(2020) 03 NCLT CK 0008

In the National Company Law Tribunal

Case No : Miscellaneous ApplicationNo. 3031 Of 2019 In Company Petition No. (IB) 3603/(MB) Of 2018

Mahesh Sureka APPELLANT

Vs

Marathe Hospitality RESPONDENT

Date of Decision : 20-03-2020

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 6(a), 7, 43, 44, 46, 238
Transfer Of Property Act, 1882 — Section 65A(2)(c)
Insolvency And Bankruptcy (Application to Adjudicating Authority) Rules, 2016 — Rule 4

Citation : (2020) 03 NCLT CK 0008

Hon'ble Judges : Suchitra Kanuparthi, J;Chandra Bhan Singh, Member (Technical)

Bench : Division Bench

Final Decision : Allowed

Judgement

Chandra Bhan Singh, Member (Technical)

1.The Applicant is the IRP in C.P.(IB)3603/MB/2018 which was â??Admittedâ?? under CIRP on 14.03.2018. This Petition was filed by M/s. Union

Bank of India (UBI) in the capacity of Financial Creditor by invoking the provisions of Section 7 of IBC read with Rule 4 of Insolvency and

Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the Corporate Debtor M/s. Phadnis Resorts & Spa India Limited (PR&SIL).

2. The relief sought by the IRP in MA 3031/2019, inter alia, is for the following:â?

A. Necessary direction shall be provided allowing the applicant to take possession of fixed assets and all documents a vailable in the office and other

premises of the Corporate debtor.

B. The instructions pertaining to carry out the necessary actions by the resolution professional shall be provided to the Economic offences Wing.

C. The past directors of the Corporate Debtor should be directed to assist in the present proceedings.

D. Public announcement in newspaper shall be allowed to be issued for appearance of the Directors before this Honâ??ble Bench.

E. The Jailor of Nashik Jail shall be directed to allow meetings with the Director Mr. Vinay Phadnis for obtaining necessary information from him.

F. The Economic Offices Wing shall be directed to release the attachment carried out in the property of the Corporate Debtor situated at Lonavala,

Tungarli as it has not been done in name of Corporate Debtor but done in the name of Mr. Balvant Arvind Marathe of Marathe Hospitability.

G. The lease agreement entered in between Corporate Debtor and Marathe hospitability shall be declared as cancelled as it was entered into in a

malafide manner and without consent of the Union Bank of India who are having first charge on the property and is against the interest of the

Creditors of the Corporate Debtor.â??

3. Submissions by the IRP/ RP:

3.1.1. The Corporate Debtor was carrying out business of running resorts and one of the properties is based at Lonavala. The resort situated at

Lonavala has been mortgaged to Union Bank of India (UBI) in 2015 for availing the loan from the Bank. A copy of the Mortgage Deed has been

attached by the IRP/ RP in his Application. After mortgaging the property to UBI, the Directors of the Corporate Debtor without taking any consent

from UBI, provided this property on lease on a long-term basis at a very small amount to Marathe Hospitality vide lease deed dated 18.05.2016.

3.1.2. The IRP/ RP, through his Associate, had tried to contact the Directors of the Corporate Debtor at the registered office address and the

residence address. However, it was closed and even after all possible enquiries no contact could be established. The Applicant visited the Partners of

Marathe Hospitality, Mr. Anup Naik, who as per the IRP/ RP, is the Tax Advisor to the Corporate Debtor. Mr. Naik informed the Applicant that he is

not in possession of any paper/ document as the registered office of the Corporate Debtor is under attachment by Government authorities.

3.1.3. Subsequently based on information, the CoC and the IRP/ RP came to know that one of the Directors of the Corporate Debtor i.e. Mr. Vinay

Phadnis is under Judicial custody at Nasik Central Jail and, therefore, information was sent to him regarding all the developments of the CIRP through

the Jailor of Nasik Central Jail. It was requested by the CoC to Shri Vijay Phadnis to furnish details of all other directors who can help in providing all

necessary details.

3.1.4. The Economic Offences Wing (EOW) has attached several of the properties of the Corporate Debtor which includes the registered office of

the Corporate Debtor. The IRP mentions that due to attachment of the registered office of the Corporate Debtor and unavailability of Directors and

other staff members it has become impossible to prepare essential details of the assets and liabilities of the Corporate Debtorâ??s Company.

3.1.5. Economic Offences Wing has also attached the premises of the Lonavala Resort situated at Tungarli, Lonavala the attachment has been done

in name of Mr. Balwant Arvind Marathe though the property belongs to corporate debtor. Mr. Balwant Arvind Marathe is the partner of Marathe

Hospitability and donâ??t own this property situated at Lonavala of the Corporate Debtor.

3.1.6. The Applicant i.e. IRP/ RP mentions that Corporate Debtor has failed to take consent from UBI before the execution of lease deed in favour of

Marathe Hospitality. The said deed, therefore, has been executed without permission of UBI, who is having the first charge on the property. The deal,

therefore, as per the Applicant, has been executed in a fraudulent manner and may be cancelled.

3.1.7. The IRP/ RP also mentions that the lease rent of the premises at Lonavala has been fixed at only Rs.25,000 per month for a property which is

valued at about Rs.12 crore and Banks have provided finance of more than Rs.10 crore on the said property.

3.1.8. The IRP/ RP in the oral submission has mentioned that Shri Anup Naik is one of the partners in the Partnership firm M/s. Marathe Hospitality,

which runs the Phadnis Resorts and Spa India Limited. Shri Anup Naik, Partner of Marathe Hospitality, was also the Tax Adviser of the Corporate

Debtor and was associated with the Corporate Debtor. Therefore, as per the IRP/ RP, this transaction of giving the property owned by PR&SIL on

lease to Marathe Hospitality is a preferential and fraudulent transaction.

4. Submissions by the Respondent No.4, Mr. Anup Naik, for self and on behalf of

M/s. Marathe Hospitality (R5).

4.1. The Respondent mentions that the Corporate Debtor and R5 had entered into a Registered Lease Agreement on 18.05.2016 at a monthly lease

rental of Rs.25,000 for a period of 10 years with a right to renew the lease for further period of time.

4.2. The Respondent mentions that it was the duty of the Corporate Debtor before giving the said property on lease to seek prior permission of the

UBI. Therefore, the Respondent submits that for the wrong doings of the Corporate Debtor, the rights and privileges of Respondents should not be

prejudiced. The Respondent also mentions that since May 2017 UBI is in knowledge of existence of the said Agreement. However, the Respondent

also mentions that in May 2017 the Respondent had learnt that UBI is taking action against the Corporate Debtor under the provisions of SARFAESI.

4.3. The Respondent mentions that as per Section 46 of the Code, the relevant time for avoidance of under value transaction is one year prior to

commencement of the CIRP of the Corporate Debtor. Therefore, as per the Respondent, since the said Agreement was entered into on 18.05.2016,

therefore, is beyond one year from the CIRP commencement date, therefore, cannot be covered u/s.46 of the Code.

4.4. Regarding applicability of section 43 and 44 of the Code which provides for avoidance of preferential transaction, the Respondents submit that

since they are not a creditor of the Corporate Debtor before executing the said Agreement the provisions of section 43 and 44 of the Code will not

apply on them.

5. Findings:â?

5.1.1. The Lonavala Resort, situated at Tungarli in Lonavala, has been mortgaged by the Corporate Debtor to Union Bank of India since 30.06.2015.

Subsequently the Corporate Debtor has executed a long-term lease agreement in 2016 with Marathe Hospitality. The relevant portion of the Lease

Deed of 2016 signed between the parties is reproduced below:â?

â??1) In pursuance of the said Agreement and in consideration of the Rent hereby reserved and of the covenants, conditions and stipulations

hereinafter contained the Lessor hereby demises unto the Lessee the said premises bearing Sub Plot Nos. 1 & 2 out of Final Plot No.; 59 old S. No.

118/1/A/1/2, Corresponding CTS No. 28/59, total adm. about 2309.93 Sq.mtrs.

along with the two storeyed building structure and other structures in all

adm. 1834.84 Sq.mtrs. built up standing thereon, and along with garden area adm. 200 Sq.mtrs. and access road adm. 109 Sq.mtrs (more particularly

specified in Schedule I written hereunder) situated at Village Tungarli, Lonavala, within the limits of the Lonavala Municipal Council, Tal. Maval,

Dist.Pune and known as â??SAHIL SAROVAR PORTICOâ? (More particularly described in Schedule - I written hereunder) and together with

right for Lessee, itâ??s employees, servants, agents, customers and persons authorized by the Lessee and to use the said premises, to hold the said

premises unto the Lessee for the period of 10(Ten) years commencing from 09/05/2016 to 08/04/2026, with right to renew the lease for the further

period provided the Lessee paying the rent the Lesser during the said terms for Rs. 25,000/-for month before 10th of each calendar month.â??

Two things are clear from this: (i) The Lease rental for a period of 10 years was a paltry sum of Rs.25,000 per month payable by 10th of the

subsequent month and (ii) the lease can be renewed for a further period by the Lessee as per the said Agreement.

5.1.2. Shri Anup Naik is the Partner of Marathe Hospitality and also Tax Advisor to the Corporate Debtor, therefore, associated with the Corporate

Debtor. This is pointer to the fact that it is a case of preferential transaction. That it is also a fraudulent transaction is clear from the fact that after 10

years of lease rental @ Rs.25,000 per month with no annual increment in rent provision. It is only the prerogative of the Lessee for the extension of

the lease agreement. What is to be noted is that the Lessor, as per the agreement, does not have any say in the matter and it cannot object to any

extension after 10 years but has to accept the extension in case it is so proposed by the Lessor, i.e. Marathe Hospitality.

5.1.3. As per Section 65-A(2)(c) of the Transfer of Property Act, 1882 as amended from time to time, no lease shall contain a covenant for

â??renewalâ??. In the lease agreement of the Corporate Debtor, in a related party transaction with Marathe Hospitality, the total rent for a huge

Commercial property measuring about 2310 sq. mtr. along with two-storeyed building structure, is only Rs.25,000 per month with no increase in rental

for a period of 10 years. In addition, as per the Lease Agreement, there is a provision for further extension at the sweet will of Lessee. In view of this, the Lease Agreement entered into between Phadnis Resorts and Spa India Limited and Marathe Hospitality is illegal as per the relevant provisions of

the Transfer of Property Act, 1882.

5.1.4. A mortgage deed was executed on 30.06.2015 between Phadnis Resorts and Spa India Ltd., the Corporate Debtor and Union Bank of India,

the Financial Creditor, for a financial loan of Rs.10 crore extended by Union Bank of India. The Section 6(a) of the Mortgage Deed reads as

under:â?

â??a) So long as this mortgage shall be subsisting on the loan account, the Mortgagor shall not create, execute or concur in this creation or execution

of any other security or encumbrance of any kind over or affecting the mortgaged premises for any part thereof in favour of any person, firm or

company whatsoever or otherwise transfer the mortgaged premises or Said Property to transfer anywise, let or license its interest in the same or part

with the possession thereof save with the prior written permission of the Mortgagee and save to the extent and in the manner permitted hereby.â??

It is clear from the above that the lease agreement entered into between Corporate Debtor and Marathe Hospitality in 2016 without the consent of

Union Bank of India who are having First charge on the property is mala fide and is invalid.

5.1.5. It is also clear that the Union Bank of India, after going through all records and title report of the property, have financed the Corporate Debtor

and, therefore, the property which was acquired in 2004 has not been acquired by the Corporate Debtor fraudulently. The attachment of the assets of

the Corporate Debtor by the Economic Offences Wing will hamper the claim of the Creditors of the Corporate Debtor and therefore to protect the

interest of the Bank and the present Creditors, this Bench directs the Economic Offences Wing and other Government Departments to release the

property and assets of the Corporate Debtor currently attached with them so that the Corporate Insolvency Resolution Process of the Corporate

Debtor could be conducted in the substantial public interest.

5.1.6. Section 238 of the Code provides for non-obstante clause to the effect that â??Code shall have effect notwithstanding anything inconsistent

herewith contained in any other law for the time being in force for any instrument having effect by virtue of such lawâ?. The Honâ??ble Supreme

Court in the case of Solidaire India Ltd. Vs. Fairgrowth Financial Services Pvt. Ltd. has held that where two statutes contain non-obstante clause,

latest statute would prevail. Therefore, in terms of Section 238 of IBC and considering the overriding effect of IBC u/s 238 of the Code this Bench is

of the considered view that the attachment order of the Economic Offences Wing is a nullity and non-est in law and therefore will not have any

binding force.

6. In view of the above, this Bench directs the following:â?

a) The Resolution Professional who is the Applicant in this Miscellaneous Application to take possession of fixed assets and all documents available in

the office and other premises of the Corporate Debtor.

b) The Jailor of Nasik Jail to allow meetings of the Resolution Professional and his associates with the ex-director Mr. Vinay Phadnis for obtaining

necessary information about the Corporate Debtor Company and its activities.

c) The Economic Offences Wing to release the attachment carried out on the property of the Corporate Debtor, i.e. Phadnis Resorts & Spa India

Limited.

d) The lease agreement between Corporate Debtor and Marathe Hospitality situated at Village Tungarli, Lonavala is declared as null and void as it

has been entered in a mala fide manner without consent of Union Bank of India, the Financial Creditor in this case.

7. MA 3031/2019 is â??Allowedâ?? as ordered at para 6 above.

