

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 379 – 381 of 2025

[Arising out of Order dated 03.02.2025 passed by the Adjudicating Authority
(National Company Law Tribunal, Mumbai Bench Court – III), in I.A.
No.2012/2022, I.A. No 2897 of 2023 & I.A. No. 672 of 2023 in CP No.1808
/2019]

IN THE MATTER OF:

Sarla Performance Fibres Ltd.

Through its Authorised Representative
Mr. Mukesh Deopura, Chief Financial Officer of
Sarla Performance Fibres Limited,
Having Office at 304, Arcadia, Nariman Point,
Mumbai 400 021.

...Appellant

Versus

Mr. Vivek Murlidhar Dabhade

Liquidator of Desimran Cartons (P) Limited,
Having Address at
Flat No. 13, Trupti Gardens,
Near Harshal Palace, Vadgoan BK,
Pune 411501.

...Respondent

Present:

For Appellant : Mr. Shyam Mehta, Sr. Advocate with Mr. Rahul Chitnis, Ms. Shwetal Shepal and Mr. Chirag Sancheti, Advocates.

For Respondents : Mr. Prakhar Tandon and Mr. Rohit, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

These three appeals have been filed, challenging the common order dated 03.02.2025 passed by the adjudicating authority (National Company Law Tribunal, Mumbai Bench, Court–III) in I.A. No.2012/2022 filed by the

liquidator, I.A. No.2897/2023 & I.A. No.672/2023 filed by the appellant. By the impugned order, adjudicating authority disposed of all the three applications, aggrieved by which order, these appeals have been filed.

2. Brief facts of the case necessary to be noticed for deciding the appeals are:

- i. Corporate debtor owns the piece and parcel of land building survey number 60/1/1, admeasuring 1000 sq. mt. along with factory shed/building consisting of ground floor and first floor situated at village Amla of Union Territory of Dadra and Nagar Haveli.
- ii. An application for initiation of Corporate Insolvency Resolution Process (CIRP) against the corporate debtor M/s. Desimran Cartons Private Ltd. was filed by Jalgaon Janta Sahakari Bank Ltd. under Section 7 of the Insolvency and Bankruptcy Code (for short the 'Code' or the 'IBC') on 08.05.2019.
- iii. On 07.06.2019, corporate debtor entered into Leave and License Agreement dated 07.06.2019 with the appellant at the rent of ₹5,000 for a term of 12 years up to 31.05.2031. The bank had existing mortgage on the assets, consent of which bank was required for transferring the assets.
- iv. CIRP against the corporate debtor commenced on 28.03.2022. No resolution plan having been received, on order dated 28.03.2022 was

passed by the adjudicating authority directing liquidation of the corporate debtor.

- v. Liquidator informed the appellant about the liquidation proceeding and asked the appellant to enter into a fresh Leave and License Agreement in respect of the said premises.
- vi. Appellant did not respond to the letter of the liquidator, hence vide letter dated 18.05.2022, liquidator asked the appellant to vacate the premises. Appellant filed its claim before the liquidator, which was not accepted by the liquidator being not in accordance with the prescribed format.
- vii. Liquidator filed an I.A. 2012/2022 seeking to disclaim the Leave and License Agreement under Regulation 10 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016.
- viii. On 21.01.2023, liquidator issued a public notice to auction the said premises on “as is where is basis”. Appellant filed I.A.672/2023 praying for quashing the public notice dated 21.01.2023. Appellant also filed an I.A. No.2897/2023, challenging the decision of the liquidator to reject the claim of the appellant.
- ix. Adjudicating authority vide order dated 23.03.2023 directed the liquidator to go ahead with the auction process but prevented the liquidator from evicting the appellant until further orders in event the auction is successfully completed. Auction was successfully held for

the assets for amount of ₹4.21 crore. Adjudicating Authority by the impugned order held that I.A. No.2012/2022 filed by the liquidator deserves to be allowed and the Leave and License Agreement need to be disclaimed.

- x. Application filed by appellant I.A. No.672/2023 challenging the auction notice was dismissed, whereas, I.A. No.2897/2023 filed by the appellant challenging rejection of its claim has been allowed, and a liquidator was directed to reconsider the claim of ₹1,15,00,000/- submitted by appellant and decide the same after due verification. Consequently, I.A. No.2012/2022 was allowed partly.
- xi. Aggrieved by the aforesaid common order passed in three applications by the adjudicating authority, these three appeals have been filed.

3. We have heard Learned Sr. Counsel, Mr. Shyam Mehta appearing for the appellant and learned counsel, Mr. Rohit Gupta appearing for the liquidator.

4. Learned counsel for the appellant challenging the order submits that Leave and License Agreement was not an onerous contract. Appellant had entered into agreement to sell with the corporate debtor on 16.04.2019 and has paid an amount of ₹40 lakhs. It is submitted that appellant has also given refundable security deposits of ₹60 lakhs between 06.05.2019 to 07.06.2019. It is submitted that two separate orders were passed by Ld. Technical Member and Judicial Member. Ld. Member Technical has found the Leave and License Agreement to be onerous contract, whereas Ld. Judicial

Member has not found the Leave and License Agreement as an onerous contract rather Ld. Judicial Member has only held that contract is unprofitable. It is submitted that there being divergent opinion between the decision of both the Members, application filed by liquidator being I.A. No. 2012/2022 could not have been allowed. It is submitted that reference of illustration 10 as by Member Judicial is not part of Regulation 10 of the Liquidation Regulation, 2016. Ld. Member Judicial has not provided any reason as to why the Leave and License Agreement allegedly is unprofitable contract. Appellant having paid an amount of ₹60 lakhs + ₹50 lakhs i.e., ₹1,15,00,000/- in furtherance of agreement of sale dated 06.04.2019 and Leave and License Agreement dated 07.06.2019, the Leave and License Agreement could not be held to be onerous agreement. Learned counsel for the appellant submits that Regulation 10 of the Liquidation Regulation 2016 goes beyond the IBC Code and is totally inconsistent with the code. Under the code only transaction which can be avoided by the liquidator are preferential transaction, undervalued transaction and transaction defrauding creditors and extortionate transaction in accordance with the provisions of Section 43 to 51 of the Code. There is no reference to any other transaction, hence Regulation 10 of the Liquidation Regulation, 2016, seeks to create new category of contract, which may be avoided by the liquidator which is not covered by any of the provisions of the Code. The above is clearly impermissible and to that extent Regulation 10 is ultra vires to the code and therefore ineffective and liable to be ignored.

5. Learned counsel for the liquidator refuting the submissions of the appellant submits that there was sufficient material on the record to come to the conclusion that Leave and License Agreement dated 07.06.2019 was an onerous transaction. It is submitted that the corporate debtor entered into the said transaction after the application was filed by the bank against the corporate debtor on 08.05.2019. It is submitted that corporate debtor entered into Leave and License Agreement at the rent of ₹5,000/- for a term of 12 years, which rent was not in accordance with the market rate. Liquidator wrote to the appellant to enter into fresh Leave and License Agreement to which initially no response was given by the appellant and subsequently appellant send a response that appellant is ready to enter into Leave and License Agreement for an amount of ₹2,25,000/- p.m., which clearly indicate that the rent on which Leave and License Agreement was entered for ₹5,000/- p.m. was wholly inappropriate and unprofitable. The transaction entered by corporate debtor was not *bona fide* transaction. Transaction was clearly undervalued transaction. The liquidator was well within his right to terminate the Leave and License Agreement. The corporate debtor has already been sold for an amount of ₹4.21 crore. Insofar as the claim of the appellant is concerned, the adjudicating authority has already directed for consideration of claim of ₹1,15,00,000/- of the appellant. It is submitted that there is no divergence of opinion between the Technical Member and the Judicial Member. Both the Members were in agreement, that the transaction is fully covered by Regulation 10 of the Liquidation Regulation, 2016, hence deserves to be disclaimed by the liquidator.

6. We have considered the submissions of counsel for the parties and perused the records.

7. In the present case, the application was filed by the liquidator being I.A. No.2012/2022 both under Section 45 of the IBC as well as Regulation 10 of the Liquidation Regulations, 2016. The prayers made in the I.A. No.2012/2022 has been extracted by the adjudicating authority in paragraph 1 of the order, which is as follows:

“a) To disclaim the Leave and License Agreement dated 07 June 2019 which was registered at the Serial No 2930 of 2019 at the office of Sub-registrar of Dadar & Nagar Haveli, Silvassa as being in the nature of an onerous contract in terms of Regulation 10 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulation, 2016;

b) To classify the transactions undertaken under the said Agreement as being undervalued in terms of Section 45(1) of the IBC, 2016;

c) To direct the Respondent to make contributions to the assets of the Corporate Debtor by directing the Respondents to pay the amount of Rs.2,51,73,573/- in terms of Section 48(1) of the IBC, 2016;

d) To pass such other orders as may deem just and proper by this Bench.”

8. The adjudicating authority has allowed the said application by the impugned order, aggrieved by which the appellant has come up in this appeal.

9. Adjudicating authority while considering the said IA has held that transaction is not covered by Section 45 of the IBC. Hon'ble Technical Member in its order has framed two questions in paragraph 28.1 of the order which is as follows:

“28.1 The said application filed by Liquidator raises two issues:

i. Whether the transactions under the Leave and License Agreement dated 07.06.2019 are undervalued transactions as defined under section 45 of the Code?

ii. Whether the Leave and License Agreement is onerous and shall be allowed to be disclaimed under Regulation 10 of Liquidation Regulations?”

10. As noted above, adjudicating authority held that Section 45 is not applicable. Prayers (b) & (c) of the IA was thus rejected. In paragraph 28.3, Ld. Technical Member proceeded to examine the transaction under the head “onerous contract”. Adjudicating authority after referring to the facts and circumstances and has recorded its conclusion in paragraphs (xx), (xxvii) and (xxviii), which are as follows:

“xx. As held above, the intention of disclaiming a contract or property as onerous is to protect the creditors of the Corporate Debtor and releasing the Corporate Debtor from a heavy burden imposed by such a contract or property. It can be seen from the terms of the agreement itself that the said agreement is not beneficial to the Corporate Debtor and its creditors since it is unprofitable considering the fact that a meagre amount of Rs. 5000 for first 5 years and Rs. 7000 thereafter has been agreed as monthly rent. The advance security payment of Rs. 60,00,000 and the advance payment of Rs. 55,00,000 paid by Sarla gives no benefit to the creditors during liquidation since the amount has been admittedly already utilized by the erstwhile management of the Corporate Debtor.

xxvii. In the peculiar facts and circumstances of the present case, we are satisfied that the leave and license agreement dated 07.06.2019 is ‘unprofitable’ and ‘burdensome’ and attracts the provisions under Regulation 10 of the Liquidation Regulations, 2016.

*xxviii. Thus, for the reasons recorded above, prayer ‘a’ in IA/2012/2022 is **allowed** and the Liquidator is allowed to disclaim, from the date of disclaimer notice issued to Sarla, the leave and license agreement as*

‘onerous property’ (unprofitable contract) under Regulation 10 of the Liquidation Regulations. Further, the licensee, i.e. Sarla Performance Fibers Limited is directed to vacate the said premises within a period of 30 days from the date of this order.”

11. Ld. Judicial Member also has proceeded to consider the application of the liquidator seeking declaration of the transaction as onerous. Judicial Member has also come to the conclusion that transaction is unprofitable transaction and is covered by Regulation 10 of the Liquidation Regulations, 2016.

12. As noted above, two principal submissions have been advanced by the appellant challenging the impugned order; firstly, there is no divergence of the opinion between the parties holding the transaction as onerous under Regulation 10 of the Liquidation Regulations, 2016, hence the order allowing the I.A. No.2012/2022 is unsustainable; and secondly, the Regulation 10 of the Liquidation Regulations, 2016 is beyond the provisions of the IBC and ultra vires to IBC, hence is an unenforceable.

13. The first submission of the appellant is regarding divergence of opinion between the two judgements delivered by the Hon’ble Technical Member and Judicial Member. Judicial Member after considering the submissions of the parties and noticing all relevant facts have come to the conclusion that Leave and License Agreement 07.06.2019 is unprofitable and burdensome and affects the provision of Regulation 10 of the Liquidation Regulation 2016. The facts as noticed above clearly indicates that Leave and License Agreement was entered for rent of ₹5,000 p.m. On a letter sent by liquidator asking the

appellant to vacate, appellant himself came with the proposal that he is ready to enter into Leave and License Agreement for amount of ₹2.25 lakhs p.m. The assets which consists of area of 1000 sq. mt. with two constructed floors measuring 545.22 sq. mt. each. No exception can be taken to the finding of the adjudicating authority that Leave and License Agreement was unprofitable and not a *bona fide* transaction. The submission which has been pressed by the appellant is that although Technical Member has declared the transaction to be covered by Regulation 10 of the Liquidation Regulations, 2016, however, the Ld. Judicial Member has not found the transaction as onerous. One of the submissions of the appellant is also that illustration 10 as referred to by Ld. Judicial Member is not there in regulation 10. Illustration 10, which has been extracted by the Ld. Judicial Member in paragraph 8 of the order was illustration of Accounting Standard, AS 29. In paragraphs 7 and 8 of the order adjudicating authority has referred to the Accounting Standard and illustration 10, which are as follows:

“7. However, section 129 of the Companies Act, 2013 provides that the financial statements shall comply with the accounting standards notified under the section 133. Under section 133 the Central Government has prescribed the standards of accounting recommended by the Institute of Chartered Accountants of India. The Institute of Chartered Accountants of India have issued Accounting Standard (AS) including AS 29. We find that ‘onerous contract’ has been explained under Accounting Standard (AS) 29.

*8. AS 29 is relating to **Provisions, Contingent Liabilities and Contingent Assets** and provides as follows:*

“Scope

This Standard should be applied in accounting for provisions and contingent liabilities and in dealing with contingent assets, except: (a) those resulting from financial instruments² that are carried at fair value;

(b) those resulting from executory contracts, except where the contract is onerous;

Explanation:

*(i) An ‘**onerous contract**’ is a contract in which the **unavoidable costs of meeting the obligations** under the contract exceed the economic benefits expected to be received under it. Thus, for a contract to qualify as an onerous contract, the unavoidable costs of meeting the obligation under the contract should exceed the economic benefits expected to be received under it. The unavoidable costs under a contract reflect the least net cost of exiting from the contract, which is the lower of the cost of fulfilling it and any compensation or penalties arising from failure to fulfil it.*

(ii) If an enterprise has a contract that is onerous, the present obligation under the contract is recognised and measured as a provision as per this Standard. The application of the above explanation is illustrated in Illustration 10 of Illustration C attached to the Standard.

Illustration C

Illustration 10: An Onerous Contract

An enterprise operates profitably from a factory that it has leased under an operating lease. During December 2005 the enterprise relocates its operations to a new factory. The lease on the old factory continues for the next four years, it cannot be cancelled and the factory cannot be re-let to another user.

Present obligation as a result of a past obligating event-*The obligating event occurs when the lease contract becomes binding on the enterprise, which gives rise to a legal obligation.*

An outflow of resources embodying economic benefits in settlement-*When the lease becomes onerous, an outflow of resources embodying economic benefits is probable, (Until the lease becomes onerous,*

the enterprise accounts for the lease under AS 19, Leases).

Conclusion-A provision is recognised for the best estimate of the unavoidable lease payments”

14. The Ld. Judicial Member thus has never held that illustration 10 is part of Regulation 10. In paragraph 10 of the order, Ld. Judicial Member has recorded its following conclusion:

“10. Thus, from the bare reading of the accounting standards it can be seen that an onerous contract is one where there are costs involved in meeting the obligations under the contract and there are outflows of resources which are much higher than the economic benefits received under it. Under the present L&L Agreement, there are no costs or outflows of resources of the Corporate Debtor involved in fulfilling any obligation towards the Licensee. Therefore, even though in the strict sense, the L&L Agreement may not fall under the phrase ‘onerous contract’ as sought by the Liquidator yet I tend to agree with Ld. Brother, Member (Technical) that it may be covered under the ‘unprofitable contract’ as one of the illustrations given under the onerous property in Regulation 10 of the Liquidation Regulations because of the reasons discussed in the subsequent paragraphs.”

15. When we look into the observations made in paragraph 10, it is clear that Ld. Judicial Member has also held that transaction is covered under unprofitable contract. Regulation 10(1)(b), includes unprofitable contracts thus, Judicial Member has also come to the conclusion that transaction is covered by one of the illustrations given under onerous property in Regulation 10. In paragraph 10 Ld. Judicial Member has obviously referred to Regulation 10(1)(d), which mentioned unprofitable contracts which can be basis for disclaimer of onerous property. We, thus do not accept the submission of the appellant that there is divergence of opinion between Technical Member and

Judicial Member. Ld. Judicial Member has given detailed reason, including the conduct of the corporate debtor and come to the conclusion that the transaction 07.06.2019 was not *bona fide* and good faith transaction. In paragraph 19 of the judgement following has been observed by the Ld. Judicial Member:

“19. Thus, considering facts and circumstances in its entirety and also in view of the fact that Sarla also wanted to take over the management of the Corporate Debtor by submitting EoI and also persuaded the Liquidator to sell the said Premises to Sarla, it is apparent that the Corporate Debtor did not act in good faith while executing the said L&L Agreement of the premises which is the substantial asset of the Corporate Debtor.”

16. Ultimately, in paragraph 24, Ld. Judicial Member has also expressed its opinion that it is appropriate to terminate the Leave and License Agreement dated 07.06.2019 i.e., to allow the disclaimer under Regulation 10. Paragraph 24 of the order of the Judicial Member is as follows:

“24. In view thereof, exercising power under section 60(5) read with section 238 of the I&B Code, 2016, I deem it appropriate to order termination of the said L&L Agreement dated 07.06.2019 to ensure effective and efficient completion of the liquidation process of the Corporate Debtor and to achieve the objective of Code i.e. value maximization. Accordingly, the Leave and License Agreement dated 07.06.2019, which has been disclaimed, stands terminated. Sarla is directed to handover the above Premises to the Liquidator within a period of 30 days.”

17. We, thus are of the view that both the Ld. Members have expressed the opinion that transaction of Leave and License Agreement dated 07.06.2019 was an onerous transaction covered under Regulation 10, hence there is no error in partly allowing the I.A.2012/2022 by the adjudicating authority.

18. Now we come to the second submission, the counsel for the appellant submits that Regulation 10 is beyond the provisions of the IBC and is ultra vires to the IBC. Learned Counsel submitted that transaction which can be avoided are enumerated in Sections 43 to 51 and the onerous transaction, which can be disclaimed under Regulation 10 are not covered by any of the above provisions, hence the Regulation 10 provides the remedy which is never contemplated by the IBC, hence the said Regulation 10 is beyond the Code and is totally inconsistent with the Code. It is relevant to notice that power which is vested in Regulation 10 was contemplated in Section 535 of the Companies Act, 1956. The adjudicating authority in paragraph 28.3 (xix) has noted the provisions of Section 535. It is useful to notice paragraph 28.3(xix) of the impugned order, which is as follows:

*“xix. We would like to refer to the judgment of **United Bank of India Vs. Official Liquidator & Others (1994) 1 SCC 575** wherein the Hon’ble Supreme Court was dealing with the provisions of section 535 of the Companies Act, 1956 which is pari materia to Regulation 10 of the Liquidation Regulations, 2016, and it was observed as follows:*

“The intention of Section 535 is to protect the creditors of the company in liquidation and not mulct them by reason of onerous covenants. The power under Section 535 is not to be lightly exercised. Due care and circumspection have to be bestowed. It must be remembered that an order permitting disclaimer, while it frees the company in liquidation of the obligation to comply with covenants, puts the party in whose favour the covenants are, to serious disadvantage. The Court must therefore, be fully satisfied that there are onerous covenants, covenants which impose a heavy burden upon the company in liquidation, before giving leave to disclaim them.”

19. Now the question need to be considered as to whether power vested in the liquidator by Regulation 10 of the Liquidation Regulations, 2016, is beyond the IBC. We need to notice Section 34(2), which provides that all powers of board of directors key managerial personnel and partners of the corporate debtor shall vest in the liquidator. Section 34(2) is as follows:

“34. Appointment of liquidator and fee to be paid

(2) On the appointment of a liquidator under this section, all powers of the board of directors, key managerial personnel and the partners of the corporate debtor, as the case may be, shall cease to have effect and shall be vested in the liquidator.”

20. Section 35 of the IBC provides for powers and duties of the liquidator. Section 35(1)(d) & Section 35(1)(o) are as follows:

“35. Powers and duties of liquidator.

(1) Subject to the directions of the Adjudicating Authority, the liquidator shall have the following powers and duties, namely:—

(d) to take such measures to protect and preserve the assets and properties of the corporate debtor as he considers necessary;

(o) to perform such other functions as may be specified by the Board.”

21. Section 35(1)(o) empowers the liquidator to perform such other functions as may be specified by the board. Expression as specified is defined in Section 3(32), which is as follows:

“3. *In this Code, unless the context otherwise requires,—*

(32) “specified” means specified by regulations made by the Board under this Code and the term “specify” shall be construed accordingly;”

22. Regulation 10 of the Liquidation Regulation, 2016, is thus regulation specified and is fully covered by Section 35(1)(o). Liquidation Regulation has been framed in exercise of powers conferred under various sections of the IBC including Section 34 and Section 35, thus regulations have been clearly framed under Section 35 and as per Section 35(1)(o) liquidator can perform such other function as maybe specified by the board. The power vested in the liquidator by Regulation 10 i.e., disclaimer of the onerous property is thus fully covered by provisions of the IBC and cannot be held to be beyond IBC or ultra vires to the IBC as contented by counsel for the appellant. We may also refer to Section 240(2) of the IBC, which provides for power to make a regulation. Section 240(2)(y) provides as follows.

“240. Power to make regulations.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(y) the manner of evaluating the assets and property of the corporate debtor under clause (c), the manner of selling property in parcels under clause (f), the manner of reporting progress of the liquidation process under clause (n), and the other functions to be performed under clause (o), of sub-section (1) of section 35;”

23. We, thus are of the view that Regulation 10 has been framed in accordance with the provisions of the IBC and the Regulation 10 empowering the liquidator to disclaim a contract is well within the statutory powers and the Regulation 10 is fully in consonance with and is in accordance with the provisions of the IBC and has been enacted to give effect to the provisions of the IBC. We, thus do not find any substance in the submission of the appellant that Regulation 10 is beyond the provisions of IBC. We, thus do not

find any substance in any of the submissions raised by the counsel for the appellant challenging the impugned order, insofar as the application filed by the appellant, I.A.672/2023, the auction having already been held for ₹4.2 crore, the said application has rightly been rejected by adjudicating authority. Insofar as I.A. No.2897/2023, questioning the decision of the liquidator rejecting the claim, adjudicating authority in paragraph 29.8 issued following directions, while allowing I.A. No.2897/2023:

*“29.8 Thus, we direct the Liquidator to re-consider the claim of Rs. 1,15,00,00 submitted by Sarla and decide on the same after due verification. Sarla is directed to submit its claim in the prescribed format along with proof of claim within 30 days from the date of this order. Accordingly, IA/2897/2023 is **allowed.**”*

24. We, thus do not find any error in the order passed by the adjudicating authority while deciding the aforesaid three applications.

There is no merit in the appeals. Appeals are dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

24th April, 2025

himanshu