

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-5

IB-1731/ND/2019

IA/1281/2022

IN THE MATTER OF:

Mayoga Investment Ltd.

Vs.

M/s MK Overseas Pvt. Ltd.

.....Respondent

....Applicant

SECTION

U/s60(5) of IBC R/w 49(1) of IBC

Order delivered on 27.04.2023

CORAM:

**SHRI P.S.N PRASAD,
HON'BLE MEMBER (JUDICIAL)**

**SHRI RAHUL BHATNAGAR,
HON'BLE MEMBER (TECHNICAL)**

PRESENT:

For the Applicant :

For the Respondent :

ORDER

Order pronounced in open Court vide separate sheets.

IA/1281/2022in IB-1731/ND/2019 **is disposed off.**

Sd/-

**(RAHUL BHATNAGAR)
MEMBER (T)**

Sd/-

**(P.S.N PRASAD)
MEMBER (J)**

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (Court-V)

IA NO. 1281 OF 2022
IN
C.P. (IB) No. 1731 of 2019

IN THE MATTER OF:

Mayoga Investment Limited

... Financial Creditor

Versus

MK Overseas Private Ltd.

... Corporate Debtor

AND IN THE MATTER OF

Suresh Kumar Jain

...Resolution Professional/ Applicant
Versus

M/s M K Overseas Export Pvt. Ltd.

.... Respondent

Order Pronounced on: 27.04.2023

CORAM :

SHRI. P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

SHRI. RAHUL BHATNAGAR, HON'BLE MEMBER (TECHNICAL)

PRESENT:

FOR THE RP (Suresh Kumar Jain) : Mr. Anoop Prakash Awasthi, Adv.

For MK Overseas Export Pvt. Ltd : Mr. Kumar Mihir, Adv.

ORDER

PER SHRI P.S.N. Prasad, Member (J)

1. This application is filed by Resolution Professional under Section 60(5) read with Section 49(1) of the Insolvency and Bankruptcy Code for the recovery of monthly user charges/damages/mesne profit for the period starting from 01.04.2020.
2. It is further stated that Respondent i.e MK Overseas Exports Pvt. Ltd. was in possession of the Dera Bassi property as per the lease agreement dated 18.10.2018 till 30.09.2021 originally at a monthly rent of Rs 25,00,000.
3. It is also noticed that on 20.07.2021 during the course of hearing of CA 185/ND/2020 there was a clear cut undertaking by the Respondent no 3 (there in applicant) through the advocate to vacate the property at the expiry of lease deed on 30.09.2021 and pay the dues of lease rental beforehand rather as per the supplied schedule of payments. The time stipulated by Respondent was up to 31.08.2022, though on the next date of hearing, when respondent appeared through different advocate, they refuted the payments due as per stipulated time schedule and vide their email, stated on record, for the vacation of premises on the completion of lease tenure.
4. There after the respondents filed an application dated 27.09.2021 seeking extension of lease period by either by Six Months or till the approval of resolution plan by Adjudicating authority, whichever is earlier. So effectively, they were in possession of said property till April 2022. IA 4520 of 2021 has been decided upon already.

5. It has been noted that the respondent alleged that licenses were not renewed by the Resolution Professional as needed, but even then, no possession has been handed over to Resolution Professional till date.

6. It has been prayed by the applicant vide this application to:

a. Direct the Respondent to pay a monthly user charges/ damages/ mesne profit for the period starting from 01.04.2020 up to 30.09.2021 i.e. period of expiry of claimed lease dated 18.10.2018 at the rate of Rs. 25,00,000 (per month) totaling to Rs 4.50 Crores.

b. Directing the respondent to pay the penal damages at double the monthly rate of damages at the rate of Rs. 50,00,000 from 01.10.2021 until vacation of Dera Bassi property by the Respondent.

c. Pass such other or further orders as may be deemed just and fit under the circumstances of the case.

7. Respondent states that The Hon'ble NCLAT in the matter of **K. L. Jute Products Private Limited v. Tirupti Jute Industries Ltd. & Ors.** (Judgment dated 20.02.2020 in Company Appeal (AT) (Insolvency) No. 277 of 2019) has observed that the Adjudicating Authority is not empowered to pass an order of eviction and it is for an 'Aggrieved party' to move the appropriate forum for redressal of its grievances in accordance with Law."

Meanwhile, in **Canara Bank Vs. Ms. Mamta Binani, RP of Aristo Texcon Pvt. Ltd.**, Company Appeal(AT)(Insolvency) No. 1117 of 2019, **Judgement dated 03.01.2022**; Hon'ble NCLAT **stated** that Resolution Professional is an Officer of the Court and he is to exercise reasonable and responsible care for the company whose property and affairs are entrusted with him.

8. **Section 25 of the Insolvency and Bankruptcy Code 2016** clearly states

that it is the solemn duty of Resolution Professional to preserve and protect the assets of Corporate Debtor including the continuing business operation for corporate debtor and shall undertake actions to take **immediate custody and control** of all assets of corporate debtor including the Business Records of Corporate Debtor.

9. In furtherance as stated by the respondent, sanctity of Lease Deed does not fall within the ambit of the categories of transactions covered under Section 49(1) of IBC 2016 which could be considered by this Adjudicating Authority. However as per **Insolvency and Bankruptcy Code 2016** under **section 60(5)** -

“(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of -

(a) any application or proceeding by or against the corporate debtor or corporate person;

(b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and

(c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code.

(6) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application by or against a corporate debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded.”

Since the payment due by Respondent MK Overseas Export Pvt. Ltd. has a

direct relation to the ongoing Insolvency Proceedings of Corporate Debtor, hence NCLT has the jurisdiction to adjudicate upon the issue. Reliance is placed on the following Judgements :

- a) Para 23 and 24 of **Tata Consultancy Services Limited v. Vishal Ghisulal Jain** reported in (2022) 2 SCC 583 by Hon'ble **Supreme Court of India** dated 23.11.2021

‘23. It was also urged on behalf of the appellant that the NCLT and NCLAT have re-written the agreement changing its nature from a determinable contract to a non-terminable contract overlooking the mandate of Section 12 of the Specific Relief Act 1963. **It is a settled position of law that IBC is a complete code and Section 238 overrides all other laws.** The NCLT in its residuary jurisdiction is empowered to stay the termination of the agreement if it satisfies the criteria laid down by this Court in Gujarat Urja (supra). In any event, the intervention by the NCLT and NCLAT cannot be characterized as the re-writing of the contract between the parties. **The NCLT and NCLAT are vested with the responsibility of preserving the Corporate Debtor’s survival and can intervene if an action by a third party can cut the legs out from under the CIRP.**”

“24. Admittedly, the appellant is neither supplying any goods or services to the Corporate Debtor in terms of Section 14 (2) nor is it recovering any property that is in possession or occupation of the Corporate Debtor as the owner or lessor of such property as envisioned under Section 14 (1) (d). It is availing of the services of the Corporate Debtor and is using the property that has been leased to it by the Corporate Debtor. Thus, Section 14 is indeed not applicable to the

present 20 case. However, in Gujarat Urja (supra) it was held that the NCLT's jurisdiction is not limited by Section 14 in terms of the grounds of judicial intervention envisaged under the IBC. It can exercise its residuary jurisdiction under Section 60(5)(c) to adjudicate on questions of law and fact that relate to or arise during an insolvency resolution process. This Court observed:

“91. The residuary jurisdiction of NCLT under Section 60(5)(c) of IBC provides it a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. If the jurisdiction of NCLT were to be confined to actions prohibited by Section 14 of IBC, there would have been no requirement for the legislature to enact Section 60(5)(c) of IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be exhaustive of the grounds of judicial intervention contemplated under IBC in matters of preserving the value of the corporate debtor and its status as a “going concern”. We hasten to add that our finding on the validity of the exercise of residuary power by NCLT is premised on the facts of this case. We are not laying down a general principle on the contours of the exercise of residuary power by NCLT.”

b) **Biator Industries Ltd. Vs. Gujarat Industrial Development Corporation** in R/Special Civil Application No. 3688 of 2022 by Hon'ble High Court of Gujarat in judgement dated **13.02.2023**, it is stated:

“7.14 While in the case of Gujarat Urja (supra) and Tata

Consultancy Services Limited (supra) the contract was central to the success of CIRP. Reading paras 84 to 91 of the judgment in Gujarat Urja (supra), what is evident is that the residuary jurisdiction of NCLT under Section 60(5)(c) of the IBC provides a wide discretion to adjudicate questions of law or fact arising from or in relation to the insolvency resolution proceedings. Reading the relevant paragraphs in Tata Consultancy Services Limited (supra) as cited by the respondent, the NCLT can intervene when, it is even the case of the petitioner that there is an embargo under the IBC. In the application filed by the respondent which is pending before the NCLT, it is open for the petitioner to take all the contentions raised in this petition. The residuary jurisdiction of the Tribunal therefore to decide this issue had already been invoked by the respondent and the petition therefore, at the hands of the petitioner company which seeks the protective umbrella under the IBC itself can oppose the prayers made in that application.”

As precedence established in **Tata Consultancy Services Limited (supra) and various others judgements**, Adjudicating Authorities are vested with the responsibility of preserving the Corporate Debtor's survival and can intervene if an action by a third party can cut the legs out from under the CIRP.

10. **Hon'ble Supreme Court of India** in the matter of **Victory Iron Works Ltd. Vs. Jitendra Lohia & Anr.** in Civil Appeal No.1743 of 2021 with Civil Appeal No.1782 of 2021 vide judgement dated **14.03.2023** discussed at length the Duties of IRP and Duties of RP under Section 18 and Section 25 of IB Code 2016 while discussing the issue of whether NCLT/ NCLAT has the jurisdiction to recover and protect the possession

of the Corporate Debtor. In Para 39 of said judgement it has been clarified:

“39. But as rightly pointed out by the learned counsel for the Resolution Professional, the Explanation under Section 18 begins with a caveat namely “for the purposes of this Section”. Therefore, the exclusion of assets owned by a third-party, but in the possession of the Corporate Debtor held under contractual arrangements, from the definition of the expression “assets”, is limited to Section 18. In other words, the Explanation under Section 18 does not extend to Section 25.”

11. A careful look to the reply filed by the respondents in the present application filed by Resolution professional clearly states that in Para 9 to para-wise reply that

“It is wrong and denied that occupation of the Dera Bassi property by the non-applicant/ respondent after 30.09.2021 is in clear contempt of orders of this Hon’ble Tribunal” **...emphasis supplied**

Substantiating the fact as pointed out by Resolution Professional that respondents were in possession of the above-said property after 30.09.2021 and as of the alleged substantial investments by respondents as stated in their pleadings of Rs 4.50 crores, no evidence or document has been placed on record to corroborate the same.

12. Hence we **conclude** that:

a) As detailed in the above judgements, this application is well within the jurisdiction of this AA. Therefore, in order to safe guard the interest of Corporate Debtor during the ongoing CIR Proceedings,

this tribunal finds that Corporate Debtor is entitled to receive the rent of Rs 25,00,000 per month as per the registered lease deed from 31.03.2020 to 30.09.2021, taking into consideration that the rent by respondents has been paid only till 31.03.2020. The due rent payable should be paid in the bank account of corporate debtor being managed by Resolution Professional within 15 days' time.

- b) As prayed by applicant in prayer (b) to direct respondent to pay penal damages at double the monthly rate of damages at the rate of Rs. 50,00,000 from 01.10.2021 until the vacation of the Dera Bassi property by Respondent. This prayer has been rejected in entirety as this forum is not a recovery forum for claiming the damages.
- c) Vide application dated 27.09.2021, respondents sought an extension of lease deed for 6 months from 30.09.2021 to 01.04.2022, Since they were in possession of the property for the said time, they are hereby directed to pay rental as per earlier lease deed which ended on 30.09.2021 at the rate of Rs 25,00,000 per month in the bank account of corporate debtor being managed by Resolution Professional within 15 days' time.
- d) Resolution Professional is directed to take the possession of said property and is entitled to receive the rent of said property for the period in which respondents were in possession and enjoyment of the property of corporate debtor after 01.04.2022 (if any). Also after the completion of lease deed on 30.09.2021, the resolution professional is, according to general standard practice in the market, entitled to 10% raised rent amount (Rs 25,00,000 + Rs 2,50,000 totaling to Rs 27,50,000 per month) for the remaining

duration till respondents were in control of said property.

e) Resolution Professional is allowed to take assistance if required from the local district administration / police. He is directed to submit a report along with proofs to same effect till the possession was with respondents on affidavit regarding taking over the custody and control of the asset. He should also furnish the bank statement in respect of receiving of the rental dues.

f) **IA 1281 of 2022 stands disposed off.**

Sd/-
(RAHUL BHATNAGAR)
MEMBER (T)

Sd/-
(P.S.N PRASAD)
MEMBER(J)