

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 305 of 2021

(Arising out of the Order dated 02nd March, 2021 passed by National Company Law Tribunal, New Delhi, Principal Bench, Court I, in I.A. No. 792/PB/2021, in C.P. No. (IB)- 967/PB/2018)

IN THE MATTER OF:

New Okhla Industrial Development Authority

Main Administrative Building,

Sector – 6, Noida, Uttar Pradesh – 201301.

(Through its Chief Executive Officer)

...Appellant

Versus

Mr. Amit Agarwal

Resolution Professional

of Boulevard Projects Pvt. Ltd.

H-63, Vijay Chowk, Laxmi Nagar, Delhi – 110092.

...Respondent

Present

For Appellant:

**Mr. Saurav Roy, Mr. Kaushal Sharma &
Mr. Prabudh Singh, Advocates.**

For Respondent:

Mr. Prashant Kumar, Advocate for Respondent.

(J U D G E M E N T)

[Per; Shreesh Merla, Member (T)]

1. By the present Appeal filed under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code'), '*New Okhla Industrial Development Authority*' ('*Noida*')/the Appellant herein has sought to challenge the Impugned Order dated 02.03.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Principal Bench) in IA792/2021, in C.P. No. (IB)- 967/PB/2018, by which Order, the

Adjudicating Authority has dismissed the Application preferred by Noida for removal of the Leasehold Land from the pull of Assets of the ‘Corporate Debtor’, observing as follows:

“16. When it comes to Sec. 18 (f), it only deals with the duties of the Interim Resolution Professional. It deals with how the Insolvency Resolution Professional is to perform his duties. It has not been said anywhere that IRP is conferred with rights and he is entitled to take control and custody of any Asset of the corporate debtor. It is only a section that deals with what Assets he could take control of under section 18; it is not a section creating or taking away rights of somebody. It cannot be a section set against the restraints set up under section 14 of the Code, Section-18 is merely a procedure to be followed for smooth change-over from the suspended directors to the IP during CIRP period. In the present context, invocation of Sec. 18 (1)(f) will not arise because the Asset in issue right from the beginning is in the possession of the corporate debtor and thereafter in the possession and control of the IRP or the RP as the case may be.

17. Section 18 will come into picture only when Asset is required to be taken into control of the IRP, in the present case, that stage is over, therefore there is no relevance to section 18 while deciding as to whether or not the Asset is to be removed from the pool of the Assets of the corporate debtor. What lies with the corporate debtor, what does not lie with the corporate debtor has to be decided in the light of the mandate given under section 14 of the Code and upon the title subsisting over a particular Asset. In this case, it is a leasehold right, as per Section 14 of the Code that right cannot be disturbed during CIRP period.

18. As to the definition of Asset given in the explanation to Section 18, it delineates the Assets owned by third party in possession of the corporate debtor held under Trust or Contractual Arrangements including bailment, these Assets are of such kind that have come to the Corporate Debtor for rendering some services, in case any such Asset is stuck with the Corporate Debtor, it

shall not be treated as an Asset of the corporate debtor under this particular section. If any Asset with a definition analogous to the above explanation is in the possession of the corporate debtor, then it could be entailed by applying doctrine of ejusdem generis, not otherwise.

19. In the present case, it is a leasehold right covered by section 14, that apart, the character of 54lease hold right cannot be called as a right analogous to the category of the Assets mentioned in the explanation given to Section 18 of the Code. If it is carefully looked into, the word 'this section' has been inserted in explanation to limit the applicability of the explanation to section 18 alone.

20. In view thereof, we have not found any merit in the application filed by Noida Authority for removal of the leasehold land from the pool of the Assets of the corporate debtor, therefore IA792/2021 is hereby dismissed as misconceived.”

2. Submissions of the Learned Counsel appearing on behalf of the

Appellant:

- The Learned Counsel appearing for Noida submitted that the Appellant is the sole lawful owner of the said premises namely Plot No. C001/A, Sector 16B, Noida, Gautam Buddha Nagar, Uttar Pradesh. Appellant had entered into the registered Sale Deed dated 29.06.2020 with the ‘Corporate Debtor’ in respect of these premises for a period of 90 years. It is submitted that the ‘Corporate Debtor’ is merely a lessee to the Appellant and nothing more.
- Under the said Lease Deed, the ‘Corporate Debtor’ was liable to pay a total premium amount of Rs.5,26,74,58,680/- out of which an amount of Rs.52,67,45,868/- was paid by the ‘Corporate Debtor’ to the Appellant when the time of signing of the Lease Deed and the balance amount of

Rs.4,74,07,12,812/- was to be paid by the 'Corporate Debtor' in 16 half yearly instalments commencing from 16.12.2012 onwards along with an interest @11% p.a. compounded half yearly from the date of allotment. It is submitted that the 'Corporate Debtor' was also liable to pay the annual ground rent and was allowed to transfer the whole Plot or building after obtaining the prior permission of the Appellant and after making payment of transfer charges. Any construction and development on the said premises was to be done in accordance with the norms prescribed by the Appellant. The 'Corporate Debtor' was to obtain the permission from the Appellant before mortgaging the said premises.

- It is submitted that the Appellant had the first charge over the demised premises and had the right to terminate the Lease Deed, if the 'Corporate Debtor' had breached any of the covenants or conditions of the Lease Deed, building bye-laws or any other rules or directions issued by the Appellant.
- After the initiation of CIRP on 08.02.2019 the Resolution Professional ('RP') took control and custody of the said premises and issued a request for Resolution Plan on 15.09.2019, inviting Resolution Plans from prospective Resolution Applicants. It is submitted that the RP has illegally taken custody and control of the said premises under Section 18(f) of the Code without taking into consideration that the 'Asset' does not belong to the 'Corporate Debtor'.
- Section 18(f) of the Code provides that an RP can only take control and custody of those Assets over which the 'Corporate Debtor' has ownership

rights. The explanation to Section 18(f) of the Code specifically excludes the Assets owned by third party in possession of the ‘Corporate Debtor’ from being taken into custody by the RP. The statute has to be construed literally by allowing the general words to take their natural meaning as held by the Hon’ble Apex Court in *‘Tata Consultancy Services’ Vs. ‘State of A.P.’*¹.

- Ownership of an immovable property can only be transferred by a registered Conveyance Deed as contemplated under Sections 54 of the Transfer of Property Act, 1882. Admittedly in the instant case, there is no Conveyance Deed executed between the parties and therefore there is no transfer and ownership under Section 54 of the Transfer of Property Act, 1882. The Appellant vide Lease Deed transfer only the Leasehold Rights for 90 years and not to Ownership Rights.
- Learned Counsel placed reliance on the following Judgements in support of his case that a lessee by entering into a Lease Deed with the owner of the property does not acquire any ‘Ownership Rights’ of such immovable property:
 - *‘Mohd. Noor & Ors.’ Vs. ‘Mohd. Ibrahim & Ors.’*².
 - *‘Hotel Queen Road P. Ltd.’ Vs. ‘Union of India & Ors.’*³.
 - *‘Embassy Property Developments (P) Ltd.’ Vs. ‘State of Karnataka’*⁴.

¹ (2005) 1 SCC 308

² (1994) 5 SCC 562

³ 2015 SCC OnLine Del 9807

⁴ (2020) 13 SCC 308

- Learned Counsel also placed reliance on the following Judgements in support of his contention that ‘Assets’ owned by a third party in possession of the ‘Corporate Debtor’, held under ‘trust’ or ‘under contractual arrangement’ shall not be treated as an ‘Asset’ under Section 18 of the Code and therefore an RP cannot be allowed to take control and custody over such Assets:
 - *‘Weather Makers Pvt. Ltd.’ Vs. ‘Parabolic Drugs Ltd.’*⁵.
 - *‘Sangita Fiscal Services Private Limited & Ors.’ Vs. ‘Duncans Industries Limited & Ors.’*⁶.

3. Submissions of the Learned Counsel appearing on behalf of the Respondent:

- Learned Counsel submitted that the Adjudicating Authority rightly held that the purpose of CIRP is to preserve the value of the ‘Corporate Debtor’, existing as on the date of the admission and that the Application has been filed by the Appellant in violation of the express provisions of Section 14(1)d of the Code which prohibits recovery of ‘any property’ by an owner or lessor where such property is occupied by or in possession of the ‘Corporate Debtor’.
- Learned Counsel placed reliance on the ratio of the Judgement of the Hon’ble Supreme Court in *‘Rajendra K. Bhutta’ Vs. ‘Maharashtra Housing and Area Development Authority’*⁷, in support of his argument

⁵ CA 2016/2019 in C.P. (IB) No. 102/CHD/2018

⁶ MANU/NC/1367/2021

⁷ (2020) 13 SCC 208

that when a Moratorium is imposed by Section 14 of the Code, the idea is to elevate Corporate Sickness and a statutory *Status Quo* is pronounced so that the Insolvency Resolution Process may proceed unhindered by any obstacle. The Lease Rights of the 'Corporate Debtor' is a valuable Asset which requires protection during the Moratorium period.

- If the demised premises along with the development which has taken place thereon is taken out from the pool of Assets, it would not only amount to a violation of Section 14(1)d of the Code, but also leads to a situation whereby the sole Asset and business of the 'Corporate Debtor' is dissipated.
- It is contended that the Application invoking Section 18(f) has been filed by the Appellant on the basis of an incorrect understanding of the provision. The Asset has been in possession and control of the 'Corporate Debtor' right from the inception of the CIRP and Section 18 would be applicable only when an Asset is required to be taken into control by the RP. In the present case, when that stage is over, there is no relevance of Section 18 Application to decide whether or not the demised premises be removed from the pool of Assets of the 'Corporate Debtor'.
- Leasehold Rights have already been created under the Lease Deed in favour of the 'Corporate Debtor', and the Appellant did not exercise their right of cancelling the Lease Deed for any reason whatsoever.
- It is submitted that Section 18(f) of the Code uses the word ownership which is different from having absolute ownership over a property.

Ownership consists of a bundle of Rights including Mortgage Rights, Leasehold Rights, Tenancy Rights under which various rights might be vested in different persons. Leasehold Rights are included in the bundle of Ownership Rights. The Hon'ble Supreme Court in '**A.R. Krishnamurthy & Ors.**' Vs. '**Commissioner of Income Tax, Madras**'⁸, held that entire ownership of the property means the ownership of a bundle of Rights and a limited interest which can be served and disposed of for a specified period in the form of lease or mortgage which is part of that bundle. Therefore, when the Appellant transferred Leasehold Rights to Respondent under the Lease Deed, it transferred some Ownership Rights in the property also.

- It is argued that the Leasehold Rights carrying only certain incidents of ownership were passed on to the 'Corporate Debtor' in the following manner:
 - *The 'Corporate Debtor' was required to obtain all statutory clearances from the concerned Authorities for its functioning and the Appellant would not be responsible for any consequence arising out of failure of Lessee to receive any statutory clearances.*
 - *The 'Corporate Debtor' had spent a considerable amount of Financial Resources in order to develop the said Plot.*
 - *In order to meet considerable Financial Resources required for a project, the 'Corporate Debtor'/Lessee had been given a specific right to mortgage the property in favour of a Scheduled Bank/Gov.t. organization/Financial Institution for the purposes of raising resources, for construction on the said Plot.*

⁸ (1989) 1 SCC 754

- *'Corporate Debtor' was vested with right to transfer plots/flats in project to third parties.*
- *Under the Lease Deed, if larger public interest so required, the Appellant could take back possession of the said Plot. However, the Appellant could take such an action only by making payments to the 'Corporate Debtor' at the prevailing market rates.*
- The argument to develop the property was not a Standard Construction Contract wherein the 'Corporate Debtor' was a developer and merely developing or constructing the property in return for consideration. The Leasehold Rights are accrued to the 'Corporate Debtor', vide the Lease Deed as a vested right, which is synonyms to the ownership to the extent of the right. The Hon'ble Supreme Court in ***'New Okhla Industrial Development Authority' Vs. 'Anand Sonbhadra RP'***⁹, held that while such a lease passes over a risk of ownership to Lessee, the rewards are to be kept with the Lessor except, the liberty to sell units which would be constructed.
- The Appellant had earlier filed CA No.1101/PB/2019 for acceptance of his claim as a 'Financial Creditor' of the 'Corporate Debtor'. In those proceedings, the Appellant had taken a stand that 'all risks and rewards are incidental to ownership' of the said land stood transferred to the 'Corporate Debtor' under the Lease Deed. At this stage, the Appellant is taking a complete turnaround praying for completely opposite reliefs in I.A.792/2021 seeking a direction to remove the demised premises from the

pool of Assets of the ‘Corporate Debtor’, on the ground, that no incidents of ownership were ever transferred to the ‘Corporate Debtor’.

Assessment

4. It is not in dispute that a Lease Deed dated 29.06.2010 was executed by the Appellant in favour of the ‘Corporate Debtor’ in respect of Plot No. C-001/A, Sector-16, B, Noida, Uttar Pradesh. It is also not in dispute that the ‘Corporate Debtor’ has also defaulted in making payments therein and CIRP was initiated on 08.02.2019, pursuant to which, the Respondent took control and custody of the said premises. A request for Resolution Plan was issued on 15.09.2019, and that demised premises i.e., the subject Plot was included as an ‘Ownership Asset’ of the ‘Corporate Debtor’. Subsequently, the Appellant filed I.A.792/2021 on 05.02.2021 under Section 18 seeking a direction to exclude the demised premises from the pool of Assets of the ‘Corporate Debtor’, *inter alia* on the ground that the ‘Corporate Debtor’ had no ownership rights to the demised premises, which Application was dismissed by the Adjudicating Authority.

5. At this juncture, Section 18(f) of the Code is reproduced here for ready reference:

***“18. Duties of interim resolution professional. -
The interim resolution professional shall perform the following duties, namely: -***

(f) 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 –

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

Explanation. – For the purposes of this 1[section], the term “assets” shall not include the following, namely:-

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”

(Emphasis Supplied)

6. It is the case of the Learned Counsel for the Appellant that Assets owned by a third party in possession of the ‘Corporate Debtor’ could not have been taken custody and control of by the RP and only those Assets over which the ‘Corporate Debtor’ has ‘Ownership Rights’ as recorded in the Balance Sheet or any information utility could have been taken custody and control of by the RP. It was

argued that the term of the Lease Deed was for 90 years; that the 'Corporate Debtor' was liable to pay the Annual Ground Rent under the Lease Deed; that the permission of the Appellant was mandatory prior to transferring the said Plot or building after payment of transfer charges; that any construction or development on the subject Plot was to be done in accordance with the terms and conditions of the Lease Deed; that prior permission of the Appellant was required for any mortgage to any Scheduled Bank, and that the Appellant had his charge over the demised premises, which all go to prove that the Appellant was the 'Rightful Owner' of the subject Plot. It is also argued that ownership of an Immovable Property can only be transferred by a registered Conveyance Deed as contemplated under Section 54 of the Transfer of Property Act, 1882, which, in the instant case is absent as no such Conveyance Deed had ever been executed between the parties. The Lease Deed under Section 105 of the Transfer of Property Act, 1881, only transfers a right to enjoy the leased premises which does not tantamount to a transfer of ownership or interest in the leased premises.

7. Section 3(27) of the Code defines property to include '*money, goods, actionable, claims, land and ever description of property constituted in India or decided in India and ever description of interest, including present or future or vested or contingent interest arising out of, or incidental tour, property*'.

8. The Hon'ble Supreme Court in '**Mohd. Noor and Ors.**' Vs. '**Mohd. Ibrahim & Ors.**'¹⁰, while enunciating the concept of ownership of the Immovable Property has observed as follows:

*"5. Austin in his book of Jurisprudence, 3rd Edition, Page 817 defines the 'right ownership' as 'a right indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing.' The theoretical concept of 'ownership', therefore, appears to be that a person can be considered to be owner if he has absolute dominion over it in all respects and is capable of transferring such ownership. Heritability and transferability are not doubt some of the many and may be most important ingredients of ownership. But they by themselves cannot be considered as sufficient for clothing a person with absolute ownership. Their absence may establish lack of ownership but their presence by itself is not sufficient to establish it. The ownership concept does no accord with the status of a person who is paying the rent. A tenant under various legislations either urban or rural property, agricultural or otherwise, enjoys right of heritability and transferability. At the same time, he does not become owner of the property. Transfer of ownership is distinct and different from transfer of interest in the property. A licensee or even a tenant may be entitled by law to transfer his interest in the property but that is not a transfer of ownership. For instance, a lessee from a corporation or a local body or even State Government to raise building may have heritable and transferable right but such a person is not an owner and the transfer in such a case of his interest in the property and not the ownership. In **Inder Sen an Anr. v. Naubat Singh and Ors. I.L.R. 7 All. 553** it was held that absolute ownership is an aggregate of compendium of rights such as right of possession, the right of enjoying usufruct of the land and so on and so forth. The ownership, therefore, is a sum total of various subordinate rights. The right to transfer the subordinate right either under general law or statutory law does not make it transfer of ownership. Section 6 of the Transfer*

¹⁰ (1994) 5 SCC 562

*of Property Act, 1882 permits transfer of any property.
It may be transfer of absolute or subordinate right.....”*

9. The Hon’ble High Court of Delhi in **‘Hotel Queen Road P. Ltd.’ Vs. ‘Union of India & Ors.’**¹¹, has held that the right of ownership over a property in cases of lease is not determined on the basis of the duration of the lease and a lease, even if for 99 years, does not confer Ownership Rights on the Lessee. The relevant portion of the Judgement is reproduced as hereunder:

“13. A lease in ordinary legal sense contemplates demise or a transfer of a right to enjoy land for a term or in perpetuity for a consideration of a price paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferor. There is a marked difference between lease and ownership. While the former is only a transfer of a right to enjoyment to a property, latter denotes a complete and total control over the property and not merely a right to enjoyment. The lessee of a property is a tenant. He may be entitled to transfer his interest in the land, but right to transfer ownership vests with the owner of the said land. Tenancy cannot be considered to be a permanent ownership, even when the tenant has made permanent structures at his own cost on the land. Though heritability and transfer may incidents common to both ownership and lease, however, that by in itself are not sufficient to cloth a person with absolute ownership...

14. The right of ownership over a property in cases of lease is not determined on the basis of the duration for which the lease is granted to the lessee. Thus, a lease even if for 99 years, does not confer ownership rights on the lessee, unless they are specifically transferred to him in which case it stops being a lease. Even in the cases of lease for long durations, the residuary rights of a leased land belong to the owner of the land and not the lessor. It is a settled law that the length of the lease is not indicative of even permanency of lease much less of

¹¹ 2015 SCC OnLine Del 9807

ownership. Even the division bench of the Bombay High Court in *'The Collector of Bombay v. Khatizabai Dharsi Somji Dossa'*, 1962 (64) BOM LR 311 has observed:-

"...The term of a lease may be 5 years, 50 years. 99 years or even 999 years. Nevertheless, the transaction is only a lease and there is always a reversion which continues to vest in the owner for the entire term of the lease".

10. In the instant case, Noida has never taken any steps to revoke the lease. It was vehemently argued by the Learned Counsel for the Respondent that *'it was never the case of the 'Corporate Debtor' that it had 'Ownership Right' over the said Plot'*. It is only their case that if the Plot along with the development which has taken place thereon is a right to be taken out of pool of Assets of the 'Corporate Debtor', it would amount to violation of Section 14(1)d of the Code.

11. The Hon'ble Supreme Court in *'P. Mohanraj' Vs. 'Shah Brothers Ispat Private Limited'*¹² has observed as hereunder:

"the object of a moratorium provision such as Section 14 is to see that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all shareholders. The idea is that it facilitates the continued operation of the business of the corporate debtor to allow it breathing space to organise its affairs so that a new management may ultimately take over and bring the corporate debtor out of financial sickness, thus benefitting all stakeholders, which would include workmen of the corporate debtor."

12. In the present case, Leasehold Rights have already been created under the Lease Deed in favour of the 'Corporate Debtor' by the Appellant as per the

¹² (2021) 6 SCC 258

mandate of Section 14 of the Code. The Learned Adjudicating Authority in the Impugned Order has observed that the Assets referred to in the explanation given to Section 18 of the Code, are only Assets of such kind, which had come to the 'Corporate Debtor' for rendering some services.

13. It is significant to mention that the Hon'ble Supreme Court in a catena of Judgements has held that Lease Rentals arising out of the execution of such Lease Deeds, are not Financial Leases, but in fact, the amount claimed under such leases would construe 'Operational Debt' and not 'Financial Debt'. To understand the status of claims of Noida vis-à-vis the 'Corporate Debtor', it is necessary to reproduce a few paras of the Judgement of the Hon'ble Supreme Court in '**New Okhla Industrial Development Authority' Vs. 'Anand Sonbhadra'**¹³, wherein the concept of ownership is discussed as follows:

"95. The concept revolves around the transfer substantially of risks and rewards incidental to the ownership of the leasehold property. Therefore, we must deal with what constitutes ownership of an asset. We may notice the following discussion regarding the 'idea of ownership' in Salmond on Jurisprudence, 12 Edition:

"Ownership denotes the relation between a person and an object forming the subject matter of his ownership. It consists in a complex of rights, all of which are rights in rem, being good against all the world and not merely against specific person(a). Though in certain situations some of these rights may be absent, the normal case of ownership can be expected to exhibit the following incidents(b)."

96. *Thereafter, the following are treated as the rights associated with ownership. An owner of a property will have the right to possess the thing which he owns, it is*

¹³ 2022 SCC OnLine SC 631

stated. Secondly, the second principle is described as follows:-

“Secondly, the owner normally has the right to use and enjoy the thing owned : the right to manage it, i.e., the right to decide how it shall be used; and the right to the income from it. Whereas the right to possess is a right in the strict sense, these rights are in fact liberties : the owner has a liberty to use the thing, i.e., he is under no duty not to use it, in contrast with others who are under a duty not to use or interfere with it.”

97. The third right is described as follows:-

*“Thirdly the owner has the right to consume, destroy or alienate the thing. The rights to consume and destroy are straight-forward liberties. The right to alienate, i.e., the right to transfer his rights over the object to another, involves the existence of a power. A non-owner even though he has possession, cannot normally transfer the rights of ownership over a thing to another; for the law acts on the principle *nemo dat quod habet*. To this principle there are certain exceptions : for example, the Factors Acts enable non-owners in possession to transfer ownership in certain circumstances.”*

98. Fourthly, the right is one associated with the indeterminate duration of the right. It is here that we find the following discussion in this regard:-

“Fourthly, ownership has the characteristic of being indeterminate in duration. The position of an owner differs from that of a non-owner in possession in that the latter's interest is subject to be determined at some future set point, whereas the interest of the owner can endure theoretically for ever. The interest of a bailee or lessee comes to an end when the period of hire or of the lease determines; the owner's interest is perpetual, being determined neither by any set point nor by the owner's death, because the property owned can descend to the owner's heir or next-of-kin, and if he

had sold the property prior to his death, then the new owner's interest would continue unaffected by the previous owner's death.”

99. *Fifthly, there is a residual nature, in regard to the concept of ownership, and it is described as follows:-*

“If, for example, a landowner gives a lease of his property to A, an easement to B and some other right such as a profit to C, his ownership now consists of the residual rights, i.e., the rights remaining when all these lesser rights have been given away. Moreover, in English law the general rule is that the extinction of such lesser rights will revive in the owner all his original rights.”

100. *A question may arise as to whether in approaching the subject, we are to be guided by an examination of the question as to whether the lessee in this case possesses the rights incidental to ownership or the expression ‘rewards incidental to ownership’ is different from rights incidental to ownership. Can there be rewards if the rights which we have indicated herein before are not transferred? Can there be rewards which must be interpreted in a different manner from the idea of rights? In this regard, we must also remind ourselves that to constitute a lease, a financial lease, it is not indispensable that the ownership is in all cases transferred from the lessor to the lessee. However, we have noticed the example hereinbefore wherein the said concept is declared. That is, it is relevant when the lease term is for the major part of the economic life. Undoubtedly, ordinarily a financial lease would be a lease which is born as a lease but ends as a sale. The lease does involve transfer of ownership from the previous owner, namely the lessor to the lessee. In this context, Parliament has defined financial lease in two enactments through Amendment Act no. 44/2016 as hereinbefore noticed.*

101. *We may at once bear in mind two concepts, in the overarching principle. The two concepts are “substantially” and “all”. In other words, substantially all the risks and rewards incidental to ownership must be transferred under the lease. While we do agree with*

the appellants that an element of flexibility is allowed by the presence of the concept 'substantially', at the same time, it cannot be a case where predominantly all the risks and rewards incidental to ownership are not transferred. In other words, on a conspectus of all the terms of the lease and the reference to the situations and examples which have already been set out, if there is for the most part, a transfer of all the risks and rewards incidental to ownership, in effect, it can be treated as a finance lease."

14. The Hon'ble Supreme Court in '**New Okhla Industrial Development Authority**' (*Supra*) has observed that Noida is an 'Operational Creditor' and that the lease cannot be construed as a Financial Lease and noted as under:

".....152. We may notice that what Section 5(8)(d) of the IBC provides for is, any liability in respect of any lease, inter alia, which is, however, confined to a finance or capital lease. We are not ruling out the possibility that, in a lease, not a finance or a capital lease, falling under Section 5(8)(d), if it otherwise fulfils the requirements of Section 5(8)(f), it would not fall under the definition of the word 'financial debt'. In other words, Section 5(8)(d) includes only a finance or a capital lease, which is deemed, as such, under the Indian Accounting Standards. Section 5(8)(f) is a residuary and catch all provision. A lease, which is not a finance or a capital lease under Section 5(8)(d), may create a financial debt within the meaning of Section 5(8)(f), if, on its terms, the Court concludes that it is a transaction, under which, any amount is raised, having the commercial effect of the borrowing. All that we are finding, in the facts of this case, is that the lease in question does not fall within the ambit of Section 5(8)(f). This is for the reason that the lessee has not raised any amount from the appellant under the lease, which is a transaction. The raising of the amount, which, according to the appellant, constitutes the financial debt, has not taken place in the form of any flow of funds from the appellant/lessor, in any manner, to the lessee. The mere permission or facility of moratorium, followed by staggered payment in easy instalments, cannot lead

us to the conclusion that any amount has been raised, under the lease, from the appellant, which is the most important consideration.”

15. The Hon’ble Supreme Court in the aforementioned Judgement has categorically held that the claims of Noida arising from such a Lease Deed cannot be defined as ‘Financial Debt’ as the lease is not a ‘Financial Lease’. In this background, we address to the issue as to whether such Leasehold Rights constitute an Asset of the ‘Corporate Debtor’ to be included in the Information Memorandum.

16. Section 18(f) of the Code discusses both Tangible and Intangible Assets which can be taken control and custody of by the RP. Since, the term ‘Intangible Assets’ has not been expressly defined under the Code, we rely on Explanation 32(1) of the Income Tax Act, 1961, which defines Tangible and Intangible Assets as follows:

17. Explanation 3 to 32(1) of Income Tax Act, 1961:

For the purposes of this sub-Section, the expression, ‘Assets’ and ‘block of Assets mean – (a) Tangible Assets, being building, machinery, plants and furniture

(b) Intangible Assets, being know-how – patents, copyrights, trademarks, licenses, franchisees or any other business or commercial rights of similar nature.

The reading of the words ‘any other business or commercial rights of similar nature’ in Clause B of Explanation 3 indicates that Leasehold Rights which have commercial nature would fall within this definition. The principle of *ejusdem generis* would strictly apply while interpreting the said expression which finds place in Explanation 3(b). We also place reliance on the definition of

‘Intangible Assets’ as defined by the Indian Accounting Standard (‘IAS’) 26. The same is being reproduced as hereunder:

“6. The following terms are used in this Standard with the meanings specified:

6.1 An intangible asset is an identifiable non-monetary asset, without physical substance, held for use in the production or supply of goods or services, for rental to others, or for administrative purposes.

6.2 An asset is a resource:

(a) controlled by an enterprise as a result of past events; and

(b) from which future economic benefits are expected to flow to the enterprise.

6.3 Monetary assets are money held and assets to be received in fixed or determinable amounts of money.

6.4 Non-monetary assets are assets other than monetary assets.....”

(Emphasis Supplied)

18. Explaining the same, the Indian Accounting Standard noted as hereunder:

“7. Enterprises frequently expend resources, or incur liabilities, on the acquisition, development, maintenance or enhancement of intangible resources such as scientific or technical knowledge, design and implementation of new processes or systems, licences, intellectual property, market knowledge and trademarks (including brand names and publishing titles). Common examples of items encompassed by these broad headings are computer software, patents, copyrights, motion picture films, customer lists, mortgage servicing rights, fishing licences, import quotas, franchises, customer or supplier relationships, customer loyalty, market share and marketing rights. Goodwill is another example of an item of intangible nature which either arises on acquisition or is internally generated.

8. Not all the items described in paragraph 7 will meet the definition of an intangible asset, that is, identifiability, control over a resource and expectation of future economic benefits flowing to the enterprise. If an item covered by this Standard does not meet the definition of an intangible asset, expenditure to acquire it or generate it internally is recognised as an expense when it is incurred. However, if the item is acquired in an amalgamation in the nature of purchase, it forms part of the goodwill recognised at the date.....”

“11. The definition of an intangible asset requires that an intangible asset be identifiable. To be identifiable, it is necessary that the intangible asset is clearly distinguished from goodwill. Goodwill arising on an amalgamation in the nature of purchase represents a payment made by the acquirer in anticipation of future economic benefits. The future economic benefits may result from synergy between the identifiable assets acquired or from assets which, individually, do not qualify for recognition in the financial statements but for which the acquirer is prepared to make a payment in the amalgamation.

12. An intangible asset can be clearly distinguished from goodwill if the asset is separable. An asset is separable if the enterprise could rent, sell, exchange or distribute the specific future economic benefits attributable to the asset without also disposing of future economic benefits that flow from other assets used in the same revenue earning activity.

13. Separability is not a necessary condition for identifiability since an enterprise may be able to identify an asset in some other way. For example, if an intangible asset is acquired with a group of assets, the transaction may involve the transfer of legal rights that enable an enterprise to identify the intangible asset. Similarly, if an internal project aims to create legal rights for the enterprise, the nature of these rights may assist the enterprise in identifying an underlying internally generated intangible asset. Also, even if an asset generates future economic benefits only in combination with other assets, the asset is identifiable if

the enterprise can identify the future economic benefits that will flow from the asset.”

19. Intangible Assets include copyrights and trademarks, Royalty Streams, Software, Licenses, Franchise Arrangements, Goodwill and Leaseholds. A Leasehold is an Intangible Asset to a Lessee that gives the him or her certain rights to use ‘leased property’. A Leasehold appears on Corporate Balance Sheets as long-term assets, with the initial value reflecting the Leasehold’s Original Cost. As Intangible Assets, Companies amortize Leaseholds instead of depreciating them. As with other long-term Assets, the Leasehold’s book value will reflect the reduction in value from its accumulated amortization.

20. We are of the view that the ‘Leasehold Rights’ is an ‘Asset’ under ‘Intangible Assets’ falling within the ambit of Section 18(f)(iv). It is the consistent stand of the Respondent that *‘the said Plot is not owned by the ‘Corporate Debtor’, but it has only Leasehold Rights over it’*. We are of the considered view that the Leasehold Rights accrued to the ‘Corporate Debtor’ vide the Lease Deed, is a right vested with the ‘Corporate Debtor’ and is an ‘Intangible Assets’ and the ownership is only to the extent of these Leasehold Rights based on which the ‘Corporate Debtor’ can be continued as ‘a Going Concern’. *It is also significant to mention that the Appellant has never initiated any proceedings or chosen to exercise their rights to invoke any of the Clauses of the Lease Deed for cancellation of the subject Deed.*

21. It is pertinent to mention that the Resolution Plan dated 30.10.2019 submitted by Max Estate Ltd. was duly approved by the ‘Corporate Debtor’ with

a majority of the 86% and has been placed for approval before the Adjudicating Authority vide CA No.2778/PB/2019 under Section 31 of the Code and is pending approval. On a pointed query from the Bench, Learned Counsel for the Appellant has fairly stated that the Appellant does not want to dispossesses the 'Corporate Debtor' but only does not want the RP to treat the demised premises as an 'Asset'.

22. Keeping in view all the aforementioned reasons, we are of the considered view that the 'Leasehold Right' is an Intangible Asset of the 'Corporate Debtor' and that the Resolution Professional is empowered under Section 18(f) of the Code to take control and custody of any Asset over which the 'Corporate Debtor' has the 'Ownership Right'. We clarify that the Asset in the instant case are 'Leasehold Rights' and not the 'Plot' *per se*. We are also conscious of the fact that substantial development and construction activity was carried on the subject Plot. Pursuant to the Lease Deed, the 'Corporate Debtor' had spent considerable amount of Financial Resources to develop the said Plot and there is no denial by the Appellant that they had in CA No.1101/PB/2019 has taken a stand that 'all risks and rewards incidental to ownership' of the subject Plot was transferred to the 'Corporate Debtor' under the said Lease Deed. It is also significant to mention that the RP issued the request for Resolution Plan on 15.09.2019, and the Resolution Plan was approved by the CoC by a majority of 86% voting share way back on 30.10.2019. Three years have lapsed, and we also do not wish to set the clock back, when time is the essential factor in these proceedings under IBC.

23. For all the foregoing reasons, this Appeal is disposed of with the aforementioned observations.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

**Principal Bench,
New Delhi
21st October, 2022**

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