

**IN THE NATIONAL COMPANY LAW TRIBUNAL  
DIVISION BENCH, COURT NO. II  
KOLKATA**

**I.A. (IB) No. 1350/KB/2024**

**In**

**C.P. (IB) No. 600/KB/2019**

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

**IN THE MATTER OF:**

**UCO Bank**

**... Financial Creditor.**

***Versus***

**GIT Textiles Manufacturing Limited**

**... Corporate Debtor.**

**And**

**IN THE MATTER OF:**

**H. R. Brothers Limited**

**... Applicant.**

***Versus***

- 1. Ramachandra Dallaram Choudhary, Resolution Professional.**
- 2. Committee of Creditors of the Corporate Debtor.**
- 3. Deep Industries Limited Successful Resolution Applicant.**

**... Respondents.**

**Date of Pronouncement: August 02, 2024.**

**CORAM:**

**SMT. BIDISHA BANERJEE, HON'BLE MEMBER (JUDICIAL)**

**SHRI. D. ARVIND, HON'BLE MEMBER (TECHNICAL)**

**APPEARANCE:**

**For Applicant in IA 1350/KB/2024:**

Mr. Rishav Banerjee, Adv.

Ms. Suranjana Chatterjee, Adv.

Ms. Sweety Shaw, Adv.

**For Resolution Professional:**

Mr. Manik Bose, Adv.

Mr. Arnab Dutta, Adv.

Ms. P. Choudhary, Adv.

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**ORDER**

**Per: Bidisha Banerjee, Member (Judicial)**

1. Court congregated though hybrid mode.
  
2. The application has been preferred by H.S. Mercantile seeking the following reliefs:
  - a) *Direct the respondent to forthwith delete the clause 4.9.3 from the resolution plan and delete any clause in the resolution plan which contemplates cancellation and/or termination of the registered lease which exists in favour of the Applicant and any other clauses where the resolution applicant has dealt with the lease hold and tenancy rights of the applicant.*
  
  - b) *An order be passed to dismiss the application being I.A. (IB) No. 680/KB/2023 filed for approval of the resolution plan and reject the resolution plan of the resolution applicant.*
  
  - c) *An interim order of stay of all proceedings in and/or arising from I.A. (IB) No. 680/KB/2023 till the disposal of the instant application, or in the alternative, the pronouncement of the final order in I.A. (IB) No. 680/KB/2023 be deferred, till the disposal of the instant application.*
  
  - d) *Such and/or further orders as this Hon'ble Tribunal deems fit and proper.*

**Facts:**

3. The applicant is a lessee of the corporate debtor, in respect of a property situated in Ahmedabad, Gujarat, in respect of which MoU was

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entered into on 02.08.2007 and a Tenancy Agreement on 01.10.2007. The Applicant and the Corporate Debtor further entered into a Deed of Lease registered on 26.09.2012 in respect of the same property. The Lease is for 99 years and is also recorded in the Records of Revenue, (pages 118-127 to the application). The applicant claims to have paid the consideration money of Rs. One Crore to the Corporate Debtor for execution of the lease deed, which was in knowledge of the Financial Creditor.

**4.** The Applicant had preferred an application being I.A. (IB) No. 849/KB/2023, praying for the necessary directions upon the Resolution Professional, hereinafter referred as “RP” so as not to include the leasehold right of the applicant in the Information Memorandum (IM) and for the directions for deletion of the said property in question from the Resolution Plan. The Adjudicating Authority vide an order dated 23.04.2024, dismissed the application having held as follows:

*“18. An IM is thus regarded as a comprehensive document that provides significant details of the Corporate Debtor to prospective Resolution Applicants, including its assets, liabilities, financial statements, list of creditors, related party debts, guarantees, stakeholders details, pending litigations and investigations. Thus, an IM provides all relevant information to a prospective Resolution Applicant to enable the Resolution Applicant to assess the liability of the business of the Corporate Debtor and submit an effective Resolution Plan.*

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19. *In such view of the matter, we find no infirmity with the Information Memorandum for inclusion of the subject property as an asset of the Corporate Debtor, the Corporate Debtor being the owner of the subject property over which the Applicant claims to have leasehold rights, without getting into the merits of such lease agreement.*

20. *As such, IA(I.B.C)/849(KB)2023 is dismissed.”*

5. The said order was assailed higher up by the applicant H.S. Mercantile but the appeal was withdrawn.

6. The Applicant has secured an extract of the Resolution Plan submitted by the Successful Resolution Applicant (for brevity “SRA”) which stands approved by the CoC, wherein Clause 4.9.3 at pages 217 and 218 of the Plan, states that all litigation with respect to the title of the land shall stand extinguished upon approval of the resolution plan and *all leasehold rights of H.S. Mercantile Ltd shall stand cancelled and revenue authority shall remove the name of H.S. Mercantile Ltd or any other third party from the revenue records upon the approval of the resolution plan etc.*

**Arguments advanced by the Applicant:**

7. Mr. Rishav Banerjee, the Learned Counsel for the applicant would vehemently oppose the inclusion of the clause 4.9.3 in the resolution plan, approved by the CoC, and seek deletion of the said clause or any other clause from the resolution plan that contemplates cancellation and/or termination of the lease granted to the applicant vide a registered

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lease deed or any further clause that deals with leasehold tenancy rights of the applicant herein.

**8.** The Learned Counsel would further submit that any clause in the resolution plan relating to cancellation of the applicant's leasehold rights and extinguishing the title of the land in question will prejudice the interest of the applicant and thus, the clause 4.9.3 or any other similar clause should not be allowed in the resolution plan.

**9.** The Learned Counsel for the applicant would further contend that the registered lease deed was executed on 26.09.2012 in favour of the applicant (lessee) for 99 years, this Adjudicating Authority under the ambit of the I&B Code, is not a civil court. Thus, this Adjudicating Authority has no jurisdiction to pass an order approving the resolution plan which results in cancellation of a lease vide a registered lease deed. The Learned Counsel would heavily rely upon the following precedents to support his arguments:

- a) *ITC Limited v. State of Uttar Pradesh & Ors.* reported in (2011) 7 SCC 493**, that the lease governed exclusively by the provisions of the Transfer of Property Act, 1882 could be cancelled only by filing a civil suit for its cancellation or for a declaration that it is illegal, null and void and for the consequential reliefs of delivering back of possession. Until a court of competent jurisdiction grants such a decree, the lease will continue to be effective and binding. Unilateral cancellation of a registered lease deed will neither terminate the lease nor entitle a lessor to seek possession.

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- b) **Mr. T. V. Sandip Kumar Reddy -v. State Bank of India & Ors.** [Company Appeal (AT)(CH) INS No. 414 of 2012-Judgement dated 2nd January 2023], where the Hon'ble National Company Law Appellate Tribunal in paragraph 62 of the judgement held that the Adjudicating Authority is not a civil court.
- c) **Embassy Property Developers Pvt. Ltd. v. State of Karnataka** reported in (2020) 13 SCC 308, (paragraph 29) that the National Company Law Tribunal is not a civil court.
- d) **Board of Trustees For Syama Prasad Mookherjee Port, Kolkata -v. Sanjal Kumar Gupta & Ors** [Company Appeal (AT)(Insolvency) No. 1009 of 2023) where in Paragraph 17, it has held that:

*“In the CIRP Process, the SRA shall take only those rights of the Corporate Debtor which it possess on the land which was assigned to the Corporate Debtor. As noted above, various issues pertaining to rate of rent of land payable by the Corporate Debtor and proceeding of eviction of the Appellant are pending consideration in different forums. In the CIRP Process those issues neither can be gone into nor can be decided. Approval of the Resolution Plan only entitles the SRA to take over those rights which are possessed by the Corporate Debtor.”*

10. Thus, the Learned Counsel for the applicant would submit that in the absence of any application before an appropriate forum, the RP cannot cancel or terminate any registered lease deed, by way of a resolution plan.

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**Arguments advanced by the Respondent (RP):**

**11.** *Per contra*, the Learned Counsel Mr. Mainak Bose, appearing on behalf of the Respondent, RP would vehemently oppose the prayer. The Learned Counsel would submit through its written notes of arguments that in I.A. (IB) No. 849/KB/2023, the present Applicant had sought for the following prayers inter alia:

*(a) To pass necessary order and/or orders directing the Respondents to not to include the said property of the Corporate Debtor in the Information Memorandum;*

...

*(c) To pass an order and/or orders directing the Respondent Resolution Professional and/or Resolution Applicant, if any, not to deal with and/or extinguish the leasehold interest of the Applicant in the said property in question;*

...

*(e) To pass an order directing the Respondent Resolution Professional not to deal with the leasehold interest of the Applicant in the said property in question in the CIRP of the Corporate Debtor and/or not to deal with the leasehold interest of the Applicant in respect of the said property in question under any Resolution Plan of the Corporate Debtor;*

**12.** The Learned Counsel for the RP would submit that this Adjudicating Authority vide its Order dated 23.04.2024, dismissed the I.A. and thus, the prayers were not granted. By way of the present I.A., the applicant has sought for the same prayers which were made earlier and stood rejected. Thus, the Principle of “*Issue Estoppel*” will apply with

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full force. Reference to that effect is made to ***Thoday v. Thoday***, reported in **1964 (1) All ER 341** where the Doctrine of “*Issue Estoppel*” is explained, that if several issues are argued, but the Court chooses one and decides the application or dismisses the application, further raising of such issues is barred under estoppel. Once the issue has been put to rest, one has to take recourse to law.

**13.** The Learned Counsel for the RP would submit that from the Order dated 23.04.2024, it would be evident that the contention of the applicant arising out of the purported deed of lease and the applicant’s right in the lease hold property was not only considered in extenso but also objection raised by the RP was also considered in detail. The Adjudicating Authority was pleased to consider that the subject property was mortgage by the Corporate Debtor with the Financial Creditor, UCO Bank.

**14.** It was the specific contention of the RP in the previous application that the possession of the subject property was taken by the UCO Bank pursuant to an order passed under Section 14 of the SARFASEI Act, 2002. That applicant is nothing but an alter-ego of the corporate debtor and is also admittedly a related part. Further, the lease agreement is void ab-initio and nullity in the eye of law based on Section 65A of the Transfer of Property Act, 1882, was also specifically recorded in paragraph 6.8 of the said orders. The judgments relied upon by the RP in support of its contention that a post mortgage lease, unless satisfies the test laid down in Section 65A of Transfer of Property Act, is ab-initio, void was also specifically recorded.

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**15.** The judgment of the NCLAT in the case of ***M/s. Jhanvi Rajpal Automotive Pvt. Ltd. v. RP of Rajpal Abhikaran Pvt. Ltd., Company Appeal (AT) (Insolvency) No. 1417 of 2021***, was placed as recorded in paragraph 6.20 of the said order. After considering the rival contentions of the parties, this Adjudicating Authority on 23.04.2024, dismissed the application. An appeal was carried before the Hon'ble NCLAT against the said order, but such appeal was dismissed as withdrawn. It is contended that an attempt was made in course of hearing of the application by the applicant to contend that the Hon'ble NCLAT found the appeal to be premature. However, the Hon'ble NCLAT was please to specifically record "*after arguing for sometimes, Counsel for the Appellant prays for withdrawal of this appeal.*"

**16.** Further, it is submitted that all the issues raised in the present application were the issues in the previous applicant which has been dismissed. It is well-settled that once issues and reliefs claimed in a proceeding is considered and dismissed and an appeal carried therefrom is also dismissed, such issue reaches to finality for all times to come. Further, not only that the principle of res judicata applied, but also the principle of *issue estoppel* applies in the facts of the present case.

**17.** Reliance is placed on ***Prem Singh v. Birbal*** reported in **(2006) 5 SC cases 353 para 16** that when a document is valid, no question arises of its cancellation. When, a document is void ab-initio a decree for setting aside the same would not be necessary as the same is *non est* in the eye of law as it would be a nullity.

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**18.** It is alleged that the lease is a sham transaction and has been created solely for the purpose of encumbering a valuable asset of the corporate debtor. Being a post mortgage lease, Section 55A of the Transfer of Property Act, 1882, is squarely applicable. Section 65A of the Transfer of Property Act deals with mortgagor's power to lease.

**19.** Section 65A of The Transfer of Property Act, 1882, is quoted hereinbelow:

**65A. Mortgagor's power to lease.—**

*(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.*

*(2)(a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage,*

*(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised, and no rent shall be payable in advance,*

*(c) No such lease shall contain a covenant for renewal,*

*(d) Every such lease shall take effect from a date not later than six months from the date on which it is made,*

*(e) **In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid with a time therein specified.***

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*(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.*

**20.** The Learned Counsel Mr. Bose would argue that the present lease is in gross violation of the provision of Section 65A in as much as:

**(i)** It has not been made in ordinary course of management of the property.

**(ii)** The rent is less than Rs. 100/- per month for industrial land of 3920 sq. mtr. Where in fact the reasonable rent in the year 2012 was 3920 sq. mtr. x 280 i.e., Rs. 10.98 lakh per annum.

**(iii)** Rs. 30 Lakh and Rs. 20 Lakh, i.e., Rs. 50 lakh is shown as premium paid and recorded in clause 1 of the lease.

**(iv)** The lease is not only 99 years but also contains a covenant for renewal for a further period of 99 years.

**(v)** It also does not contain a clause for entry for non-payment of rent.

**21.** It is submitted that thus, the applicant H.S. Mercantile who claims to be a lessee cannot claim any right in law under a void instrument. The present application must fail on that ground alone. The Hon'ble Apex Court in ***Harshad Govardhan Sondagar*** reported in **2014 (6) SCC 1 at**

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**para 28** has held that lease made after creation of mortgage must satisfy the requirements of Section 65A of the Transfer of Property Act, to be valid.

**22.** Mr. Bose learned Counsel for the RP accordingly contends that the submissions made by the applicant is otherwise wholly misconceived in as much as the plan having been approved by the CoC, the same cannot be challenged by a third party, whose previous application has failed and an appeal carrying has also been disposed of.

**In Counter, the Applicant's submissions:**

**23.** In rejoinder, the Learned Counsel, Mr. Rishav Banerjee would submit that the Principle of "*Issue Estoppel*" would not apply as this Adjudicating Authority has simply allowed the leasehold interest of the applicant to be mentioned in the Information memorandum without entering into the merits of the matter. Thus, issue raised therein were not conclusively decided.

**Analysis and Finding:**

**24.** Vide order dated 23rd April 2024, in I.A. (I.B.C)/849(KB)2023, this Adjudicating Authority, having noted that the Corporate Debtor is the owner of the subject property over which the Applicant claims to have leasehold rights, had permitted inclusion of the subject property as an asset of the Corporate Debtor in the Information Memorandum, without however getting into the merits of such lease.

**25.** It is a trite, axiomatic and settled law that the Adjudicating Authority is not a civil court to resolve a civil dispute, thus, cancellation

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or extinguishment of the leasehold right in question cannot be sought for at this forum.

**26.** It is further trite and fairly well-settled that the Resolution Plan must be consistent with the extant law. The Resolution Applicant having stepped into the shoes of the corporate debtor, shall make necessary applications along with filing fees to the concerned regulatory or statutory authorities for the renewal of business permits and supply of essential services, and such authority shall also consider the same keeping in mind the objectives of the Code, which is essentially resolving the insolvency of the Corporate Debtor. Thus, the RP shall also approach the appropriate forum for the termination of lease.

**27.** We would note that ***Embassy Property Developments Pvt. Ltd. vs. State of Karnataka*** reported at **MANU/SC/1661/2019: (2020) 13 SCC 308**, the Hon'ble Apex Court has laid down that:

*“39. If NCLT has been conferred with jurisdiction to decide all types of claims to property, of the corporate debtor, Section 18(f)(vi) would not have made the task of the interim resolution professional in taking control and custody of an asset over which the corporate debtor has ownership rights, subject to the determination of ownership by a court or other authority. In fact an asset owned by a third party, but which is in the possession of the corporate debtor under contractual arrangements, is specifically kept out of the definition of the term "assets" under the Explanation to Section 18. This assumes significance in view of the language used in Sections 18 and 25 in contrast to the language employed in Section 20. Section 18 speaks about the duties of the interim resolution professional and Section 25 speaks about the duties of resolution professional. These two provisions use the word*

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*"assets", while Section 20(1) uses the word "property" together with the word "value". Sections 18 and 25 do not use the expression "property". Another important aspect is that Under Section 25(2)(b) of IBC, 2016, the resolution professional is obliged to represent and act on behalf of the corporate debtor with third parties and exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings. Section 25(1) and 25(2)(b) reads as follows:*

*25. Duties of resolution professional -*

*(1) It shall be the duty of the resolution professional to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.*

*(2) For the purposes of Sub-section (1), the resolution professional shall undertake the following actions:*

*(a).....*

*(b) represent and act on behalf of the corporate debtor with third parties, **exercise rights for the benefit of the corporate debtor in judicial, quasi judicial and arbitration proceedings.***

**This shows that wherever the corporate debtor has to exercise rights in judicial, quasi-judicial proceedings, the resolution professional cannot short-circuit the same and bring a claim before NCLT taking advantage of Section 60(5).**

**40. Therefore in the light of the statutory scheme as culled out from various provisions of the IBC, 2016 it is clear that wherever the corporate debtor has to exercise a right that falls outside the purview of the IBC, 2016**

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**especially in the realm of the public law, they cannot, through the resolution professional, take a bypass and go before NCLT for the enforcement of such a right.”**

**(Emphasis Added)**

**28.** Borrowing the same analogy, we are of the view that though Section 25 of the Code casts a duty upon the RP to represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial and arbitration proceedings, which includes its right to get a lease legally terminated by a competent court of law so that a clear title passes on to the SRA, or get a lease declared null and void, but under no circumstances the RP can short circuit the procedure and seek approval of a resolution plan that leads to cancellation of an existing lease, on the ground that it has been approved by the CoC. The lease, even if contrary to law, can only be determined by an appropriate forum of civil jurisdiction.

**29.** Further, we would infer that it is the liability of the SRA upon approval of its plan to get the subject lease terminated by a Competent Court of law.

**30.** Hence, we direct the RP to delete the clause 4.9.3 in the plan and/or refrain from inclusion of any clause in the resolution plan which contemplates cancellation and/or termination of the existing registered lease in favour of the Applicant, herein. Since the rights of the Corporate Debtor as a “lessor” passes on to the SRA as it steps into the shoes of the Corporate Debtor GIT Textile Manufacturing limited, an appropriate action may be taken including an action before a competent Court of law

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concerning the disputed lease mentioned at Clause 4.9.3 of the Resolution Plan.

**31.** The application being **I.A. (IB) No. 1350/KB/2024** is **disposed of** accordingly.

**32.** A certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

**D. Arvind  
Member (Technical)**

**Bidisha Banerjee  
Member (Judicial)**

**This Order is signed on the 02<sup>nd</sup> Day of August 2024.**

Bose, R. K. [LRA]