

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II**

INTERLOCUTORY APPLICATION. No. 2903/2023

In

COMPANY PETITION (IB) No. 4302/MB/C-II/2018

*Application filed under Section 60(5) of the Insolvency
and Bankruptcy Code, 2016 read with Rule 11 of the
National Company Law Tribunal Rules, 2016.*

In the matter of

- 1. Mr. Hitendra Vishanji Nagda,**
- 2. Mrs. Heena Hitendra Nagda and**
- 3. Mr. Viral Hitendra Nagda**

All Residing at: B2, 1403, Kutchi Sarvodaya
Nagar, P.L. Lokhande Marg, ACC Nagar,
Govandi, Chembur, Mumbai-400043.

...Applicants

v/s.

Prime Plaza Premises Co-operative Society Ltd.

Old Carrol Road, Balaseth Madhukar Marg, JV
Patel Compound, Elphinstone, Mumbai-400013

...Respondent No.01

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT II

I. A. No. 2903/2023
In
CP No. 4302/MB/C-II/2018

Mr. Fanendra H Munot

Liquidator of M/s. Max Flex & Imaging Systems
Ltd. Having its registered office at: 06th Floor,
Mafatlal House Building, H.T. Parekh Marg,
Backbay Reclamation, Mumbai-400020.

...Respondent No.02

In the matter of:

Dena Bank

....Financial Creditor

v/s

M/s. Max Flex & Imaging Systems Ltd.

...Corporate Debtor

Order Pronounced on: - 23.01.2024.

Coram:

Shri. Anil Raj Chellan : Member (Technical)

Shri. Kuldip Kumar Kareer : Member (Judicial)

Appearances (in Physical Mode) :

For the Applicant : Adv. Meghna Arvind.

For the Respondent No.01 : Adv. Abhishek Pednekar.

For the Respondent No.02 : Adv. Kunal Chheda.

ORDER

Per: Shri. Kuldip Kumar Kareer, Member (Judicial).

1. This is an application filed by the Applicants under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 against the Respondents *inter alia* seeking following reliefs: a) To restrain the Respondent No.01 from recovering outstanding dues from the Applicants which were payable by the Corporate Debtor; b) to be included as the member of the society with immediate effect; and c) to allow the Applicants to use the parking space which is a part of the immovable property purchased by them.

Case of the Applicant in brief:

2. The Corporate Debtor was admitted into Corporate Insolvency Resolution Process ('CIRP') on September 08, 2021. The Respondent No.02 was appointed as the Resolution Professional ('RP'). Liquidation commenced against the Corporate Debtor vide Order dated 23.09.2022 and RP was confirmed as the Liquidator of the Corporate Debtor. Corporate Debtor was the owner of the property situated at Unit No. 4B-2, Ground Floor, Prime Plaza Society, Old Carrol Road, Elphinstone, Mumbai- 400013 (hereinafter referred to as the Immovable Property") and was a member of "The Prime Plaza Premises Co-operative Society Limited".
3. Respondent No. 02 issued Asset Sale Process Memorandum on December 12, 2022 in relation to the sale of the Immovable Property referred to hereinabove. Respondent No.02 also issued a public announcement of the proposed auction

of the Immovable Property in Business Standard and Loksatta on 12.12.2022 in accordance with Regulation 12(3) of the IBBI (Liquidation Process) Regulations, 2016. E-Auction was conducted on 07.01.2023 and the Applicants were declared as the highest bidder for the Immovable Property pursuant to which a Letter of Intent ('LoI') was issued by Respondent No.02 in favour of the Applicants on 09.01.2023 after adjusting the Earnest Money Deposit ('EMD') paid by the purchasers in the bid process.

4. In compliance with the terms and conditions stipulated in the Asset Sale Process Memorandum, the Applicants have paid the entire sale consideration of INR 3,41,77,500/- (Rupees Three Crores, Fourty-One Lakhs, Seventy-Seven Thousand and Five Hundred Only) on 04.01.2023 and 30.01.2023 towards the Immovable Property. Pursuant thereto, the Applicants and the Respondent No.02 executed a Deed of Sale dated 30th January, 2023 ("Deed of Sale").
5. Subsequent to the Deed of Sale, the Applicants wrote a Letter dated 07th February, 2023 through an Advocate stating that the Applicants are now the rightful owner of the Immovable Property and sought for the process to be included as the member of the society. The Applicants clearly in their aforementioned letter stated that any outstanding dues, maintenance or liabilities of the Immovable Property prior to 30th January, 2023 shall be claimed from the Corporate Debtor or from the Liquidator of the Corporate Debtor and the Applicants are liable to pay the maintenance dues and outstanding taxes from 30th January, 2023 only.

6. The Respondent No.01 addressed to the Applicants a Letter dated 29th March, 2023. The aforesaid letter states that an amount of Rs. 17,17,711/- is due from the Corporate Debtor which must be cleared by the Applicants since the Applicants are the current purchasers of the Immovable Property. Thereafter, the Respondent No.01 served a copy of Dispute Application No. 273 of 2023 filed against the Applicants before the Hon'ble Co-operative Court No. III, Mumbai seeking to recover the outstanding maintenance dues which were payable by the previous owner along with interest to the tune of Rs. 23,19,220/- from the Applicants since the Applicants are the purchasers of the Immovable Property. Respondent No.01 wrote a Letter dated June 05, 2023 to the Applicants that the Applicants had been illegally parking the cars/vehicles which are solely reserved for the members of the society. In response thereto, the Applicants had addressed a Letter dated June 06, 2023 to the Respondent No.01 stating that the Applicants are the rightful owners of the Immovable Property and they are not liable to pay the previous dues of the Corporate Debtor in view of various provisions of IBC.
7. The Respondent No.01 had informed the Applicants vide Letter dated June 13, 2023 that the Applicants are not shareholders of Unit No. 4B-2 in the Prime Plaza Society as there are pending maintenance dues of society and that the society has not transferred the share certificates in the name of the Applicants. Further, the Respondent No.01 informed that since the Applicants are not the members of the society, they are not allowed to park their vehicles in the parking space of society premises. The Applicants state that the Respondent No.01 has

also obstructed the goods truck from entering and being parked in the parking space of the society.

8. Being aggrieved by the aforesaid acts of the Respondent No.01, the Applicants herein are constrained to file this application. Hence this application.

Reply of the Respondent No.01:

9. The Applicants have purchased the Immovable Property through E-Auction by executing the Sale Deed on 'As Is, Where Is, Whatever There Is and Without Recourse Basis' and hence, any pending dues left by the previous owner would have to be paid by the Applicants. It was the duty of the Applicants to inquire with the Respondent No.01 society regarding dues before participating in the auction and purchasing the Immovable Property.
10. There are other auction purchasers who too participated in the E-auction and purchased other units of the Corporate Debtor in the society of the Respondent No.01 who have peacefully complied with by paying the pending maintenance dues without obstructing and objecting to the society.
11. The Applicants are not the members of the Respondent No.01 and therefore, the Applicants are not entitled to use the parking space of the society.

ANALYSIS AND FINDINGS

12. We have heard the Counsel for the parties and have gone through the records.
13. It has been argued by the Ld. Counsel for the Applicant that the Applicant purchased the property in question, which was previously owned by the

Corporate Debtor who was a member of the Respondent No. 1 Society vide Share Certificate no. 34 for five shares of Rs. 50 each bearing no. 16 and 170, in an open auction conducted by the Liquidator. The Applicant paid an EMD of Rs. 34,17,750/- on 04.01.2023 and further paid a sum of Rs. 3,41,77,500/- after he was declared the highest bidder. The sale deed was executed by the Liquidator and the property in question was conveyed to the Applicant. The Ld. Counsel for the Applicant has further argued that Respondent No. 1 has filed Application no. 273 of 2023 before the Co-operative society for recovery of Rs. 23,19,220/- with interest. The society also wrote to the Applicant restraining him from parking cars/vehicles which are reserved for the members of the society. Thus, according to the Counsel for the Applicant, the Respondent society is not treating the Applicant owner/member.

14. The Counsel for the Applicant has further contended that the Respondent society is not entitled to claim any dues pertaining to pre-CIRP period regarding which it has already lodged the claim with Liquidator which would be treated and decided as per Section 53 of the IB Code, 2016. In support of his arguments, the Counsel for the Applicant has relied upon *Haryana State Industrial and Infrastructure Development Corporation Limited vs. AAR AAR Technoplast Private Limited and another (Company Appeal (AT) (Insolvency) No. 606 of 2021 decided on 06.09.2022*, whereby it has been held that after the completion of the sale by the Liquidator any claim relating to such property for dues prior to auction cannot be raised against the auction purchaser specially when the Company is in Liquidation and the dues were already claimed by the said party as an Operational Creditor during the CIRP process. The Counsel for the Applicant

has further relied upon *Chinar Steel Segments Centre Pvt. Ltd. vs. Sameer Kumar Agarwal and other (Company Appeal (AT)(Insolvency) No. 1355 of 2022 decided on 11.10.2023*, whereby it has been held that the claim of the Appellant to realise the pre-CIRP dues from the successful auction purchaser is clearly in conflict of the statutory scheme as laid down in the Court. In the light of the law laid down in the aforecited cases, it has been urged by the Counsel for the Applicant that the application deserves to be allowed.

15. On the other hand, the Counsel for the Respondent No. 1 has argued that the Application is without any merit and deserves dismissal. According to the Counsel for the Respondent No. 1 that it is a registered society under the Maharashtra Co-operative Societies Act, 1960. A commercial unite was developed by Respondent No. 1 in the year 1946. The Corporate debtor purchased certain units in Respondent No. 1 society. Subsequently, the Corporate Debtor was admitted into Insolvency and Liquidation. The Liquidator auctioned the property in question on “as is where is basis whatever is without recourse basis”. The Applicant is the Successful Bidder of Unit No. 4 B/2 situated on the ground floor and the sale deed was also executed in favour of the Applicant on 30.01.2023. According to the Counsel for the Respondent No. 1, as the property was purchased by the Applicant ‘as is where is’ basis, he is liable to pay the outstanding dues on the said property. In support of his contentions, the Ld. Counsel for Respondent No. 1 has relied upon *K C Ninan vs. Kerala State Electricity Board and others* whereby the Hon’ble Supreme Court has held that where sale is conducted on ‘as is where is’ basis, the purchaser would be acquiring all its existing rights, obligations and liabilities and all such

encumbrances on the property stand transferred to the purchaser upon the sale. It was further held that the auction purchaser is expected to exercise due diligence.

16. The Ld. Counsel for the Respondent No. 1 has further argued that the dispute with regard to the past outstanding dues pertaining to the property in question is pending before the Co-operative Court in the shape of Dispute Applicant No. 273 of 2023 and the Hon'ble Co-operative Court has the exclusive jurisdiction to adjudicate the matter. As regards the parking space, it has been argued by Respondent No. 1 that there is no mention of any parking space in the sale deed dated 30.01.2023 and the Applicant is illegally demanding the parking space. It has also been contended by the Counsel for the Respondent No. 1 that the provisions of IBC are not applicable to a Co-operative Society registered under the Co-operative Societies Act, in this regard a reliance has been placed upon *The Solapur District Central Co-operative Bank Limited vs. Sangola Taluka Sahkari Sakhar Karkhana Limited (decided by this Tribunal on 04.02.2022)* whereby an Application u/s 7 of the Code was dismissed on the ground that the Co-operative was not a corporate person nor the provisions of the IB are applicable to a Co-operative society. The Counsel for the Respondent No. 1 has further contended that the remedy available with the Applicant is to pursue its case before the Co-operative Court where the dispute is pending, and the present Application is not maintainable and deserves to be dismissed.
17. We have weighed the contentions raised by the Counsel for the parties and have gone through the records.

18. By way of this Application, the Applicant seeks exemption from payment of outstanding dues payable, if any, to Respondent No. 1 society and also that the Applicant be included/joined as the member of the society and further the Respondent society be restrained from preventing the Applicant from using the parking space. It has been claimed by the Applicant that he has purchased the property in question in an open auction conducted by the Liquidator for the total sale consideration of Rs. 3,41,77,500/- and the entire sale consideration is stated to have been paid on 30.01.2023. The sale deed was also executed by the Liquidator on 30.01.2023.
19. Now the question arises as to whether or not the Applicant is liable to pay the outstanding dues of Respondent No. 1 prior to the execution of the sale deed in his favour executed by the Liquidator on 30.01.2023.
20. To prove his case, the Counsel for the Applicant has relied upon *Haryana State Industrial and Infrastructure Development Corporation Limited (supra)*. It was held by the Hon'ble NCLAT that any claim relating to such property for dues prior to the auction cannot be raised against the auction purchaser specially when the company is in liquidation and the dues were already claimed by the said party as an Operational Creditor during the CIRP process and claim Form B was also filed with the Liquidator. In the cited case also, the property was sold in auction on 'as is where is' basis. On the basis of the law laid down in this case by the Hon'ble NCLAT, in our considered view, it can be safely held that Respondent No. 1 society cannot recover the arrears of the dues pertaining to the period prior to execution of the sale deed in favour of the auction purchaser.

21. So far as the law laid down in *K C Ninan vs. Kerala State Electricity Board and others (supra)* is concerned, which has been relied upon by the Counsel for the Respondent society, the same cannot be applied to the facts and circumstances of the instant case as the property in the cited case was not sold under the provisions of the IB Code, 2016 and it was a case of simple sale by way of an auction on 'as is where is' basis.
22. The Counsel for Respondent No. 1 Society has further argued that Respondent No. 1 has already filed a Dispute Application No. 273 of 2023 before the Co-operative Court under the Maharashtra Co-operative Society Act, 1960 as the matter in dispute falls within the purview and jurisdiction of the Co-operative Court. It has also been argued on behalf of the Respondent No. 1 that this Authority is not empowered to adjudicate the matter in the light of the law laid down in *Asset Reconstruction Company (India) Limited vs. Precision Fasteners Limited* in CP(IB) No. 1339/NCLT/MB/2017, whereby it was held that jurisdiction to grant reliefs of recovery of rent from tenant and eviction of the tenant lies in the exclusive domain of the Civil Court and cannot be dealt with by the Adjudicating Authority by invoking the provisions of 60(5) of the Code. Even this contention raised on behalf of the Respondent No. 1 society cannot be said to be tenable nor the case law cited by the Counsel for the Respondent can be applied to the facts and circumstances of the present case.
23. Counsel for Respondent No. 1 Society has further argued that the society is not a Corporate person and, therefore, the provisions of the IBC would not applied to it. Even this contention raised on behalf of the Respondent is appears to be misconceived. In this regard, it is worthwhile to mention that Section 238 of the

IB Code provides that 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 virtue of any such law.

24. In the light of the above brief discussion, we hold that Respondent No. 1 is not entitled to recover the past arrears in respect of the unit purchased by the Applicant in auction from the Liquidator of the Corporate Debtor.
25. Accordingly, we allow the Application to the extent, directing the Respondent not to claim/recover the past dues pertaining to the prior to the execution of the sale deed in favour of the Applicant by the Liquidator. However, this will not preclude the Respondent society from claiming any transfer fees or other charges which are usually charged by the society from the transferee members. The Applicant shall also be liable to pay all charges leviable/payable in respect of the period post the execution of the sale deed in his favour. The Application is accordingly **allowed** to the extent indicated above.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)