

Through Videoconference

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI
COURT No. II, SPECIAL BENCH**

IA 1012 of 2020

in

CP (IB) 3025/MB/C-V/2019

Under Section 60(5) of the Insolvency
and Bankruptcy Code, 2016

In the matter of

1. Patrimoine Expo Private Limited

...Applicant No. 1

2. Dr. Vikram Patil

(Through his constituted attorney
Mr. Avinash A S)

...Applicant No. 2

Versus

**1. Reliance Communication
Infrastructure Limited**

...Respondent No. 1

2. Mr. Anish Nanavaty

...Respondent No. 2

**3. Realsoft Cybersystems Private
Limited**

...Respondent No. 3

4. Mr. Sumit Roy

...Respondent No. 4

Order Delivered on 15.12.2020

Coram:

Janab Mohammed Ajmal, Hon'ble Member Judicial

Mr. Ravikumar Duraisamy, Hon'ble Member Technical

Appearance:

- For the Applicant : Mr Jayprakash Sen, Senior Advocate
a/w Mr. Hemant Sethi, Advocate
- For the Respondent No 1 & 2 : Mr. Gaurav Joshi, Senior Advocate a/w
Mr Ameya Gokhale, Advocate.
- For the Respondent No 3 : Mr Ankit Lohia, Advocate.
- For the Respondent No 4 : Ms Anaisha Zacharia, Advocate.

ORDER

Per: Ravikumar Duraisamy, Member

This application is being filed by the applicants under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 (“IBC”) seeking following Order/Directions:

- (a) Restraining the Resolution Professional from including assets of Respondent No 3, particularly described in MOU dated 03.02.2018 including shares held by Respondent No 1 in Respondent No 3 in the resolution plan.
- (b) Direction against Resolution Professional to transfer the equity shares of Respondent No 3 held by Respondent No 1 in favour of Applicants on receipt of balance consideration and complete the entire transaction under MOU 03.02.2018 and execution of all the documents to same effect.
- (c) Restraining the Respondent No 4 from surrendering shares of Respondent No 3 held by him in Escrow account to Respondent No 1 and 2.
- (d) Any other order which Hon’ble Adjudicating Authority may find fit in the facts and circumstances of the case.

Submissions made by Applicants by way of Interlocutory Application:

1. This Bench vide order dated 25.09.2019, ordered the commencement of the CIRP of the Respondent No 1/Reliance Communications Infrastructure Limited (RCIL)/Corporate Debtor and Respondent No 2 Mr. Anish Nanavaty was appointed as an IRP.
2. The Karnataka Industrial Areas Development Board (“KIADB”) leased out property in favour of Respondent No 1. The Applicant No. 1 and Respondent No 1 RCIL entered into binding Memorandum of Understanding (MOU) dated 03.02.2018. The Applicant made Payment

- of Rs. 5.50 Crores out of Rs. 51.50 Crores as the first instalment as per the terms and conditions contained in the MOU.
3. As per the MOU, RCIL would create a Special Purpose Vehicle (“SPV”) for transfer of leasehold right to such SPV and thereafter transfer of shares of the SPV in favour of the Applicant on payment of full consideration.
 4. RCIL identified Respondent No 3 as the SPV for the purpose of implementation of the project and transferred the leasehold interest to SPV. The Applicant fulfilled all the conditions as was required to be complied with outlined in clause 2 of the MOU. Despite complying with all the requirement set out under the MOU. RCIL failed to transfer the shares of the SPV in the name of the Applicant. The Applicant was in the possession of the said property and had begun implementing the project on the property.
 5. As on the date no shares of the Respondent No 3 have been transferred in favour of the Applicant.
 6. The Applicant has repeatedly expressed its willingness to pay the balance consideration of Rs. 46 Crores and further stated in one of the email addressed to the Resolution Professional (“RP/Respondent No 2”).
 7. In the midst of all this, RCIL was admitted to CIRP and Applicant were at all the time willing to comply with obligation set out under the MOU. The Applicant apprehends that as part of CIRP process, the RP will dispose of the shares of Respondent No 3 and consequently its leasehold right in the said property.
 8. 05.06.2020 is the last day for bidding of RCIL the Applicant apprehends that if the said property is included in the bidding without consideration of Applicant’s right the same will be extinguished under the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC) and Specially when the payment of Rs. 5.5 Crores has already been paid towards the transactions under the MOU.

Submissions made by Applicants by way of Additional Affidavit:

9. The subsequent events that took place pursuant to filing of said Interlocutory Application on 04.06.2020 before this Tribunal.

10. Pursuant to filing of said Interlocutory Application the Applicants received a letter dated 11.06.2020 from the RP/Respondent No 2 stating that the MOU entered between Respondent No 1 and Applicant No 1 dated 03.02.2018 the rights thereunder stands extinguished on account of the sale transaction envisaged under the MOU not having been completed until the long stop date 03.10.2018.
11. At the outset, all that stated by RP in his letter seems to be false and inconsistent. The RP has chosen to not file an Affidavit as he is well aware of the repercussions of false Affidavit before this Tribunal. On the basis of the letter received it is clear that the RP is neither apprised with the facts of the matter nor has he perused the records correctly.
12. Further, submitted that in so far as the validity of the MOU is concerned Applicant No 1, Respondent No 1 and Respondent No 3 had entered into an Escrow Agreement dated 24.01.2019 wherein they place the Shares of Respondent No 3 in escrow with an Escrow Agent/ Respondent No 4. The said Escrow Agreement was executed after long stop date under the MOU and is still valid and subsisting as on date. Further, the said Escrow Agreement extended the terms of the MOU making it co-terminus with the terms of the Escrow Agreement. This clearly demonstrates that it was the intention of the Respondent No 1 to extend the tenure of the MOU and transfer ownership of its shares in Respondent No 3 to Applicant No 1.
13. Further, submitted that in order to fulfil the conditions of MOU, the leasehold interest in Jigani Land was assigned to Respondent No 3 under a Supplementary Agreement dated 21.09.2019 between Respondent No 1 and KIADB. Consequently, the Applicant commenced the implementation of the project at its own cost and only the formality of transfer of Shares of Respondent No 3 to the Applicant No 1 as contemplated under the MOU is required to be fulfilled. It is pertinent to note here that, the said Supplementary Agreement was executed on request of Respondent No 1 almost year after the purported date of expiry of the MOU.
14. Also submitted that there have been several letters of correspondence between Applicant No 2 and Respondent No 1 in regard to

implementation of the project and completion of the transaction under the MOU even after the purported date of expiry of the MOU. In one such letter dated 19.12.2018, Respondent No 1 provided Applicant No 1 with a draft letter for extension of lease to be procured from KIADB.

15. Further, submitted that from the above-mentioned facts and circumstances, it is clear that the conduct of parties reveal that they proceeded with definite understanding and consensus to extend the tenure of the MOU and to complete the transaction thereunder. Further, extension of the said MOU till 01.06.2020 on account of delay and latches on the part of Respondent No 1 was anyway agreed upon by the parties vide letter dated 01.03.2018.
16. Further, submitted that by a letter dated 05.06.2020 the RP inter alia informed Applicant No 2 that:
“However, I would like to clarify that what was intended to convey in my previous email, was that the sale of assets of the Company or any equity interest of the Company in any subsidiary having rights/title/interest in the Jigani Land, under Regulation 29 is currently not possible, for reasons cited in my previous email.”
Further, the CIRP initiated against Respondent No 1 and not its subsidiary i.e Respondent No 3 therefore the RP is not empowered to usurp the properties of its subsidiary.

Submissions made by Respondents No 1 and 2 by way of Affidavit in Reply:

17. The application is not maintainable. The Application proceeds on the basis of incorrect facts, namely that (i) the leasehold rights in the Property (defined below) and (ii) the shares of Respondent no. 3, are not the property of the Corporate Debtor. As would be evident from the details below, the leasehold rights in the property and shares of Respondent no. 3 are both assets of the Corporate Debtor.
18. Without prejudice to the other submissions, since the Corporate Debtor is undergoing corporate insolvency resolution process (“CIRP”), a moratorium has been prevailing on the Corporate Debtor under Section 14 of the Code. Section 14(1)(b) prohibits the “transferring, encumbering, alienating or disposing off by the corporate debtor of any of its assets or any legal right or beneficial interest therein”. Therefore, transfer of leasehold rights in the property and shares of Respondent no. 3 which are

both assets of the Corporate Debtor, are prohibited. Thus, the reliefs claimed by the Applicants in the Applications would be hit by Section 14 of the Code.

19. Further, recording any change in the ownership interest of the Corporate Debtor by the Resolution Professional requires the prior approval of the Committee of Creditors (CoC) under Section 28 of the Code.

No reliefs as prayed can be granted as the leasehold rights in the Property and (ii) the shares of Respondent no. 3 are the property of the Corporate Debtor.

20. It is a trite law that a resolution plan can provide for transfer of all or part of the assets of the Corporate Debtor. Thus, both Property and shares of Respondent no. 3 being the asset of the Corporate Debtor, as detailed below, can be dealt under a Resolution plan. Therefore, no reliefs with respect to the Property and shares of Respondent no. 3 can be granted in the present Applicant.
21. Under the lease cum sale agreement dated 12th July, 2007 (“Lease Agreement”) entered between the Corporate Debtor and KIADB, the Corporate Debtor was granted leasehold rights with respect Plot nos. 284 (part) and 330 in survey no parts of 144, 149 to 155, 198 to 202 of Bommasandra – Jigani Link Road, Industrial Area, Jigani – Anekal, District, Bangalore (“Property”).
22. By virtue of the Supplementary Agreement dated 21st September, 2019 (“Supplementary Agreement”), KIADB had permitted the Corporate Debtor to implement the project on the Property in the name of Respondent no. 3, subject to the condition that the original promoters of the Corporate Debtor continue to hold minimum of 51% interest/share in Respondent no. 3 till the end of lease period and the execution of sale deed.
23. By virtue of the Supplementary Agreement, KIABD had only permitted the implementation of the Project in the name of (or through) Respondent no. 3. The Supplementary Agreement did not envisage transfer of lease in favour of Respondent no. 3 as is being incorrectly canvassed by the Applicant. Neither have the Corporate Debtor and Respondent no. 3 entered into a formal agreement to sell/transfer the leasehold rights in the Property in favour of Respondent no. 3 nor any

- consideration has been received by the Corporate Debtor from Respondent no. 3 for the same.
24. The leasehold rights with respect to the Property remain vested with the Corporate Debtor and have not been transferred to Respondent no. 3. This is also evident from the fact that (i) the lease hold rights are capitalised in the financial statements of the Corporate Debtor and (ii) the leasehold rights of the Property are also reflected in the statement of Asset held for sale as on 30th September, 2019.
 25. In view of the stipulation in the Supplementary Agreement that the Corporate Debtor would have to hold minimum of 51% interest/share in Respondent no. 3 till the end of lease period and exclusion of sale deed, as full transfer of all shares of the Respondent no. 3 held by the Corporate Debtor cannot take place unless a sale deed is executed by KIADB and Corporate Debtor.
 26. The leasehold right over the Property under the Lease Agreement was initially valid for 6 years from 12.07.2007. The term of the lease was subsequently extended and was valid until January, 2020. The lease has expired on 08.01.2020. However, the Corporate Debtor and the Respondent no. 3, jointly, have applied to KIABD for an extension of lease for a period two years. The application for extension of lease was made jointly since the implementation of the Project is now being undertaken by Respondent no. 3.
 27. In this regard it is pertinent to note, all the prospective resolution applicant has been made aware about the status of the Property and the expiry of lease. In the virtual date room, all the relevant documents and information, including copies of the MoU, Supplementary Agreement, status of lease of the Property and the pendency of the present Application has been adequately disclosed. The statement of fixed asset held for sale, referred above, is also a part of the information memorandum which can be accessed by all the prospective resolution applicant.
 28. Thereafter, the resolution applicant would be aware about the status of lease of the Property and would accordingly make a resolution plan. It is also important to note that the Applicant no. 3 who is also representing

one of prospective resolution application, namely Thor Energy India Private Limited also has access to the aforementioned information/documents disclosed on the virtual data room and the information memorandum.

29. It is not in dispute that the Respondent no. 3 is a wholly owned subsidiary of the Corporate Debtor. The Corporate Debtor owns 100% shares of Respondent no. 3. Therefore, the shares of the Respondent no. 3 are also the asset of the Corporate Debtor. In the financial statement of the Corporate Debtor for the half year 30.09.2019, the shares of Respondent no. 3 are reported under the heading investment in subsidiaries.
30. For the Applicant has contended that (i) the shares of Respondent no. 3 are presently not held by the Corporate Debtor and (ii) the shares of Respondent no. 3 belong to the Applicant. Both the contentious are incorrect and baseless in view of the aforementioned facts.
31. Thereafter submitted, both the leasehold rights in the Property and the shares of Respondent no. 3 are assets of the Corporate Debtor and can be a part of the resolution plan of the Corporate Debtor. Thus, there cannot be any restriction or injunction on the leasehold rights in the Property and the shares of Respondent no. 3 being part of the resolution plan of the Corporate Debtor. On this ground alone, the Application ought to be rejected.
32. The Applicant No 1 and the Corporate Debtor had entered into a memorandum of understanding dated 3rd February 2018 (“MoU”), inter alia, to acquire leasehold rights in the Property from the Corporate Debtor.
33. The MoU had been executed prior to the commencement of the CIRP of the Corporate Debtor. Further, the transaction was undertaken prior to the assumption of the management of the affairs of the Corporate Debtor by the Resolution Professional. The approval of lenders obtained prior to the CIRP for the said transaction of sale/transfer to Applicants is neither relevant nor can be acknowledged considering the ongoing CIRP process. Therefore, the factual context in which the MoU had been entered into is different from the current circumstances prevailing in the Corporate

Debtor. Further, I am not in a position to confirm on the decisions adopted by the erstwhile management of the Corporate Debtor.

34. Corporate Debtor was required to create a SPV and transfer the lease rights of the Property for Rs. 51.5 crores. The Applicants were required to pay a non-refundable deposit of Rs. 5.5 crores. The transfer of leasehold rights in the Property in favour of the Applicants was conditional upon various events including completion of construction as per KIADB norms of the approved infrastructure at the Property and payment of entire consideration. The Applicants were required to complete all conditions prior to 03.10.2018.
35. Time was the essence of the MoU and any default in making payment as per the schedule of the MoU or non-completion of the obligations on or before 03.10.2018 would result into an automatic termination of MoU.
36. The Applicants have till date neither paid the entire consideration of Rs. 51.5 crores nor completed the conditions envisaged under the MoU. In terms of Clause 2.3 of the MoU, the transfer of leasehold rights in the Property was conditional upon various activities to be undertaken and completed by the Applicant. However, till date, the Applicant have not completed following conditions and thus the Applicant are in breach of MoU.
 - It appears that the Applicants have not obtained the building plans.
 - Applicants have not completed construction as per KIABD norms.
 - It appears Applicants have not obtained environmental clearance form Department of Ecology and Environmental clearance for the Project, Karnataka Pollution Control Board.
 - Applicants have not favourably settled/closed Suit bearing no. OS No. 37112.
37. By way of a letter dated 01.03.2018, the term of the MoU was extended until 01.06.2020. Thus, the MoU stood determined as on 01.06.2020 and thus, the Applicants cannot claim any rights thereunder.
38. On 24.01.2019, the Corporate Debtor, the Applicants and Respondent nos. 3 and 4 entered into an escrow agreement (“Escrow Agreement”), whereby the shares of Respondent no. 3 were to be held by Respondent

no. 4 in escrow. This was contemplated to facilitate transfer/sale of shares of Respondent no. 3 in favour of the Applicant only upon completion of the conditions mentioned in the MoU.

39. Under the Escrow Agreement, the ownership of the shares of Respondent no. 3 remain vested with the Corporate Debtor until the Applicant completes the conditions mentioned in the MoU within the Long Stop Date or any extension thereof. In any event, the shares of Respondent no. 3 continue to be held by the Corporate Debtor; and they have not been deposited with the escrow agent, Respondent no. 4.
40. Without prejudice, even under the Escrow Agreement, the shares of Respondent no. 3 remained the assets of the Corporate Debtor. The relevant portions of the Escrow Agreement are as under: -

Ownership of the Sale Shares

- (a) The Parties agree that during the period that the Sale Shares are held in escrow with the Escrow Agent, any distributions or benefits to the Sale Shares (if any) shall be to the credit of seller (Corporate Debtor), and shall be released into a bank account notified in writing by the seller (Corporate Debtor). In addition, in relation to the Sale Shares, during the period they are held in escrow with the Escrow Agent.
 - (b) The Seller (Corporate Debtor) confirms, notwithstanding any stated herein and/or in any other agreement and to the maximum extend permissible under the Applicable Law, the Parties hereby agree, the ***the Seller (Corporate Debtor) is, and shall continue to be, the beneficial and legal owner of the Sale Shares until the Purchaser completes the conditions, more specifically specified in clause 2 for the MoU on or before the Long Stop Date or any extension thereof.***
41. As stated above, since MoU itself stands determined, the Applicants have no right either in the shares of the Respondent no. 3 or the Property and Escrow Agreement has met its purpose.
 42. The Application filed by the Applicant is essentially seeking specific performance of the MoU. No specific performance of a contract, which stands determined/lapsed, can be granted.
 43. Without prejudice, it is a trite law that no specific performance of a contract can be granted which is determinable in nature. The MoU contains a termination clause and is thus a contract which is

determinable in nature. Therefore, no specific performance of the MoU can be granted.

44. In terms of the provisions of the Code, I have the power and obligation to take control and custody of the assets of the Corporate Debtor.

Submissions made by Respondent No 3. by way of Affidavit in Reply:

45. Respondent No 3 submitted that the transfer contemplated under the MOU dated 03.02.2018 is in two parts (a) transfer of the lease from Respondent No. 1 to Respondent No.3, and (b) transfer of the entire shareholding of Respondent No. 1 in Respondent No. 3 in favour of the Applicant. Against this transfer, Respondent NO.1 is entitled to receive the entire consideration in the manner set out in the MOU. The entire transaction under the MOU was required to be completed prior to 03.10.2018 and extended till 01.06.2020 (see Clause 2.6 page 25). Since such the transfer is prohibited under the terms of the Lease Agreement dated 12.07.2007, the MOU contemplates that appropriate permission being obtained from the KIADB.
46. Further submitted, there is no agreement executed between Respondent No. 1 and Respondent No.3. No consideration has been paid by Respondent NO.3 to Respondent No.1.
47. The purported transfer under the MOU is admittedly in violation of the conditions laid down by a statutory authority i.e. KIADB.
48. It is apparent from the record that the Karnataka Industrial Areas Development Board has not granted permission to transfer the shares of Respondent No.3 as contemplated under the MOU dated 03.02.2018. Therefore, there is no permission for a complete transfer as contemplated under the MOU.
49. Further submitted, Even if the contention of the Applicant that the lease stands transferred in the name of Respondent No.3, is to be accepted a transfer of shareholding contemplated under the MOU will be in violation of the lease deed dated 12.07.2007 but also in violation of the Supplementary Agreement dated 21.09.2020 (Exhibit Q page 114) relied upon by the Applicant, which restrict transfer of shareholding as contemplated under the MOU.

50. In view thereof, the MOU, as it stands, is incapable of specific performance and a relief in terms of prayer clause (b) (page 14 of IA). Absent a relief under prayer clause (b), the applicant cannot claim a right over the property and therefore no relief in terms of prayer clause (a) can be granted.
51. Upon realizing that the MOU, as executed is incapable of performance, the Applicant sought to alter the terms of the MOU and gave a proposal dated 23.01.2020 (Exhibit L page 79 of IA). In the proposal the Applicant does not show any readiness and willingness to perform the MOU. On the contrary in paragraph 7 thereof (pages 81 & 82 of the IA) submits that the Applicant is “willing and ready” to perform the agreement on fresh terms proposed in the letter.
52. The Applicant further proposed that “For any reason that the approval to consummate the Transaction cannot be given. I humbly request for allowing a refund of the amount of INR 5,50,00,000/- (Indian Rupees Five Crores and Fifty Lakhs)” (See paragraph 9 page 83 of IA)
53. While addressing the letter dated 23.01.2020, the Applicant did not and could have expressed his readiness and willingness to perform the term of the MOU. The proposal of the Applicant dated 23rd January 2020, when read as a whole, proceeds on the basis that (i) the MOU as executed is incapable of performance (ii) fresh terms need to be agreed between the parties and (iii) if fresh terms are not agreeable to the parties, the amount be refunded. The terms proposed by the Applicant neither form a part of the MOU nor the Escrow Agreement dated 24th January 2019.
54. The letter dated 23.01.2020 shows clear lack of readiness and willingness on the part of the Applicant to perform the terms of the MOU.

55. Without prejudice to the above, it is submitted that it is trite law that in a claim for specific performance, readiness and willingness is required to be proved by the Applicant by leading evidence (See the judgment of the Hon'ble Supreme Court dated in C.C. Venkatesh Vs. ASC. Murthy & Ors dated 7th February 2020).
56. The reliefs sought for by the Applicant are in the nature of a decree before trial. The provisions of Section 60(5) do not contemplate the Tribunal passing a decree in favour of an Applicant without a trial.
57. In a judgment dated 13.11.2019 in the matter of Dipco Private Limited Vs. Aristo Developer Pvt. Ltd. This Hon'ble Tribunal, while dealing with the scope of section 60(5) inter alia held as follows:

28. Now first on the issue of maintainability the Respondent have relied upon the order passed in ArcelorMittal in which at Paragraph 81 the court has held as follows:

“If, on the other hand, a resolution plan has been approved by the Committee of Creditors, and has passed muster before the Adjudicating Authority, this determination can be challenged before the Appellate Authority under section 61, and may further be challenged before the Supreme Court under Section 62, if there is a question of law arising out of such order, within the time specified in Section 62. Section 64 also makes it clear that the timelines that are to be adhered to by the NCLT and NCLAT are of great importance, and that reasons must be recorded by either the NCLT or NCLAT if the matter is not disposed of within the time limit specified. **Section 60(5), when it speaks of the NCLT having jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person, does not invest the NCLT with the jurisdiction to interfere at an applicant's behest at a stage before the quasi-judicial determination made by the Adjudicating Authority. The non-obstante clause in Section 60(5) is designed for a different purpose: to ensure that the NCLT alone has jurisdiction when it comes to applications and proceedings by or against a corporate debtor covered by the Code, making it clear that no other forum has jurisdiction to entertain or dispose of such applications or proceedings.**”

The categorical view taken by the Hon'ble Supreme Court in the above case was also followed by the Mumbai Bench of NCLT, Mr. Sunil Gopichand Teckchandani & Ors Vs, Metalica Industries Limited through Jitender Kumar Jain, Interim Resolution Professional (CP No. 1329/2017 in M.A. No. 1253/2018). Precisely, in a nutshell the essence of this judgment is that any financial claim or any operational claim can be questioned before the Adjudicating Authority only after the Resolution Plan is voted upon by the CoC and not before that. In fact, it goes without saying that the Hon'ble Supreme Court had given lot of thought to conclude in the abovesaid manner for the reason that the approval of the Resolution Plan actually crystallizes the exact value of the plan within which the secured Financial Creditors can be considered for the payment purely depending upon their entitlement and ratio as decided by the CoC. Filing of Claims even before the Resolution plan is approved would only result in unnecessary delays and further would act as negative factor in attracting the possible Resolution Applicants. There are several other reasons for that, which need not be elucidated at the present moment. Therefore, in our view of the matter the preliminary objection raised by the Respondent as regards the maintainability of both the Applications are very much sustainable and it is clear that the Applicants have knocked the door of this Tribunal even before the issue is ripe for adjudication. Therefore, it is trite law that all applications of the nature such as the present application can be filed and /or considered only after the resolution plan is in place and before this Tribunal for approval/adjudication.

58. In view thereof, the reliefs prayed for by the Applicant are not only beyond the scope and jurisdiction of this Hon'ble Tribunal under Section 60(5) but also contrary to the law relating to specific performance of contract which requires a person claiming performance to prove readiness and willingness by leading evidence.

Submissions made by Respondent No.4. by way of Affidavit in Reply:

59. The application has been filed by the Applicants against the Respondent No. 4 merely on the basis that the Respondent No. 4 is in possession of

the shares of the Respondent No. 3 pursuant to the Escrow Agreement dated 24.01.2019. Except for the aforementioned and the specific averment with respect to execution of the Escrow Agreement dated 24.01.2019 in terms of which the Respondent No. 4 was appointed as the Escrow Agent, no other averment/assertion has been made by the Applicants against the Respondent No. 4.

60. With regard to the Escrow Agreement dated 24.01.2019, the Respondent No.4 submits, that indeed an Escrow Agreement dated 24.01.2019 was executed between the Applicant No. 2, the Respondent No. 3 and the Respondent No. 4. (hereinafter referred to as the “Escrow Agreement”), whereby the Respondent No. 4 was appointed as an Escrow Agent.
61. In terms of the Escrow Agreement, the Respondent No.1 had undertaken to deposit 100% equity shares of the Respondent No. 3 with the Respondent No. 4 in accordance to the terms of the Escrow Agreement until the conditions set forth in the MOU dated 03.02.2018 is completed on or before the Long Stop Date or within such extensions as may be agreed to be between the Applicant No. 2 and the Respondent No. 1.
62. However, while the Respondent No. 1 is contractually obligated to deposit the equity shares with the Respondent No. 4, but has failed to do so till date. Hence, it shall not be out of place to mention herein that the equity shares of the Respondent No.3 are not in the possession of the Respondent No.4 since the Respondent No.1 failed to deposit the same.

Rejoinder to the Affidavit in Reply filed on behalf of Respondent No. 1 and Respondent No. 2

63. It is submitted that contrary to the averments in Affidavit in Reply, Karnataka Industrial Areas Development Board (“KIADB”) has vide letter dated 09.01.2019 marked and annexed as Annexure – P to IA no. 1012 of 2020 granted extension of lease prior for one year of Bommasandra Jigani Link Road Industrial Area (“the Property”) in the name of Respondent no. 3. Further the Affidavit in reply filed on behalf

of Respondent no. 1 and Respondent no. 2 itself contains a letter addressed to KIADB by Respondent no. 3 for extension of lease period in respect of the Property for a further period of two years i.e upto 31st March, 2022. The said letter is marked and annexed as Exhibit – E to the Affidavit in reply filed on behalf of Respondent no. 1 and Respondent no. 2 Respondent no. 3 inter alia informed KIADB that:

“We understand based on the letter of extension of lease dated 09.01.2019 issued by KIADB (“Letter of Extension”) that lease of Property has been extended for a period of one year in the name of Realsoft Cyber Systems Private Limited, a wholly owned subsidiary of RCIL (“Company”) Further, RCIL and KIADB have entered into a supplementary agreement dated 21.09.2019, approved the implementation of the project on the property in the name of the Company and to this effect, possession certificate dated 27.06.2019 has been endorsed in the name of the Company.”

64. Therefore, the contention that there is no transfer of leasehold rights in the Property in favour of Respondent no. 3 is baseless and incorrect in view of the aforementioned facts.
65. It is further submitted that the financial statements on which reliance is placed by the Respondent no. 1 and Respondent no. 2 are inaccurate and erroneous in as much as it does not reflect the true state of affairs of the Respondent no. 1 and Respondent no. 3. The leasehold rights of the Property ought to have reflected in the financial statement of Respondent no. 3 since the leasehold rights have been transferred in favour of Respondent no. 3. Pertinently, the Respondents have failed to acknowledge the defects in the financial statement therefore their assertions are false and misleading.
66. It is submitted that with regards to the contention of the Respondents that the Applicants were not ready and willing to perform the MoU as it stood is patently false. Applicants have repeatedly expressed their willingness to perform the terms of the MoU and have already paid Rs. 5.5 crores towards the first instalment of the Purchase consideration and have always been ready and willing and still are ready to pay the balance portion of the Purchase Consideration immediately. Further, it is pertinent to note that there was an inordinate delay on the part of Respondent no. 1 due to which the conditions of the MoU could not

have been completed and the delay, if any, is solely attributable to the non-performance by Respondent no. 1.

67. Further submitted that, most of my communication/discussions with Respondent no. 1 have been orally whereby I have constantly been following up with them to (i) ensure that 20% shareholding of Respondent no. 3 was transferred to me and that lease was transferred at the earliest. I have also with a view to show Applicant no. 1's bonafides informed them that the money has been ready and at numerous occasions offered to transfer the same. In response, Respondent no. 1 has due to several other businesses, work and factors in its organization taken time to make decisions and/or respond and has delayed the act of transferring the shares and allowing me to transfer the balance funds. Respondent no. 1/ its personnel have always assured me that the shares would be transferred and that the monies could be paid thereafter. In the meantime, Respondent no. 1 has till 21st September 2019 taken all other steps in furtherance of the MoU including transfer of the lease, soon after which CIRP was initiated against it.
68. Additionally, submitted that, several messages have been exchanged between Applicant no. 2 and personnel of Respondent no. 1, with respect to the implementation and/or performance of the MoU. Some of them are narrated hereinafter. In fact, soon after execution of the MoU and payment of Rs. 5.5 crores, I had in a message sent on 23.02.2018 to Mr. Suresh Rangachar, Director of Respondent no. 1 requesting that Respondent no. 1 move fast as per the MoU i.e. the transfer of the shares and the lease be completed and also stated that the Applicants were ready with the funds. It is evident that due to delays on part of Respondent no. 1, the extension letter was executed on 01.03.2018 (page 27 of Additional Affidavit). Thereafter, on 30.04.2018, Mr. Rangachar in response to my message informed me that he was confident of having the shares and lease transferred and thanked me for my patience. Even a year after execution of the MoU and soon after execution of the Escrow Agreement, Respondent no. 1 was continuing to delay the transaction. Soon after the approval had been granted by KIADB to transfer the lease to Respondent no. 3, I shared such an approval with Mr. Rangachar on

WhatsApp on 21.12.2018 and once again requested for transfer of the shares of Respondent no. 3 in terms of the Agreement. On 24.01.2019 (the same day the Escrow Agreement was executed), I sent a message to Mr. Rangachar requesting to speak to him on the phone and also requesting that the MoU be pushed forward by Respondent no. 1 i.e. the transfer of the shares done and also informed him that the funds were ready and that I had been holding onto them for a year. In response Mr. Rangachar sent me a message on 26.01.2019 stating that he would call me on the following Monday, when it would be easy to push, however, I received no such call and had to keep following up. The same is apparent from the numerous messages addressed by me to Mr. Rangachar in February 2019 and March 2019. I have also exchanged messages with Mr. Prabhat of Respondent no. 1, where initially, I had coordinated with him for survey of the Jigani Land and also coordinated with him for the letter to be addressed to KIADB. On 27.09.2018, he had messaged me to discuss the application for the building plans to be submitted and sought my advice. In response, I had expressed willingness to do so and requested for transfer of the lease from Respondent no. 1 to Respondent no. 3. On 03.02.2019, I had with a view to accelerate the transaction and transfer of money in fact offered to Respondent no. 1 (vide my message to Mr. Prabhat) to pay a sum of Rs. 20 crores (in addition to Rs. 5.5 crores already paid) for 49% shares of Respondent no. 3 and offered to place the balance sum of Rs. 25 crores with an Escrow Agent nominated by Respondent no. 1 for 51% of shares of Respondent no. 3. In response to this suggestion, I was orally informed that Respondent no. 1 was awaiting that the supplemental lease agreement be executed and thereafter this could be considered.

69. Lastly submitted, as regards to the contention that the building plan has been rejected, Applicants state that the same is incorrect as the information being displayed on the website is due to some technical error with the website of KIADB. I crave leave to refer to and reply upon documents indicating the correct status of the approvals, as and when available.

Upon perusal of the documents, submissions made by Learned Senior Counsels and Counsels for the parties the bench made the following observations: -

- i. As per Section 18(f) of the I & B Code the Interim Resolution Professional shall take control and custody of any Asset over which the Corporate Debtor has ownership rights as recorded in the balance sheet of the Corporate Debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including..... Further Sub-Clause (V) states that securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies. Further an explanation is provided for the term assets and it states that shall not include the following, namely the Sub-Clause (a) assets owned by a third party is in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment; In the instant case Respondent No. 1 RCIL is the Corporate Debtor which is under the CIRP. Though, the Corporate Debtor was the holding company of Respondent No 3 Realsoft Cybersystems Private Limited, in the books/ the balance sheet of the Corporate Debtor the investment in the Respondent No 3 in the form of shares only will reflect and the land, assets details, title would reflect on the assets side in the books / balance sheet of the Respondent No 3 i.e. the subsidiary company therefore, leasehold land is not an asset of the Corporate Debtor therefore, the prima facie argument / the submissions of the RP that the shares of the Respondent No 3 and the leasehold land of Respondent No 3 is the property of the CD is factually incorrect/wrong notion.
- ii. Upon analysis of the balance sheet of Respondent No. 1, RCIL it is noted that in note no. 2.03 under the heading **INVESTMENT IN SUBSIDIARIES** it is stated that 10,000 shares of Rs. 10/- each amounting to Rupees One Lakh is held in Realsoft Cyber Systems Pvt. Ltd. However, the lease hold land at Jigani, Bangalore which is the subject matter in this IA is not mentioned in the balance sheet of RCIL therefore, as per the Section 18(f) of I & B Code, the IRP/RP of the Corporate Debtor is not entitled to take possession of this land and include the same as part of assets of CD in the Resolution Plan as argued by the

Applicants. Further it is also observed that the said land which is the subject matter in this IA is shown in Exhibit C, of reply of the Respondent No. 1 and 2 in the remarks, it is also recorded that an advance of Rs. 5.5 Crores received in February 2018 from Vikram D Patil. It is also submitted that the physical possession of the said land is also with the Applicant. In view of the above analysis and factual position this land of Jigani cannot be a part of CIRP and cannot be included in the Resolution Plan of the CD.

- iii. Though as claimed by the RP the said details of the Jigani land was made available in the virtual data room is of no consequence because the land is not reflected in the books of Respondent No 1. Any wrong claim of assets by Corporate Debtor which is not reflected in the balance sheet of the Corporate Debtor will not take away the rights of the real, actual owner and in the instant case the applicants have already paid the first tranche amount of Rs. 5.5 Crores but the Corporate Debtor has failed to transfer 20 per cent of the shares of R3 to the Applicant which is in violation of the terms of the MoU. Not even a single share is transferred to the Applicants. We are also of the view that the party who do not full fill its part of obligation, cannot claim further rights. It is also submitted that the physical possession of the said land is also with the Applicant. From the facts, other records it is also noted that the Corporate Debtor had failed to transfer 20% of shares of Respondent No 3 to the applicant even though the applicant Company had made payment of Rs 5.5 crores as per MoU on 09.02.2018 within six days of MoU dated 03.02.2018. It is also noted that the shares have to be transferred within 24 hours of receipt of payment however, even after completion of more than two years the shares have still not been transferred in the name of the Applicant No. 1 despite several follow up emails, letters, WhatsApp correspondences.
- iv. Further as per the Escrow Agreement dated 24.01.2019 the shares of Respondent No 3 is not placed with the Escrow agent that is Respondent No 4 and the same was confirmed by Mr. Sumit Roy the Escrow agent that even till date not even a single share of Respondent No 3 is transferred/placed with him.

- v. Original Lease Agreement dated 12.07.2007 was between KIADB and RCIL for establishing a data center project. From the records it is also noted that the lease hold rights/interest of the Jigani land had already been transferred to Respondent No 3 and the same was confirmed by KIADB and the same was recorded in the Supplementary Agreement dated 21.09.2019. Respondent no. 3 i.e. Realsoft Cyber Systems Private Limited is the SPV created to hold the leasehold land, interest on the land allotted by KIADB at Jigani, Bangalore.
- vi. As per the approval granted by KIADB, vide letter dated 19.12.2018, 51% of the shares of Respondent No 3 would be held by the Corporate Debtor till execution of sale deed between KIADB and Respondent No. 3. The said MoU had been extended at the mutual consent of the applicants and the Corporate Debtor. In the supplementary agreement dated 21.09.2019 KIADB permitted the Corporate Debtor to implement the project in the name of Respondent No 3 with the condition that 51% of the shares of Respondent No 3 would be held by the Corporate Debtor.
- vii. Further it is also submitted by the applicants vide various emails, telecon they have requested the Respondent No 1 company for implementation of the project, transfer of shares to the applicant, making further payment of Rs. 20 crores and Rs 26 crores (Total Rs 46 crores) for their shares in Respondent No 3 company. However, the Respondent No 1 company and the RP could not commit firmly on the aspect of rest of balance payment from the applicants, transfer of shares. The applicants have approached this tribunal only after the RP has rejected the claim of the Applicant for transfer of shares for the amount of Rs. 5.5 cores already paid on 09.02.2018 i.e. 1 ½ years before initiation of CIRP. The RP has rejected the claim of the Applicant and informed the same vide his letter dated 03.06.2020. Applicants raised objection for selling this asset as assets of RCIL and filed the present IA. In the light of above facts and circumstances, we are of the considered view that the stand taken by the RP/CoC that the leasehold land, rights, interest belong to the property of the Corporate Debtor is incorrect in view of the IBC provision quoted above. The Respondent No 1 Company has also failed to transfer the

shares of the Respondent No 3 to the Escrow Agent as per the agreement dated 24.01.2019 and also failed to transfer 20% of shares to the Applicants. Various communications of the Applicants vide email, WhatsApp dated 05.03.2020, 17.03.2020, 20.03.2020, 11.05.2020, 27.05.2020 shows the bona fide commitments to fulfil the part of obligation of making payment in tranches, the applicants did not receive appropriate instructions even from Respondent No 1 or from Respondent No 2. Applicants have also intimated (email dated 23.02.2018 and 03.02.2019) that the funds are ready with them for balance transfer of shares i.e. Rs. 20 Crores for 49% of shares and offered to place balance sum of Rs. 26 Crores with an Escrow Agent for balance 51% shares of R3.

- viii. The RP has also taken stand in the reply that the amount of Rs. 5.5 Crores paid by the applicant is towards non-refundable deposit. From the perusal of the records it appears that the RP has taken contra position. If the amount is towards non-refundable deposits, then the question of transferring 20% of the shares of R3 to Applicant No. 1 i.e. Patrimoine Expo Private Limited does not arise.
- ix. It may also be added that only one party to the MoU cannot be expected to keep on fulfilling its part of obligation, making payment etc. and the other party fails to fulfill its part of obligation as per the MoU. It is also argued by the applicants that if the first step is not fulfilled by the other side of the party, any delay cannot be attributed to the Applicants. In this regard Applicants also relied upon the judgment of the Hon'ble Supreme Court in Nathulal V/s Poolchand [1969 (3) SCC120]. Applicants have also completed/taken effective steps, series of activities viz extensions of the lease period obtained from KIADB, leasehold rights transferred to R3, building plan etc. It is a well-known fact, that usually in any (major) project, time overrun and cost overrun is normal. Therefore, any delay in getting approval from various government agencies by either party is normal and necessary extension would be obtained by the parties to ensure the project is implemented with suitable safeguards (would normally be a part of the MoU/Contract) and the long stop date to complete the project would be extended suitably to benefit both the parties

instead of forgoing substantial money, time, manpower, energy etc. already invested in the project.

- x. The Applicants have relied upon the Judgments of Hon'ble NCLAT dealing with Section 60(5) to decide on any question of priorities or any question of law or facts, arising out of or in relation to Insolvency Resolution of Corporate Debtor. Further the applicants have also relied upon Section 63, 231 and 238 of IBC which would exclude the jurisdiction of other forums including Civil Courts. They have also relied upon the judgment of Hon'ble Supreme Court, Hon'ble High Court in the matter of Swiss Ribbons Private Limited, Liberty House Group, GE Power India Limited V/s NHPC Limited.
- xi. KIADB approved the transfer of leasehold rights in favour of R3 and permitted implementation of the project in the name of R3.
- xii. The submission of the Respondents that the transfer of the leasehold rights in the property and shares of Respondent no. 3 which are both assets of the Corporate Debtor and in view of the moratorium imposed under Section 14 of the Code, is prohibited is not a valid argument since the leasehold rights is already transferred in the name of the R3 as per the supplementary agreement dated 21.09.2019 and recorded by KIADB, the Lessor. Inclusion of the leasehold rights of the land and the details being made available as part of RCIL and selling to the prospective Resolution Applicant is not a bona fide Act by the RP/CoC since as per the MoU dated 03.02.2018 the Applicant had already made the payment of Rs. 5.5 Crores for 20% of the shares of R3. In view of the above we are of the view that the wrong details shown to the prospective Resolution Applicants in various modes including virtual data room will not take away the rights of the Applicants. Though the Respondents have contended that non-completion of the obligation on or before 03.10.2018 would render an automatic termination of MoU and this submission/argument of the Respondent is also not valid since a supplementary agreement was entered on 21.09.2019. Further the Respondents themselves have submitted that by way of letter dated 01.03.2018 the term of MoU was extended until 01.06.2020.

- xiii. The claim of the Respondents that the MoU as it stands, is in capable of specific performance and the Respondents have relied upon the Judgment in the matter of Dipco Pvt. Ltd. V/s Aristo Developer Pvt. Ltd. For which the Applicants argued that they did not seek any specific performance and this Adjudicating Authority is capable to decide the issue involved in the IA in view of various provisions of I & B Code as discussed above.
- xiv. We also fail to understand the submission of the Respondents i.e. the MoU is admittedly in violation of the condition laid down by KIADB but whereas KIADB had granted approval for transfer of leasehold land rights/interest in favour of Respondent no. 3.
70. In view of the above discussions, findings the prayer of the Applicants deserves to be allowed. In the factual matrix and legal position, justice is in favour of the applicants. Therefore, the aforesaid land at Plot nos. 284 (part) and 330 in survey no parts of 144, 149 to 155, 198 to 202 of Bommasandra – Jigani Link Road, Industrial Area, Jigani – Anekal, District, Bangalore, cannot be a part of CIRP and cannot be included in the Resolution Plan. Further we direct all the respondents especially Respondent No 1 and Respondent No 2 to ensure transfer of 20% of shares of Respondent No 3 to the Applicants within a period of 10 days from the date of receipt of the copy of this order. Since the Applicants have shown bona fide and keen to implement the project, as per their various mails and telecon, we also direct the applicants to pay the balance amount of Rs. 46 crores within the period of 3 months from the date of the receipt of the copy of the order or as per the terms of the MoU whichever is earlier so as to settle the issue amicably and to implement the project.

Sd/-
RAVIKUMAR DURAISAMY
Member (Technical)

Sd/-
JANAB MOHAMMED AJMAL
Member (Judicial)

15.12.2020
SAM