

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT-II)

Company Appeal (IBC) No. 13/2023

IN

Company Petition No. (IB)-2963/(ND)/2019

IN THE MATTER OF:

Mr. Tarun Khanna

... Petitioner/Operational Creditor

Versus

Deltronix India Limited

... Respondent

AND IN THE MATTER OF COMPANY APPEAL NO.13/ND/2023:

1. Mr. A. Guhan

No.1, Brindavan Street,
Mylapore, Chennai- 600004

... Appellant No. 1

2. A.G.S. Sumyuha

No.1, Brindavan Street,
Mylapore, Chennai- 600004.

... Appellant No. 2

VERSUS

Ms. Sunita Umesh

Liquidator, M/s Deltronix India Limited

Address:

M/s UCC & Associates LLP, Chartered Accountants

1315 Ansal Tower, 38 Nehru Place

New Delhi – 110019

Email: sunita.umesh@uccglobal.in

... Respondent

Order Delivered on: 09.05.2023

SECTION: **Section 42 read with Section 60(5) of IBC 2016**

CORAM:

SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant

: Adv. Abhinav Hansaria

For the Liquidator

: Adv. Sunita Umesh, Adv. Sumant Batra,

Adv. Aishwarya, Adv. Ruchi Goyal,

Adv. Sarvapriya

ORDER

PER: SH. ASHOK KUMAR BHARDWAJ, MEMBER (J)

The captioned appeal has been preferred by the Appellants under Section 42 read with Section 60(5) of IBC, 2016. The salient grievance espoused in the appeal is regarding non-vacation/occupation of the premises, described in the appeal at S. No. 820/1B2 in No. 28, Kuthambakkam Village, Thiruvallur District comprising an industrial building owned by the Appellants herein, by the Respondent i.e., the Liquidator for Deltronix India Limited. The other grievance raised in the appeal is qua non-payment of arrears of rent for the premises, for the CIRP period i.e., 03.02.2021 to 18.10.2022 @ Rs. 21,83,000/- per month by treating the same as the CIRP cost. As can be gathered from the averments made in the appeal, the Appellants herein are lawful owners of the aforementioned premises measuring 7.63 acres which comprise the built-up area of 1,18,000 sq. Ft. The Appellants had obtained the title of demised property from Sh. KR Appavoo, as per the settlement deed dated 18.03.2015. In terms of the lease deed dated 04.04.2012, Mr. KR Appavoo, the predecessor of the Appellant in title in respect of the demised property leased out the industrial shed admeasuring 1,18,0000 Sq. Ft. together with an open area of about 50,000 Sq. Ft. of the land mentioned herein above, in the southern side of the industrial shed to the Appellant herein. The term of the lease commenced on 04.04.2012 was seven years, which ended on 04.04.2019. The monthly rent for the

leased-out property was Rs.21,83,000/-. The Corporate Debtor was also liable to pay a sum of Rs. 2,18,30,000/- as an interest-free security deposit to the predecessor in title of the Appellants qua the leased-out property. As has been provided in the lease deed, the security was refundable to the Corporate Debtor at the time of termination/determination of the lease. Having acquired the title of the demised premises, the Appellants stepped into the shoes of the lessor and derived all the rights and entitlements qua the leased-out property. The Corporate Debtor started delaying/defaulting in payment of rent from January 2014, and from December 2014, it stopped paying the rent completely. The Appellants' predecessor in title invoked Clause 21 (a) of the Lease Agreement and issued notice dated 01.05.2015 to the Corporate Debtor, terminating the leased deed and also calling upon the CD to pay the arrears of rent due and hand over the possession of the leased property to him in its original condition. Subsequently, the issue was referred for Arbitration and the Arbitral Tribunal passed an award dated 07.09.2016. In terms of the award, the Corporate Debtor was liable to pay a sum of Rs.1,26,95,876/- minus TDS @ 10%, being the rental arrear for the period from 16.12.2014 to 01.05.2015 within three months from the date of the award to the Appellants. The Corporate Debtor was further held liable to pay a sum of Rs. 21,83,000/- per month to the Appellants less TDS @ 10% as damages for the use and occupation of the leased property from May 2015 till the date of handing over the possession of the leased property. For the execution of the award, the Appellants filed E.P Nos. 40/2018 and 41/2018 before District Court,

Thiruvallur. During the pendency of the execution proceedings, Mr. Tarun Khanna filed a Petition CP (IB)-2963(ND)/2019 under Section 9 of IBC, 2016 to admit the CD to CIRP. In the said petition, this Adjudicating Authority passed an order dated 03.02.2021 admitting the CD to CIRP and appointed Mr. Santosh Sharma as IRP. Subsequently, Mr. Santosh Sharma was confirmed as RP. The Appellants herein filed the claim for Rs.12,18,30,000/- before RP in Form-B. The RP admitted the claim of the Appellant to the extent of Rs.12,64,30,176/- being the arrears of rent till the commencement of CIRP.

2. As the premises were not vacated, the Appellants herein served a legal notice dated 02.12.2021 upon the RP seeking recovery of rent for the period from 02.12.2021 as also possession of the leased-out premises. Finding no response from the RP, the Appellants preferred IA No. 2379/2022, before this Adjudicating Authority, seeking issuance of direction to Respondent in IA to vacate the leased-out premises as also to pay the arrears of rent w.e.f. 03.02.2021. A prayer was also made in the IA for adjusting and reconciling the amount payable to State Bank of India only after adjusting the sum of Rs.11,78,82,000/- payable to Appellant herein as the rent of leased-out premises for the period from 30.08.2016 to 03.02.2021. Subsequently, during the pendency of IA 2379/2022, the Liquidator issued an e-mail dated 17.12.2022, revising the amount of claim of the Appellants herein to the extent of adding the amount of rent from 03.02.2021 till 18.10.2022 to their claim as an operational creditor. Thereafter, in terms of the order dated 19.12.2022

passed in IA No. 2379/2022, this Adjudicating Authority directed the Appellants to approach the Liquidator regarding their grievance within a period of one week and the Liquidator was directed to decide the claim within one week thereafter. In terms of the order dated 19.12.2022 passed by this Adjudicating Authority, the Appellants made an application dated 26.12.2022 to Liquidator asking him to vacate the leased-out premises and to pay an amount of Rs.4,25,68,500/- as an arrear of lease rent/damages for unauthorized occupation of the premises. In the said application the Respondent passed the order dated 03.01.2023 making it clear to the Appellants that their claim for Rs.4,25,68,500/- has already been admitted as a claim of the Operational Creditor and the leased-out premises would be vacated shortly. Nevertheless, in the said e-mail, the Liquidator expressed willingness to pay the occupation charges for the period beyond 18.10.2022. Thus, the Appellant preferred the present appeal.

3. The Ld. Counsel appearing for the Appellants contended that there being a moratorium in operation as per Section 14 (1) (d) of IBC, 2016, the Appellants could not have recovered the possession of the leased premises and certain machinery belonging to CD are still attached to the site, thus the CD is liable to pay an amount of Rs.4,25,68,500/- as rent for the leased premises for CIRP period. In his submission, could there be no moratorium imposed in terms of the provision of Section 14 (1) (d) of the IBC, 2016, the Appellants could retrieve the possession of the leased premises and could also claim the rent qua the same for CIRP

period, thus the amount of rent for CIRP period is payable to them as CIRP cost.

4. Per contra, Mr. Sumant Batra, Ld. Counsel appearing for the Respondent contended that the entire claim of the Appellants qua the rent for leased premises till the commencement of Liquidation could be admitted as operational debt, thus no prejudice was caused to them. According to Mr. Sumant Batra, for any amount to form CIRP cost, the definition of cost given in Section 5 (13) of the IBC, 2016 needs to be met/satisfied. He further contended that in terms of the definition of “Insolvency Resolution Process Cost” given in Section 5 (13)(c)(e) read with Regulation 31 (b) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, any cost incurred by the Resolution Professional in running the business of the Corporate Debtor as a going concern or amounts due to any person whose rights are prejudicially affected on account of the moratorium imposed upon under Section 14 (1) (d) of the IBC, 2016, can alone be considered as Insolvency Resolution Process Cost. According to him, since as per their own admission, the Appellants were not in receipt of rent since December 2014, it cannot be contended that their right to claim rent could be prejudiced only on initiation of the CIRP against the CD on 03.02.2021.

5. We heard the counsels for the parties and perused the record. As can be seen from the definition of the “Insolvency Resolution Process Cost”, the cost, inter alia, incurred by the Resolution Professional in

running the business of the Corporate Debtor as a going concern. The definition reads thus: -

“13. Insolvency Resolution Process Costs” means-

- a. The amount of any interim finance and the costs incurred in raising such finance;*
- b. The fees payable to any person acting as a resolution professional;*
- c. Any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;*
- d. Any costs incurred at the expense of the government to facilitate the insolvency resolution process; and*
- e. Any other costs as may be specified by the Board;”*

It is not the case of the Appellant herein that the IRP or RP could ever run the business of the CD as an on-going concern, thus the claim of the Applicants qua the rental value of the leased property on which only the machines of CD were stacked cannot be perceived as CIRP cost by any stretch of the imagination. As far as Regulation 31 (b) of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 is concerned, indubitably only the amount due to the person whose rights are prejudicially affected on account of the moratorium imposed under Section 14 (1) (d) is to be treated as CIRP cost. In the present case, as per the admission by the Appellants themselves, the validity of the lease was for seven years i.e. up till 04.04.2019. The CIRP commenced on 03.02.2021. Thus, when much prior to the commencement of the CIRP, the lease deed had expired, the Appellants cannot be heard saying that as on 03.02.2021 they were entitled to any amount of rent in terms of the lease deed, which claim could be prejudicially affected on account of

the moratorium imposed under Section 14 (1) (d) of IBC, 2016. It is also the case of the Appellants that the CD had discontinued payment of rent qua the leased premises from December 2014 itself. Ergo, also in terms of such contention put forth by the Appellants, it was not on account of the moratorium commenced on 03.02.2021 that any prejudice was caused to the Appellants. As it may, on discontinuance of the payment of rent by CD from December 2014, when there was no moratorium in operation against CD, the Appellants/predecessor in title had remedies available to them in accordance with law. Availing such remedy, the predecessor of the Appellants had invoked Clause 21(a) of the Lease Agreement and had invoked Arbitral Proceedings successfully. In terms of the award dated 07.09.2016, passed in Arbitration Case No. 1/2015, the Arbitral Tribunal directed the CD to pay the rent towards the leased premises from May 2015 till the date of handing over the possession of the leased property to Appellants. Admittedly, the Appellants instituted execution proceedings in terms of EP Nos. 40/2018 and 41/2018 before District Court, Thiruvallur. Prejudice on account of the moratorium could be said to have been caused to Appellants, only when the Appellants could not have taken steps prohibited under Section 14 of IBC, 2016. In the present case, the cause of action had arisen to the Appellants much before initiation of CIRP i.e., in December 2014 and the Appellants had availed the legal remedies for redressal of their grievance successfully. They could also resort to execution proceedings much before the commencement of CIRP. Thus, no prejudice could be said to have been caused to them on account of the moratorium. We may also

be not oblivious to the fact that the position on the commencement of CIRP was the same as was prevalent in December 2014. The prejudice on account of the moratorium could be alleged only when, till the commencement of the moratorium, the Appellants could be in receipt of rent and thereafter the payment could be stopped only by operation of Section 14 of IBC, 2016. There is no such position involved in the present appeal. Thus, we are of the considered view that the entitlement of the Appellants for rent qua the leased premises was not prejudiced in view of the commencement of moratorium and the plea espoused by the Appellants that a sum of Rs.21,83,000/- per month should be paid to them as CIRP cost for the period from 03.02.2021 to 18.10.2022 is not tenable. It would not be out of place to mention here that the Appellants had consciously filed their claim before the IRP in Form-B. Apparently, the Claim in Form-B of Schedule 1 to IBBI (IRPC) Regulations, 2016 is submitted by the Operational Creditors for operational debt. The best contention of the Appellants may be that their claim for rent was materialized in terms of the Arbitral Award dated 07.09.2016 (ibid). If such could be the plea of the Appellants, the award has taken care of their right and entitlement from 16.01.2014 to 01.05.2015 and from May, 2015 till the vacation of the lease premises, which is yet to be vacated. Thus, the Appellants could avail the remedy and get the relief that they could look for, but for the moratorium. For the implementation of the award, besides filing execution proceedings before the appropriate forum, they could also file a claim as Operational Creditor before IRP/Liquidator. The Appellants cannot plead that part of the amount of

the Arbitral award should be treated as operational debt and part of the same should be treated as CIRP cost. At the cost of repetition, it is viewed that once the Arbitral Award has taken care of the claim of the Appellants qua the rent up till vacation of leased premises, the moratorium has not caused any prejudice to them. Our view is also fortified by the judgment of the Hon'ble National Company Law Appellate Tribunal dated 21.03.2018 passed in **JAS Telecom Pvt. Ltd. Vs. Eolane Electronics Bangalore Pvt. Ltd.** (Company Appeal (AT) (Insolvency) No. 37 of 2018).

The relevant excerpt of the order/judgment reads thus: -

“7. Learned Counsel for the Resolution Professional (Respondent) rightly pointed out that the rent amount due to the Appellant was not prejudicially affected on account of the moratorium imposed under Section 14 (1) (d). In fact, it has not been paid since prior to the order of moratorium i.e. since 1st January, 2017. The order of moratorium was passed subsequently on 31st August, 2017, therefore, the Appellant cannot claim that its right has been affected prejudicially on account of moratorium imposed by the Adjudicating Authority.

8. Learned Counsel appearing on behalf of the Respondent submits that the liquidation process has already been started therefore the claim of the Appellant may be considered in terms of provision of I&B Code, 2016.”

It would not be out of context to note that after the commencement of the Liquidation Process w.e.f. 18.10.2022, the moratorium under Section 14 of IBC, 2016 came to an end and the Liquidation under Section 33 (5) of IBC, 2016 commenced. In terms of the provisions of Section 33 (5) of IBC, 2016, no fresh suit or other legal proceedings can be instituted by or against the Corporate Debtor, but there is no bar in pursuing the

proceedings already pending. Regarding the plea for the vacation of leased premises, Mr. Sumant Batra, Ld. Counsel for the Respondent categorically submitted that the vacant possession of the leased premises would be available to Appellants on 09.05.2023. In view of the aforementioned, the present application is disposed of with the directions that: -

- (I) The Respondent would make the vacant possession of the leased premises available to the Appellant on 09.05.2023;
- (II) The rent qua the leased premises for the period from 03.02.2021 to 18.10.2022 during which CIRP was in vogue shall not be treated as CIRP cost;
- (III) On handing over of vacant possession of the leased premises by Respondent to Appellant on 09.05.2023, the Respondent would be entitled to claim the amount of Rs. 2,18,30,000/-, paid by the CD to the predecessor of the Appellant as an interest-free security deposit, which was refundable to CD on termination/determination of the lease. Nevertheless, it would be open to Appellants herein to work out their claim for adjustment of said amount towards the rent payable by the CD to the predecessor in title of Appellants qua the leased premises and/or the occupation charges which the CD is willing to pay to the Appellants for occupying the premises for the period beyond 18.10.2022, in terms of her e-mail dated 03.01.2023;

6. The Appeal stands disposed of accordingly.

**Sd/-
(L. N. GUPTA)
MEMBER (T)**

**Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)**