shri Anoop Prakash Awasthi, Learned Counsel for Respondent-Resolution Professional.

3. Learned Counsel for the Appellant made very precise and concise submissions attacking the Order of the Adjudicating Authority. Learned Counsel for the Appellant submits that Appellant had obtained possession of the above said plant by a Registered Agreement for Assignment cum Transfer of Lease cum Sale dated 05th August, 2019 which registered document could not have been cancelled by the Adjudicating Authority by the Impugned Order. It is submitted that the Adjudicating Authority violated the principles of natural justice in not hearing the Appellant who was affected party by the said Impugned Order. It is submitted that the Appellant has already filed an Application seeking various directions from the Adjudicating Authority being Application I.A. No. 699 of 2020 in CP(IB) No. 1731 of 2019 where prayer was made to restrain the Resolution Professional from taking control of the Property which Application is pending. Further the Application bearing I.A. No. 1304 of 2020 filed by the Resolution Professional under Section 25 read with Section 60(5) of the Code seeking direction and declaring Agreement for Assignment cum Transfer of Lease cum Sale null and void is also pending. I.A. No. 3175 of 2020 filed under Section 43 and 45 of the Code has been decided by the Impugned Order. It is submitted that Appellant is bona fide purchaser who could not have been deprived possession of the property validly obtained.

4. Learned Counsel for the Resolution Professional refuting the submissions of the Learned Counsel for the Appellant contends that claim of the Appellant is a fraudulent claim. Board Resolution dated 15th April, 2019 of the Corporate Debtor which was passed with the signatures of Mohd. Nasira Begum and Mohd. Kamil for executing the sale of said Taloja Industrial Area was passed by Directors who were no more the directors of the Corporate Debtor. Mohd Nasira Begam ceased to be director of the Corporate Debtor with effect from 12.09.2018 whereas Mohd Kamil ceased to be director of the Corporate Debtor on 12.09.2018 and both of them claimed to have passed the Board Resolution dated 15th April, 2019 which Resolution was itself void and inoperative and all actions taken in pursuance of the said Board Resolution has no legal status and liable to be ignored. It is further submitted that the said Taloja Industrial Area Plot is mortgaged with the Yes Bank and Yes Bank has issued conditional NOC on 01st August, 2019 for sale of the property for value at least INR 17.86 Crore. The sale which is claimed to be obtained for only 11 Crore out of which only an amount of Rs. 0.63 Crore have been deposited by the Appellant in the Bank Account of the Yes Bank itself indicates that the transaction was not bona fide transaction and was undervalued transaction. It is submitted that Appellant was present before the Adjudicating Authority and was also heard in Application I.A.No. 699 of 2020.

5. We have considered the submissions of Learned Counsel for the parties and perused the record.

6. The Adjudicating Authority has placed reliance on Transaction Audit Report of the Transaction Audit dated 2nd July, 2020. Paragraph 5(i), (ii) and (iii) of the Impugned Judgment where transaction audit report has been referred pertaining to property in question are as follows:

> *"5. The observations made by A.K.G. & Associates (Transaction Auditor) on behalf of the Resolution Professional, in the final report dated 02.07.2020 with respect to the present application made under Section 45 of the code are reproduced as*
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> *i. It is submitted that the Corporate Debtor had a plant in Mumai bearing address-Plot M-6, Taloja Industrial Area, Village Pale Khurd, Taluka Panvel, Distt Rajagd, Maharashtra. The said plant with a combined book value of Rs. 9.16 crores was mortgaged to YES Bank for availing credit facilities (Post shipment in Foreign Currency and Packing Credit in Foreign) from YES Bank. It is submitted that a conditional NOC dated 01.08.2018 was granted by Yes Bank to the Corporate Debtor for sale of such property. The conditional NOC required the above plant to be sold to Adriatic Sea Food Private Limited for at least 17.86 crore. That during the month of August, 2019, said plant was transferred to Adriatic Sea Food Private Limited vide Agreement for Assignment cum Transfer of Lease-cum-Sale dated 05.08.2019 for Rs. 11.00 crore, against which only Rs. 0.63 crore were received as consideration till 30.08.2019 from the under mentioned parties:*

DATE	*PARTY NAME*	*SALE PROCEEDS IN Rs. (Crore)*	*SALE PROCEEDS RECEIVED IN*
August 2019	*Sameer Haji Mohammed Latif*	*0.28*	*YES BANK A/c xx0739*

	(Director of Adriatic Sea Food Private Limited)		
August 2019	*Adriatic Sea Food Private Limited*	*0.35*	*YES Bank A/c. xx0739*
	Total	*0.63*	

ii. It is submitted that as per the information available the possession of the plant has been handed over by the Corporate Debtor to the buyer in the month of August 2019 only which is in anticipation of triggering of the CIRP. It is further submitted to point out that the said property record as available with CERSAI show that the above property has been charged with YES Bank. It is clear that the ex-management of the Corporate Debtor has transferred and handed over the possession of such property at Rs. 0.63 crore only against the amount as per YES Bank's condition NOC i.e. Rs. 17.86 Crore, indicting an undervalution thereof Rs. 17.23 Crore. The relevant extract of the ledger, CERSAI Search report, copy of the conditional NOC from YES Bank and copy of the sale Agreement has been annexed under para 16.2 of the report annexed with this application.

iii. It is further submitted that sale of the above mentioned property was cancelled as the buyer paid Rs. 62.25 lakh and YES Bank kept such amount under lien till the balance amount of Rs. 10.37 crore is received and due to initiation of the CIRP the buyer failed to pay the consideration in full. Hence, the amount was forfeited and necessary entry was passed in the books of account. The application to that affect for treating the sale as NIL and recovery of possession is pending before the Hon'ble Tribunal as C.A. No. 1304/2020."

7. The Application was filed by the Resolution Professional being I.A. No. 1731 of 2019 praying for an order under Section 43 and 45 of the Code regarding preferential transaction and undervalued transaction done by the Corporate Debtor. Section 45 of the Code is as follows:

"45(1) If the liquidator or the resolution professional, as the case may be, on an examination of the

> *transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.*
>
> *(2) A transaction shall be considered undervalued where the corporate debtor—*
>
> *(a) makes a gift to a person; or*
>
> *(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor,*
> *and such transaction has not taken place in the ordinary course of business of the corporate debtor."*

8. Under Section 46 relevant period for avoidable transaction or undervalued transaction is period of one year preceding the Insolvency Commencement date. The transaction in question being of 05th August, 2019 is within the period as contemplated under Section 46 as noted above. Insolvency Commencement date is 19.09.2019 and it was less than one and half month before the said date that this transaction was made by the Corporate Debtor. The Adjudicating Authority noted the transaction audit report and submissions made by the Appellant. It was noted by the Adjudicating Authority that 'no objection' granted by Yes Bank for sale of the property, was at least Rs. 17.86 crore. When the mortgagee Bank has issued conditional NOC for 17.86 crore transaction of the property, at the amount of 11 crore is undervalued transaction and we do not find any error in the decision of the Adjudicating Authority holding the transaction as undervalued transaction.

9. One more aspect needs to be noticed in this context is that although consideration of the Agreement for Assignment cum Transfer of Lease-cum-Sale dated 05.08.2019 mentioned 11 Crore but total amount paid by the Appellant in the Account of the Corporate Debtor was 0.63 Crore and the entire possession of the property was handed over by Directors of the Corporate Debtor on receipt of only 0.63 crores, which speak for itself. The Appellant never paid the balance amount of consideration amount apart from payment of Rs. 0.63 crore. Clause 4 of the deed contemplated handing over possession after payment in Loan Account in of Seller which clause 4 is as follows:

> *"4. On receipt of demand cum NOC from Yes Bank the repayment by Purchaser/Assignee directly to Loan Account in of Seller/Assignor in Yes Bank thereafter peaceful possession of the said plot on as is where basis is shall also be handed over the Purchaser/Assignee on or before execution this present."*

10. There is one more reason due to which the Transaction dated 05.08.2019 has to be held to be undervalued. The Agreement for Assignment cum Transfer of Lease-cum-Sale mentions the consideration of Rs. 11 Crores. In Paragraph 3, 3(A) and 3(B) payments schedule are mentioned. The Purchaser/Assignee already paid Rs. 25 Lacs and has agreed to pay Rs. 10,75,00,000/- to Yes Bank but in Paragraph 3 (A) and (B) Rs. 10,75,00,000/- which contains heading "Payment Schedule" there is no period mentioned for payment of Rs. 10,75,00,000/-. The Transaction was entered for Rs. 11 Crores on payment of only Rs. 25 Lacs itself. Thus, total consideration paid was 1/44 of the transaction of the sale consideration.

However, as noted above in Paragraph 4 of the Agreement it was mentioned that on receipt of demand cum NOC from Yes Bank the repayment by purchaser directly to loan account in of seller/assignor in Yes Bank thereafter peaceful possession of the Plot shall be handed over whereas the Appellant's case is that after execution of the agreement the possession of the plant was handed over, which indicate that whole transaction was entered only on payment of Rs. 25 Lacs. The possession was handed over to the Appellant by the Corporate Debtor at meagre payment of Rs. 25 Lacs of property for which NOC was issued by the Yes Bank for sale of an amount of not less than 17.86 Crore, which proves that the transaction dated 05th April, 2019 was undervalued transaction and the Adjudicating Authority had rightly come to the conclusion that transaction is an undervalued transaction.

11. However, handing over the possession by the Directors of the Corporate Debtor to the Appellant before even payment indicates the nature of transaction which transaction was preferential transaction as well as undervalued transaction. Transaction was a transaction to defeat the rights of the creditor of the Corporate Debtor.

12. Learned Counsel for the Appellant had laid emphasis that Adjudicating Authority has passed an order for cancelling the Registered Agreement which was not within the domain of the Adjudicating Authority. In the Application filed by the Resolution Professional it was pleaded that since the buyer failed to pay the consideration in full, hence the sale was treated to be cancelled and called off and advance amount was forfeited and necessary entry was passed in the books of accounts which clearly mean that the books of accounts of the Yes Bank where sale was treated to be cancelled. Under Section 45 sub-section 1 of the Code, the Resolution Professional can <u>make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction.</u> Where an Application under Section 45(1) is allowed the effect of the Order has to be treated to be in accordance with Section 45(1). The use of expression used in the Impugned Order is that "as a consequent to the cancellation of the sale of the Mumbai Plant, it is hereby directed that the possession of the Mumbai Plant be handed over to the Resolution Professional". The Adjudicating Authority itself has not directed for cancellation of the sale rather cancellation of sale deed was inferred on account of non-payment of balance consideration and entry made by the Bank in its books of accounts. Direction in the Impugned Order is only to hand over the possession of the plant to the Resolution Professional which is consequential action on account of reversal of the transaction. The Order passed by the Adjudicating Authority thus cannot be said to be beyond Section 45(1). However, when transaction is treated to be void it loses all its legal effect and submissions of Learned Counsel for the Appellant that since application for declaring the transaction void being Application No. 1304 of 2020 pending no direction could have been issued by the Adjudicating Authority as has been issued in the Impugned Order cannot be accepted. The factum of pendency of Application being 1304 of 2020 under Section 25 read with Section 60(5) is not subject application for declaration of sale deed as null and void have no bearing on Application filed under Section 43 and 45 of the Code thus pendency of I.A. No. 1304 of 2020 has no bearing on disposal of the Application 3175 of 2020. Another submission of the Appellant is that I.A. No. 699 of 2020 which was filed by the Appellant seeking direction to restrain the Resolution Professional from taking control of the property remain pending has also no bearing on the Order passed in I.A. No. 3175 of 2020. The Application I.A. No. 699 of 2020 is to be held to have become infructuous in view of the directions issued in I.A. 3175 of 2020.

13. The submission of Learned Counsel for the Appellant that Appellant has not been heard in the Application I.A. No. 3175 of 2020 filed by the Resolution Professional. Suffice it to say that Appellant was well aware of the proceeding and he himself has filed an Application I.A. No. 699 of 2020 seeking direction to restrain the Resolution Professional from taking control of the property which cannot be said that he was not aware of the issue which were before the Adjudicating Authority. The Respondent in his Reply before this Court has stated that Appellant was heard by Adjudicating Authority on 30th September, 2021 which is apparent from the proceedings dated 30th September, 2021 which proceedings has been brought on record. More so it was action of the suspended directors of the Corporate Debtor which was in question and all suspended directors of the Corporate Debtor who entered into preferential transactions and undervalued transaction were heard. Appellant who claimed to be assignee of rights by Corporate Debtor can have no better case than the Corporate Debtor themselves who have assigned the rights to the Appellant. Corporate Debtor who entered into preferential transactions and undervalued transactions have been issued notice and heard, we are not persuaded to accept the submission of the Appellant that order is vitiated on account of violation of principles of natural justice.

14. Respondent has also brought on record relevant materials to indicate that both Mohd Nasira Begum and Mohd Kamil who claimed to have passed resolution for transferring the plants on 15th April, 2019 were ceased to be directors with effect from 12.09.2018 hence the entire proceedings beginning from decision to transfer of the property was not legally done and preferential transaction and undervalued transaction in favour of the Appellant was only with a intent to defeat the rights of the creditors and no error have been committed by the Adjudicating Authority in allowing the Application filed by the Resolution Professional under Section 43 and 45 of the Code, We do not find any good ground to interfere with the Order passed by the Adjudicating Authority dated 04.10.2021. The Appeal lacks merit and is dismissed, accordingly.

[Justice Ashok Bhushan]
Chairperson

[Dr. Alok Srivastava]
Member (Technical)

NEW DELHI
16th March, 2022
Basant B.