

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins.) No. 697 of 2023 & I.A. No. 2322 of 2023

(Arising out of the Order dated 28.04.2023 passed by the National Company Law Tribunal, New Delhi, Court III, in IA – 1208/ 2023 in CP IB) No. 138/ND/2020)

IN THE MATTER OF:

Prabhat Jain, Liquidator of Narmada Cereal Private Limited

B-61, Flatted Factory Complex,
Jhandewalan, New Delhi – 110055

Mail – liquidator.narmada@gmail.com

...Appellant

Versus

1. MP Industrial Development Corporation Limited.

Regional Office, Bhopal (MP)
1st Floor, Tawa Complex
Bittan Market, E-5, Area Colony,
Bhopal, MP – 462016

Mail : robpl@mpidc.co.in

...Respondent No. 1

2. Punjab National Bank (PNB)

Zonal Sastra Centre
1st Floor, PNB Building, Arera Hills
Bhopal (M.P.) – 462011

Email : zs8338@pnb.co.in

...Respondent No. 2

3. Arun Mittal

Ex- Director of CD
12, Eastern Avenue,
Maharani Bagh,
New Delhi – 110065
Mail ID. arun.vandana@yahoo.com

...Respondent No. 3

4. Abhinav Mittal

Ex- Director of CD
12, Eastern Avenue,
Maharani Bagh,

New Delhi – 110065

Mail ID. arun.vandana@yahoo.com

...Respondent No. 4

Present

For Appellants: **Mr. Saurabh Kalia, Mr. Iswar Mohapatra,
Advocates.**

For Respondents: **Mr. Abhishek Choudhary & Mr. Aalok Kumar,
Advocates for R-1.
Mr. Ankit Raj, Mr. Akash Chandrayan, Mr. Ali
Mohammed Khan, Advocates for R-2.**

J U D G E M E N T

(27.11.2024)

NARESH SALECHA, MEMBER (TECHNICAL)

1. The present Appeal has been filed by Mr. Prabhat Jain, Liquidator of M/s Narmada Cereal Pvt. Ltd. (the Corporate Debtor under liquidation) under 61(1) of the Insolvency & Bankruptcy Code, 2016 (in short ‘**Code**’) against the Impugned Order dated 28.04.2023 passed by National Company Law Tribunal, New Delhi Bench (in short ‘**Adjudicating Authority**’) in IA No. 1208/2023 in CP. (IB) No. 138/ND/2020, whereby the Adjudicating Authority rejected the plea of the Appellant to allow the Appellant to sub-lease the factory of the Corporate Debtor to M/s Maa Yashoda Food Grains. Aggrieved by the same, the Appellant has filed the present appeal.

2. MP Industrial Development Corporation Limited (“MPIDCL”) is the statutory authority of Government of MP who had given the said land on lease to the Corporate Debtor and the Respondent No. 1 herein.

Punjab National Bank (“PNB”) is the Sole Financial Creditor of the Corporate Debtor who is the Respondent No. 2 herein.

Mr. Arun Mittal and Mr. Abhinav Mittal are the Ex-Directors of the Corporate Debtor who are Respondent No. 3 and Respondent No. 4 respectively.

3. Heard the Counsel for the Parties and perused the records made available including the cited judgements.

4. Corporate Insolvency Resolution Process (in short ‘**CIRP**’) against the Corporate Debtor was initiated by the Adjudicating Authority vide order dated 07.12.2020 and Mr. Arun Chadha was appointed as Interim Resolution Professional and subsequently the Committee of Creditor (in short ‘**CoC**’) recommended appointment of Mr. Vichitra Narayan Pathak of Resolution Professional who was confirmed by the Adjudicating Authority on 09.02.2021. Since, the resolution of the Corporate Debtor could not take place, the Resolution Professional filed an application under Section 33(2) of the Code for passing an order of liquidation of the Corporate Debtor as referred in Section 33(1) of the Code and the Adjudicating Authority passed the order for liquidation of the Corporate Debtor on 04.01.2022 and appointed Mr. Prabhat Jain, the Appellant herein, as the Liquidator of the Corporate Debtor.

5. We note that the Ex-Directors challenged the liquidation order dated 04.01.2022 before this Appellate Tribunal, however, this Appellate Tribunal

dismissed the appeal vide order dated 18.02.2022 permitting them to participate in the liquidation process in accordance with the law.

6. The Appellant submitted that the Corporate Debtor was under operation during the CIRP period as well as during liquidation period and hence the Appellant approached the Adjudicating Authority seeking permission to sale the Corporate Debtor as a going concern under Regulation 32A of the IBBI (Liquidation Process) Regulation, 2016 and the Adjudicating Authority granted the said permission vide order dated 23.02.2022. The several round of e-auction were tried, however, there no success could be achieved to sale the Corporate Debtor as a going concern. In the meanwhile, the Appellant received scheme of compromise/ arrangement under Section 230 of the Companies Act, 2013 from Respondent No. 3 (Ex -Director of the Corporate Debtor) which was not approved by the Sole Financial Creditor/ PNB i.e., Respondent No. 2 herein.

7. It is the case of the Appellant that he filed a fresh application bearing IA 4379 of 2022 seeking direction to proceed for sale of the Corporate Debtor as a going concern as per earlier direction of the Adjudicating Authority dated 20.02.2022 and the same is pending before the Adjudicating Authority. Although, it has not been made clear that once the Adjudicating Authority has already given permission vide order dated 23.02.2022 to sale the Corporate Debtor as a going concern, what was the need for the Appellant to approach the

Adjudicating Authority again for permission to sale the Corporate Debtor as a going concern.

8. The Appellant submitted that Muskaan Overseas who was doing job work for the Corporate Debtor during the CIRP period suddenly left in mid September, 2022 leading the Corporate Debtor to bear running expenses like electricity bills which are approximately of Rs. 6 Lakhs per month. It is the claim of the Appellant that in order to reduce the expenses, with the knowledge of the Respondent No. 2, the Appellant leased out the plant and machinery / rice mill for a period of 11 months the M/s Maa Yashodha Food Grains on monthly rental of Rs. 5 Lakhs per month conditions that day to day expenses including electricality would be borne by the lessee i.e., M/s Maa Yashodha Food Grains. The Appellant justified this action to keep the Corporate Debtor as a going concern with reduced expenses and to continue employment to the labours etc.

9. The Appellant informed that he got show-cause notice dated 07.02.2023, and dated 22.02.2023 from the Respondent No. 1 threatening the Appellant to close down the unit forcibly on 24.02.2023. The Appellant submitted that the notice of the Respondent No. 1 contained reference to clause 23 of the Lease Deeds dated 18.06.2009 which allows a period of 60 days to remedy the breach, whereas the Respondent No. 1 gave only 15 days period to remedy the breach which was a violation of Lease Agreement. The Appellant stated that he however replied the Respondent No. 1 notice dated 07.02.2023 and 22.02.2023

vide Appellant's reply dated 25.02.2023 requesting for personal hearing which was not allowed by the Respondent No. 1.

10. The Appellant stated that he filed an IA. No. 1208 of 2023 before the Adjudicating Authority seeking the interim prayers and the main prayers regarding continuation of temporary Sub Lease Agreement entered into with M/s Maa Yashodha Food Grains, however, the Adjudicating Authority vide Impugned Order dated 28.04.2023 dismissed the application filed by the Appellant and held that there has been breach of terms and conditions of lease by the Appellant. The Appellant also stated that the Adjudicating Authority also gave direction to the Respondent No. 1 to refund the lease amount by invoking Clause 12 of the Lease Deed dated 18.06.2009 and gave the right to the Respondent No. 1 to re-entry over the leased premises of the Corporate Debtor.

11. The Appellant submitted that the Adjudicating Authority failed to appreciate that permission of the Respondent No. 1 was not required according to Clause 22 of the MP State Industrial Land and Building Rules, 2019 which describes situation for permission of sub-lease of plots which is not the case here as according to the Appellant the present sub-lease is given to M/s Maa Yashodha Food Grains only to run the factory for temporary period of 11 month. The Appellant further elaborated that he only gave the plant and machinery on sub-lease and not land and building to M/s Maa Yashodha Food

Grains and thus the Corporate Debtor has not violated Section 22 of the MP State Industrial Land and Building Rules, 2019 .

12. The Appellant also stated that the Adjudicating Authority failed to appreciate that the action was done only in good faith with the knowledge of sole financial Creditor / PNB/ Respondent No. 2, where sub-lease was granted to M/s Maa Yashodha Food Grains for 11 months with a condition that sub-lease will be terminated once order of the Adjudicating Authority is passed either allowing compromise submitted by the Ex- Promoters of the Corporate Debtor under Section 230 of the Companies Act, 2013 or rejecting the same.

13. The Appellant also cited that the judgement passed by the Hon'ble Supreme Court of India in the matter of ***Municipal Corporate of Greater Mumbai vs. Abhilash Lal*** [(2020) 13 SCC 234] to support his case, that the Respondent No. 1 could not have taken such action.

14. The Appellant assailed the Adjudicating Authority who allegedly failed to consider that Section 35 of the Code defined Powers and Duties of the Liquidator and further as per Section 35(1)(d) of the Code, the Liquidator is required to take such measures to protect and preserve the assets and properties of the Corporate Debtor as he considers necessary. The Appellant also stated that Regulation 32A of the IBBI (Liquidation Process) Regulations, 2016 also prescribed that where the committee of creditors has recommended sale under clause (e) (sale of Corporate Debtor as going concern) or clause (f) (sale of the

business of the Corporate Debtor as going concern) of regulation 32 or where the liquidator is of the opinion that the sale under clause (e) or (f) shall maximise the value of Corporate Debtor, he shall endeavour to first sell under the said clauses. The Appellant stated that it is the responsibility of the Liquidator to keep the Corporate Debtor as a going concern to preserve the assets of the Corporate Debtor because only a running unit can maximise the value of the assets. The Appellant emphasised that the objective of Code is to maximise the value of assets of Corporate Debtor and the Hon'ble Supreme Court of India and this Appellate Tribunal has held this position in several cases directing the Resolution Professional/Liquidator to keep the Corporate Debtor as a going concern.

15. The Appellant assailed the Impugned Order which wrongly gave rights to the Respondent No. 1 for re-entering in the premises of the Corporate Debtor after paying back the lease charges.

16. The Appellant also assailed the Impugned Order for mis-interrupting Clause 12 of Lease Deed which was meant only to prevent unauthorised sub-lease, assign or otherwise transfer the said land or any part thereof, which is not the present case where the Appellant only gave temporary lease for 11 months to M/s Maa Yashodha Food Grains to keep the Corporate Debtor as a going concern.

17. The Appellant cited the judgment passed by the Hon'ble Supreme Court of India in the matter of ***Sundresh Bhatt, Liquidator of ABG Shipyard vs. Central Board of Indirect Tax and Custom*** in *Civil Appeal No. 7667 of 2021* decided on 26.08.2022 which held that Section 33(5) bars suit or other legal proceeding against the Corporate Debtor. The Appellant stated that the illegal action of the Respondent is covered under legal proceeding against the Corporate Debtor and thus, the action taken by the Respondent No. 1 was illegal and wrong.

18. Concluding his arguments, the Appellant pleaded that the Impugned Order passed by the Adjudicating Authority deserves to be set aside and also requested this Appellate Tribunal to declare that all action taken by the Appellant as valid since there was no violation of terms of Lease Deed executed between the Corporate Debtor and Respondent No. 1.

19. Per contra, the Respondent No. 1 denied all the allegations of the Appellants labelling these as mischievous and misleading.

20. The Respondent No. 1 submitted that the Answering Respondent is a public body which has been incorporated by the Government of Madhya Pradesh in order to facilitate private investment in the industrial sector, inter alia, by establishing and leasing out industrial areas in various districts of the State and by formulating and enforcing regulations for the management of the said areas.

21. It is the case of the Respondent No. 1 that he had also preferred one Cross-Appeal against the same Impugned Order dated 28.04.2023 to the limited extent that vide the said order, the Adjudicating Authority directed the Answering Respondent to refund the land premium paid by the Corporate Debtor at the time of the execution of Lease Deeds dated 18.06.2009 and 16.05.2007. The Respondent No. 1 is aggrieved only on the finding of the Adjudicating Authority in the Impugned Order that the Corporate Debtor although, had breached the said lease deeds but the Respondent No. 1 should refund the lease charged and re-enter the premises.

22. We note that the Appeal filed by the Respondent No. 1 bearing Company Appeal (AT) (Ins.) No. 937 of 2023 was dismissed, for non prosecution vide our order dated 29.08.2024 which has been again submitted by the Respondent No. 1 vide Restoration Application No. 45 of 2024 for recall of our order dated 29.08.2024 and the same is pending decision by this Appellate Tribunal.

23. The Respondent No. 1 submitted that the Appellant violated the terms of the Lease Deeds dated 16.05.2007 and 18.06.2009 and the M.P. State Industrial Land and Building Management Rules by creating sub-lease in favour of M/s. Maa Yashoda Food Grains dated 04.11.2022. The Respondent No. 1 stated that he had leased to the Corporate Debtor Plot Nos. D-2 and D-3 in the Mandideep Industrial Area Phase-II vide Lease Deeds 16.05.2007 and 18.06.2009. As noted in the Impugned Order, each of the aforesaid lease deeds contained a clause that

a sub-lease can be granted by the Corporate Debtor only after obtaining the sanction of the Respondent No. 1 as per Clause 12 of each Lease Deed. The Respondent No. 1 submitted that the aforesaid plots have been sub-leased by the Appellant to M/s. Maa Yashoda Food Grains vide sub-lease dated 04.11.2022 which legally belonged to the Respondent No. 1 and can be further sub-leased of only in accordance with the relevant M.P. State Rules and the stipulations contained in the Lease Deeds. The Respondent No. 1 stated that the M.P. State Industrial Land and Building Management Rules, 2019 lay down that a sub-lease can be created on the Respondent No. 1 land only with prior permission of the Respondent No. 1.

24. The Respondent No. 1 submitted that Appendix-E of the 2019 Rules lays down in detail the conditions that need to be satisfied and the procedure that needs to be followed before the grant of sub-lease by a lessee of the Respondent No. 1 and further a separate draft Tripartite Agreement has also been published by the Respondent No. 1, and all sub-leases on the Respondent No. 1 industrial areas conform to this standard. The Respondent No. 1 stated that the 2019 Rules clearly contemplate that a sub-lease can be granted only after obtaining prior permission from the Respondent No. 1 and on the fulfilment of certain conditions and procedure.

25. The Respondent No. 1 emphasised that the Clause 12 of the Lease Deeds dated 16.05.2007 and 18.06.2009, similarly stipulate that a sub-lease may be

granted over the aforesaid two plots only after obtaining the prior written consent of the Respondent No. 1

26. The Respondent No. 1 submitted that the Adjudicating Authority correctly held that the execution of the sub-lease by the Appellant without having sought the requisite sanction from the Respondent No. 1 tantamounted to a breach of the Lease Deeds and entitles the Respondent No. 1 to terminate the said deeds as the Appellant failed to obtain prior permission not just from the Respondent No. 1 but also from the Adjudicating Authority. The Respondent No. 1 submitted that the communication relied on by the Appellant (Annexure A-7 of the captioned Appeal) does not disclose that the Appellant had sought the opinion any other stakeholder as specified in Regulation 31 of the IBBI (Liquidation Process) Regulations, 2016 about the necessity of granting a sub-lease.

27. The Respondent No. 1 stated that his right as well as duty to regulate public lands in accordance with its laws are not overridden by the provisions of the Code and negated the Appellant's claim that the aforesaid M.P. Rules do not apply because of Section 238 of the Code. The Respondent No. 1 submitted that such understanding of the Appellant is erroneous since, there is no inconsistency between the M.P. Rules and the Code. The Respondent No. 1 highlighted that this is evident from the fact that the power contained in Section 35(1)(d) of the Code relied by the Appellant i.e., to take such measures to

protect and preserve the assets and properties of the corporate debtor as he considers necessary, applies only to the assets owned by the Corporate Debtor and not to the assets that belong to a third party like the Respondent No. 1 herein. The Respondent No. 1 emphasized that Section 35(1)(d) of the Code has no application to the aforesaid two plots, which are properties of the Respondent No. 1 and over which the Corporate Debtor had no more than leasehold rights. The Respondent No. 1 highlighted that the Explanation to Section 18, which lays down the duties of an IRP, excludes from the meaning of the term assets "assets owned by a third party in possession of the corporate debtor held under trust or contractual arrangements including bailment". The Respondent No. 1 submitted that the meaning ascribed to "assets" for the purposes of Section 18 of the Code supports an interpretation of Section 35(1)(d) of the Code that does not extend the power of the Liquidator under the said Section to such assets that are in possession of the Corporate Debtor under a lease or other contractual arrangement but not owned by it.

28. The Respondent No. 1 objected to the Appellant's contention that creating the sub-lease dated 04.11.2022 in favour of M/s. Maa Yashoda Food Grains was essential to maintaining the Corporate Debtor as a going concern and maximising its value as misleading in as much as, as per the documents relied on by the Appellant itself, the factory was un-operational during April, May,

July, October and November 2022, which was subsequent to the appointment of the Appellant as the Liquidator of the Corporate Debtor.

29. The Respondent No. 1 also castigated the Appellant who allowed Muskaan Overseas to occupy the premises and operate the plant/machinery of the Corporate Debtor till September 2022. The Respondent No. 1 stated that the purported ledgers of the Muskaan Overseas in respect of the plant in question shows operations only till 15th February, 2022, which refutes the claims of the Appellant. The Respondent No. 1 submitted that had the engagement of a third party to carry out business operations at the unit been as vital as is sought to be portrayed by the Appellant, it would have been immediately pursued by the Appellant upon his appointment as Liquidator of the Corporate Debtor.

30. The Respondent No. 1 highlighted nexus between the Appellant and the Respondent No. 3 as seen from the GST Returns annexed by the Appellant at Annexure-8 of Appeal which clearly show that the factory remained in the possession of the suspended management as evident from the fact that the returns were verified by Arun Mittal, Respondent No. 3 in the present Appeal, in the capacity of Director. The Respondent No. 1 stated that the Appellant acted in a manner having the effect of defeating the provisions of the Code by allowing the suspended management to exercise control over the Corporate Debtor even subsequent to the passing of an order of Liquidation.

31. The Respondent No. 1 further submitted that there is no bar on routine maintenance activity being undertaken by or at the instance of the Liquidator i.e., the Appellant herein in order to preserve the value of the plant and the Respondent No. 1 has throughout cooperated with the Appellant in undertaking routine maintenance activity of the buildings/plant constructed on the aforesaid plots of land. The Respondent No. 1 elaborated this point by stating that the Appellant had filed an application for release of raw material (paddy) and processed rice lying at the factory premises vide LA. No. 1779 of 2023 as accorded by Adjudicating Authority vide Order dated 31.03.2023, where the Respondent No. 1 had not taken any objections to removal of the raw material and processed rice, and the Respondent No. 1 had further facilitated the authorised representative of the Appellant in carrying out the said work.

32. The Respondent No. 1 submitted that the decision of the Appellant on 12.04.2023, as stated in para (aa) of the Appeal, to terminate the sub-lease dated 04.11.2022 in favour of M/s. Maa Yashoda Food Grains renders the main prayer in the Appeal infructuous in as much as the Appellant has sought a direction from this Appellate Tribunal that it be allowed to run the factory/plant through third party under a sub-lease agreement with M/s. Maa Yashoda Food. Grains.

33. The Respondent No 1 submitted that the Appellant's actions clearly demonstrate its intention not to comply with the terms of the Lease Deeds and the relevant M.P. Rules. The Appellant acted in violation of the said provisions

by suppressing the fact that Muskaan Overseas had earlier been allowed by the Appellant to possess and operate the premises. The Respondent No. 1 further submitted that if the Appellant is allowed to repossess the property, there is every possibility that it will create third-party interest in the property in a manner contrary to the applicable provisions and will work for benefit of Ex-management-cum-Promoters of the Corporate Debtor rather than for creditors of the Corporate Debtor.

34. The Respondent No 1 submitted that the Appellant's contention that the show-cause notices dated 07.02.2022 and 22.02.2022 amount to a "legal proceeding" and were therefore hit by Section 33(5) was not pleaded in the Application filed before the Adjudicating Authority and is a mere afterthought.

35. The Respondent No. 1 submitted that an indication of what constitutes "other legal proceeding" is provided by the view taken by courts while interpreting Section 446(1) of the Companies Act, 1956, which stated that "no suit or other legal proceeding" could be commenced against a company under liquidation without obtaining the leave of the company court. (A provision analogous to Section 446 is contained in Section 279 of the Companies Act, 2013). The Respondent No. 1 cited the judgment in the matter of **S. V. Kandeakar vs. V.M. Deshpande**, [(1972) 1 SCC 438], where a five-judge bench of the Hon'ble Supreme Court held that assessment and re-assessment proceedings initiated under the Income Tax Act, 1961 did not qualify as "other

legal proceeding" and consequently, the leave of the company court was not required for initiating such administrative action. The Respondent No. 1 stated that notices issued by him to the Corporate Debtor also fully in this nature, hence there is no violation of Section 33(5) of the Code.

36. The Respondent No. 1 also cited the judgement in the matter of ***Nirmala Bafna vs. Khandesh Spinning and Weaving***, [(1992) 2 SCC 322], where the Hon'ble Supreme Court of India laid down, in the context of Section 446 of the Companies Act, 1956, the principle that "merely because a company goes in to liquidation and a liquidator/official liquidator is appointed, the rights of the company vis-a-vis its landlord and/or its tenants do not undergo any change." The Respondent No. 1 submitted that this principle squarely applies to the present case, and the Liquidator of a Corporate Debtor is not entitled to act in violation of the terms and conditions of a lease to which the Corporate Debtor is a party.

37. The Respondent No. 1 denied that the Corporate Debtor was under operation during the period of CIRP as well as liquidation and submitted that Rice Processing Unit remained non-operational during the entire period Corporate Debtor underwent CIRP and even after the liquidation order was passed by the Adjudicating Authority. The Respondent No. 1 mentioned that as per information made available to him, since the initiation till the execution of the sub-lease dated 04.11.2022, i.e., approx. for 24 months the Corporate Debtor

remained non operational and even the Appellant hasn't raised this contention before the Adjudicating Authority.

38. The Respondent No. 1 stated that if the engagement of a third party to carry out business operations at the Rice Processing unit had been as vital as is sought to be portrayed in the Appeal by the Appellant, it would have been pursued by the Resolution professional upon whom Section 25(1) of the Code casts the duty to "preserve and protect the assets of the corporate debtor", or indeed by the Liquidator during the first 11 months of his tenure, or have been directed by the CoC during CIRP. The Respondent No. 1 submitted that the contention of the Appellant that the Unit was operational throughout the period of the CIRP is not substantial and baseless and the same has been observed by the Adjudicating Authority.

39. The Respondent No. 1 submitted that the Appellant claims that the sub-lease is given on a temporary basis on the condition that the lease will be terminated immediately after the compromise between the Corporate Debtor and Promoters is a clear violation of Clause 12 of the lease deed dated 18.06.2009. and M.P. State Industrial land and Management Rules, 2019., as there was no such provision mentioned in the lease deed and any rules which provide for the disposal of land without the prior permission of the Respondent No. 1.

40. Concluding arguments, the Respondent No. 1 requested this Appellate Tribunal to dismiss the Appeal with an exemplary cost.

41. The Respondent No. 2 also gave his view points and submitted that he as the sole secured financial creditor (PNB) and he was not a party before the Adjudicating Authority in the present proceedings as the Appellant was contesting the alleged violation before the Adjudicating Authority representing the Corporate Debtor for securing assets.

42. The Respondent No. 2 submitted that he (PNB) is a Public Sector Bank and the sole Financial Creditor to the Corporate Debtor and the CIRP against the Corporate Debtor was initiated vide order dated 07.12.2020 by the Adjudicating Authority, however due to unsuccessful resolution of the Corporate Debtor, the liquidation order was passed against the Corporate Debtor vide order dated 04.01.2020 appointing the Appellant as the Liquidator of the Corporate Debtor.

43. The Respondent No. 2 also stated that vide order dated 23.02.2022, the Adjudicating Authority granted permission to the Appellant to sale Corporate Debtor as a going concern however, the E- auction notice i.e., on 08.03.2023 and 21.03.2023 inviting bidders to participate in tender process but no bidder participated.

44. The Respondent No. 2 stated that the Appellant received a proposal from one of the suspended directors under Section 230 of the Companies Act, 2013 which was declined by the Respondent No. 2.

45. The Respondent No. 2 submitted that the issue of sub-lease of the said plant and machinery/ Rice Mill of the Corporate Debtor was intimated to the

Respondent No. 2 which was not disapproved as the said proposal was conveyed to him over email only and w.r.t. to management of assets of the Corporate Debtor and the Appellant bring the current authority to deal with such issues, the Respondent No. 2 as Financial Creditor decided that he had nothing to do with it and therefore did not object to sub-leasing.

Findings

46. Since, clauses 12 of lease Deed has been quoted by the parties in support of their arguments it will be worthwhile to look into this clauses 12 of Lease Deed which reads as under :-

“12-”The Lessee agrees it shall not sub-let, assign or otherwise transfer the said land or any part thereof or any building constructed thereon for any purpose whatsoever except as provided in Rule 20 of MP Allotment of Shed Plot and Land Rule 1974 without previous sanction in writing of the lessor or any other officer authorized by him.”

(Emphasis Supplied)

47. This makes very clear that the Appellant could not have sub-leased the land or premises without specific approval of the Respondent No. 1. We also observe that the Clause 12 also use the word “any building constructed thereon”. We recall pleadings of the Appellant that the Appellant did not sub lease land and only gave lease of plant and machinery etc. We wonder, if the building is not part of such agreement between the Corporate Debtor and M/s. Maa Yashoda Food Grains how and where these plant and machinery would have

been housed and how these would have been operated. Hence, we are unable to accept contention of the Appellant that no permission of the Respondent No. 1 was required.

48. At this stage, we would also like to take into account the relevant part of the Rule 22 of the MP State Industrial Land and Building Management Rule, 2019 which reads as under :-

“22. Permission for sub-lease of plots:

Insofar the undeveloped land are concerned, the Managing Director of MPIDC, and insofar as developed lands are concerned, the Executive Director of MPIDC shall be entitled, on the basis of evaluation, to grant permission for all types of units.

....

For the purpose, a tripartite agreement is to be executed between the principal lessee, the lessor and the sub-lessee. The standard terms of sub- lease are provided at Appendix-E of the Rules".

(Emphasis Supplied)

This rule also amplify that necessary permission is needed and further even tripartite agreement also required. This also does not support cause of the Appellant.

49. We note that the Appellant has referred to the judgment of the Hon’ble Supreme Court of India in the matter of ***Sundresh Bhatt (Supra)*** in support of his argument that no legal proceedings could have been initiated against the

Corporate Debtor. It is further the case of the Appellant that action of the Respondent is covered under other legal proceeding against the Corporate Debtor and hence not maintainable in view of statutory bar under Section 33 (5) of Code, 2016. The relevant portion of the judgment reads as under :-

“42. We are of the clear opinion that the demand notices to seek enforcement of custom dues during the moratorium period would clearly violate the provisions of Sections 14 or 33(5) of the IBC, as the case may be. This is because the demand notices are an initiation of legal proceedings against the Corporate Debtor. However, the above analysis would not be complete unless this Court examines the extent of powers which the respondent authority can exercise during the moratorium period under the IBC.

46. There is another aspect of this case that needs to be highlighted to portray the inconsistency of the Customs Act vis-à-vis the IBC during the moratorium period. In the present case, the demand notice dated 11.07.2019 was issued by the respondent under Section 72 of the Customs Act, in clear breach of the moratorium imposed under Section 33(5) of the IBC Issuing a notice under Section 72 of the Customs Act for non-payment of customs duty falls squarely within the ambit of initiating legal proceedings against a Corporate Debtor. Even under the liquidation process, the liquidator is given the responsibility to secure assets and goods of the Corporate Debtor under Section 35(1)(b) of IBC.

54. *On the basis of the above discussions, following are our conclusions:*

i) Once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be, the respondent authority only has a limited jurisdiction assess/determine the quantum of customs duty and other levies. The respondent authority does not have the power to initiate recovery of dues by means of sale/confiscation, as provided under the Customs Act. ...”

(Emphasis Supplied)

50. We find that the facts of the ***Sundresh Bhatt (Supra)*** were entirely different and were related to custom duty payments by the Corporate Debtor and right of the custom authorities to initiate recovery action. In context with the facts in the present case, there is no such action involved and rather it is the violation by the Appellant himself regarding Lease Deed entered with Respondent No. 2 which led to issue of notices by the Respondent No. 2 which cannot be termed as legal proceedings against the Corporate Debtor. Hence, the contentions of the Appellant does not appeal to us.

51. We note that in fact the Respondent No. 2, as banker, has taken stand that as Financial Creditor his role is limited matters of operation of the Corporate Debtor which is role of the Appellant as Liquidator. In fact, we find that the Respondent No. 2 has indirectly supported the cause of the Appellant in so much so it cut the cost on the part of the Corporate Debtor. However, we are

not clear as why single member CoC/ Financial Creditor/ PNB/ Respondent No. 2, did not question legal requirements needing the consent of the Respondent No. 1 for sub-leasing by the Appellant, which admittedly not taken by the Appellant from the Respondent No. 1.

52. At this stage, we would like to go in detail the rational of the Adjudicating Authority as contained in the Impugned Order while rejecting the application of the Appellant. The relevant paras of the said Impugned Order dated 28.04.2023 reads as under :-

“7. Analysis and Findings

....

ii. It is the contention of the Liquidator that in order to run the company as a going concern, the Liquidator has entered into a sub-lease with the partnership firm called “M/s Maa Yashoda Food Grains” vide Lease Deed dated 04.11.2022 (the term of the sub-lease is to run from 01.12.2022 to 31.10.2023), which according to the Respondent is not in conformity with the Clause 12 of the lease deed dated 18.06.2009....

It is clear from the records that the Liquidator/Applicant did not obtain the prior permission of the MP Industrial Development Corporation Limited (lessor) for granting sub-lease to the partnership firm called M/s Maa Yashoda Food Grains vide Lease Deed dated 04.11.2022. Hence, the sub-lease falls outside the purview of the lease deed dated 18.06.2009 executed between the Corporate Debtor and

Respondent. Moreover, the Applicant has placed nothing on record to suggest that it sought the opinion of either the sole financial creditor, namely Punjab National Bank, or any other stakeholder as specified in Regulation 31 of the IBBI (Liquidation Process) Regulations, 2016 about the necessity of granting a sub-lease.

iii. Further, the M.P. State Industrial Land and Building Management Rules, 2019 lay down that a sub-lease can be created on the Respondent's land only with the prior permission of the concerned authority

....

"47. In the opinion of this court, Section 238 cannot be read as overriding the MCGM's right-indeed its public duty-to control and regulate how its properties are to be dealt with.

.....

We are in agreement with the submissions made by the Ld. Counsel for the Respondent in view of the law as laid down by the Hon'ble Supreme Court in Municipal Corporation of Greater Mumbai (supra) regarding the ability of a public body to regulate its lands in accordance with relevant statutory provisions.

vi. We have also noticed that Clause 24 of the lease deed dated 18.06.2009 takes care of a situation that on the re-entry of the lessor, the lessee is entitled to the refund by the lessor of the amount paid at the time of execution of the lease deed. The conduct of the Respondent being a lessor is well within the ambit of the lease deed as Clause 24 clearly provides for the right of reentry over the land/premise.

....

We come to the finding that there is a breach of the terms and conditions of the lease deed by the liquidator. Hence, we feel it appropriate in the facts and circumstances of the present case to pass a direction to the Respondent to refund the lease amount.

Therefore, we are inclined to dismiss this application.

vii. Since the Corporate Debtor had taken the lease of property bearing Plot Nos. D-2 and D-3 on 99-years for the running of the rice mill unit and undoubtedly paid the lease amount. Therefore, the lease amount should be refunded to the Corporate Debtor, which will help the Liquidator to complete the process of Liquidation in accordance with the law. The Respondent is directed to refund the money within 15 days from the pronouncement of this order to the Liquidator and further inform the bench accordingly by filing the additional document in the form of an affidavit.

viii. From the above analysis, we come to the finding that the Respondent is justified in the action of the right of re-entry over the land/premise, if any condition is breached by the Corporate Debtor/lessee and the sub-letting of the land/premise without prior permission of the Respondent is considered as the breach of the terms and conditions of the lease deed.

Hence, this **application is dismissed**, in view of the above terms.

No order as to costs.”

(Emphasis Supplied)

53. We find that the Adjudicating Authority has given detailed reasoning, after full analysis and examining the Lease Deed, MP Rules, cited judgments of the Hon'ble Supreme Court of India and the provision of the Code, while rejecting the application of the Appellant. We do not find any fault in the Impugned Order or any violation of the Code or regulations which can be found in the Impugned Order. Therefore, we support the Impugned Order and do not accept the pleadings of the Appellant made before us in the present appeal.

54. We are observed that the Section 35(1)(d) of the Code does not entitles a Liquidator to grant sub-leases over properties not owned by the Corporate Debtor and therefore Section 238 of the Code cannot be interpreted in a manner that has the effect of overriding the Respondent No. 1 duty to enforce the relevant Rules on how public lands are to be regulated. We have already noted earlier that this is supported by a three-judge bench decision of the Hon'ble Supreme Court in Municipal Corporation of Greater Mumbai vs. Abhilash La/, (2020) 13 SCC 234, wherein the Hon'ble Supreme Court of India was confronted with the question of whether, Section 238 of the Code would override the ability of a public body to regulate its lands in accordance with relevant statutory provisions. In answering this question in the negative, the Hon'ble Supreme Court of India held:

*"47. In the opinion of this court, Section 238 cannot be read
as overriding the MCGM's right-indeed its public duty-to*

control and regulate how its properties are to be dealt with. That exists in Sections 92 and 92A of the MMC Act. This court is of opinion that Section 238 could be of importance when the properties and assets are of a debtor and not when a third party like the MCGM is involved. Therefore, in the absence of approval in terms of Section 92 and 92A of the MMC Act, the adjudicating authority could not have overridden MCGM's objections and enabled the creation of a fresh interest in respect of its properties and lands.”

(Emphasis Supplied)

55. We find this judgment clearly negates the contention of the Appellant, that Section 238 of the Code override the provisions of the M.P. State Industrial Land and Building Management Rules, 2019. We note that the Hon'ble Supreme Court of India has categorically held that the statutory powers of a public body to regulate public lands cannot be overridden by provisions of the Code. Therefore, we find that the Appellant did not has right to create sub-leases over a third party's land. We also note that this judgement has been followed by this Appellate Tribunal in ***New Okhla Industrial Development Authority vs. Abhishek Anand, Liquidator of Mega Soft Infrastructure Pvt. Ltd.***, Company Appeal (AT) (Ins.) No. 998 of 2021 and ***Maharashtra Industrial Development Corporation vs. Santanu T Ray***, Company Appeal (AT) (Ins.) No. 1004 of 2021 etc., and therefore, we are duty bound to follow the same.

56. In view of above detailed analysis we hold that action of the Appellant to sub-lease to M/s Maa Yashoda Food Grains, without specific permission of the Respondent No. 1 was incorrect and illegal as correctly held by the Adjudicating Authority in the Impugned Order.

57. In fine the appeal, devoid of any merit, fails and stands dismissed. No costs. IA, if any, are closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

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