
(2022) 11 NCLT CK 0019

In the National Company Law Tribunal

Case No : ?CA No. 15/2020, IA No. 553/2020 & CA No. 415/2019 in CP (IB)
No.15/Chd/Chd/2017

Mr. Haravtar Singh Arora, Erstwhile Promoter Of James Hotels **APPELLANT**

Vs

Navneet Gupta, Liquidator Of James Hotels **RESPONDENT**

Date of Decision : 04-11-2022

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 7, 18(f)(iv), 33(2), 36(3), 36(3)(d),
36(4), 36(4)(a)(iv), 42, 54, 60(5), 60(5)(c)
National Company Law Tribunal Rules, 2016 — Rule 11

Citation : (2022) 11 NCLT CK 0019

Hon'ble Judges : Harnam Singh Thakur, Member (J); Subrata Kumar Dash,
Member (T)

Bench : Division Bench

Advocate : Nahush jain, Monish Panda, Anupam Gupta, S.S. Virk

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

CA No 415/2019

1. The present appeal is filed under Section 42 of the Insolvency and Bankruptcy Code, 2016 (herein referred as "Code") by Mr. Bharat Bhushan Goel (herein referred as "Appellant") against Navneet Gupta, Liquidator of James Hotel (herein referred as "Respondent/Liquidator").

2. The appellant has prayed to pass an order directing the respondent to accept the claim of Rs. 7,33,372/- submitted by the appellant/ Applicant

3. The brief facts of the case as stated in the application are that

i. The CIRP of the corporate debtor was initiated by order dated 27.04.2017. During the CIRP Process no resolution plan was approved by the CoC within the statutory time limit. As no resolution plan has been approved, therefore, the CoC

has decided to liquidate the Corporate Debtor in terms of Section 33(2) of the Code.

ii. This Adjudicating Authority has passed an order dated 17.10.2018 for liquidation of the Corporate Debtor. The respondent-liquidator has made a public announcement in Form-B dated 24.10.2018 for the submission of the claim and the last date was given as 16.11.2018.

iii. The appellant has failed to file the claim within the stipulated time and submitted the claim dated 28.01.2019 to the respondent in Form-E by speed post. The copy of the said claim Form and speed post is attached as Annexure-A1 of the application.

iv. The liquidator has rejected the claim of the appellant by letter dated 14.02.2019 stating that the claim was filed beyond the last date fixed for receiving the claim.

v. The appellant has filed CA No. 202/2019 under Section 42 of IBC, which was disposed of by order dated 27.03.2019 directing the Respondent-Liquidator to reconsider the claim of the appellant on merits.

vi. Thereafter, the appellant sent an email dated 05.04.2019 to reconsider the claim dated 28.01.2019. The liquidator has sent an email dated 10.05.2019 wherein the claim of the appellants were partly rejected to the tune of Rs. 2,97,149/- out of a total claim of Rs. 7,33,372/-

4. It is averred by the appellant that he joined the Corporate Debtor on 17.02.2014 as Chief Financial Officer (reappointed as Chief Operating and

Financial Officer) and was serving the Corporate Debtor in the same capacity even after the commencement of CIRP. The Appellant has faced medical problems and sought sick leave of five days by email dated 06.07.2017 and the same was denied by the Respondent. The appellant submitted a resignation on 27.07.2017 through email on health grounds. Afterwards, the parties exchanged various emails wherein the authorised person of Corporate Debtor sought confirmation for filing resignation with RoC and Stock Exchanges and the Appellant has demanded release of salary for the month of June and July, 2017. On 10.10.2017, the Appellant has withdrawn his resignation as the RP has failed to accept the resignation. The Respondent has rejected an amount of Rs. 1,70,000/- i.e. one month salary in lieu of the fact that appellant has not served one month notice and further rejected Rs. 32,903/- from the salary of July, 2017 as the salary of the said month is payable for 21 days only.

5. Hence, it is prayed to direct the respondent to accept the claim of Rs. 7,33,372/- in toto as the resignation tendered by the appellant was not accepted by the Respondent and that resignation does not hold any effect at all.

6. The respondent has filed a reply vide Diary No. 4545 dated 03.09.2019 wherein it has been stated that the appellant has stopped coming to the

company and stopped replying to the queries imposed by the relevant officer of the Corporate Debtor. The one-month salary was rejected on the ground that the claimant did not serve notice period and resigned immediately on 27.07.2017 from the company. As per the terms of his appointment he had to serve two months' notice or give up one month's salary in lieu of his advance notice. The PF, TDS and other deductions from June and July, 2017 salary were deposited to the Income Tax Department and other Authorities on his behalf and the same could be claimed by him. Similarly, the excess amount of Rs. 32,903/- and the interest amount could not have been paid to him as the appointment letter does not provide for the same. The copy of the appointment letter is annexed as Annexure-R2 of the reply.

7. We have heard the learned counsel for the Appellant and the respondent and perused the records carefully.

8. In the present case, the appellant had served as Chief Operating & Financial Officer from 17.02.2014. The terms of the appointment of the appellant are mentioned in the appointment letter dated 17.02.2014 (Annexure R-2 of the reply). It is noted that at point No.2 of the appointment letter, it is categorically mentioned that a two-month's notice or one month's salary is required to be given. The relevant point no.2 of the appointment letter dated 17.02.2014 is reproduced below:-

"2. In case your services are terminated, you will be served with two month's notice or given one month's salary in lieu of notice. A similar notice or pay in lieu of notice will have to be given by you in case you wish to leave the services of the company."

9. It is noted that the appellant has sought leave of 5 days by email dated 06.07.2017 on medical grounds and requested for an extension on 24.07.2017 and on 25.07.2017. The appellant has submitted his resignation by email dated 27.07.2017, although the same has not been accepted by the respondent. The appellant has filed a claim amounting to Rs.7,33,372/- which was already partially admitted consequent to certain directions by this Bench. The respondent has rejected the claim of Rs.2,97,149/- on the ground that the amount of one month salary has to be deducted as the appellant has not served the notice period. Moreover, PF, TDS and other deductions from June and July were duly deposited with the authorities and there is no provision for payment of interest in the appointment letter. The respondent has passed the claim of the appellant after deducting the aforesaid amounts. In view of above facts, we hold that the respondent has rightly rejected the claim as per the terms of the contract with the appellant to the tune of Rs.2,97,149/- as the appellant has neither served the corporate debtor during the period for which he is claiming his salary nor any notice has been given by him in this regard.

10. In the result, the present application is dismissed and disposed of accordingly.

CA No 15/2020 & IA No 553/2020

CA No. 15/2020 & IA No. 553/2020 are taken up together as IA No. 553/2020 was filed subsequent to auction dated 03.02.2020 and the earlier CA No.15/2020 was filed prior to the auction notice to revoke the auction process. CA No.15/2020 is, therefore, rendered irrelevant to the auction dated 03.02.2020. Also, as recorded in our order dated 26.08.2022, the learned counsel for the applicant in CA 15/2020 has stated that he has restricted his arguments to the rejoinder filed by Dairy No. 82 Dated 30.01.2020 in CA No. 15/2020.

11. The present applications are filed under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 (herein referred to as "Code") read with Rule 11 of NCLT Rules, 2016 by Haravtar Singh Arora- erstwhile promotor of M/s James Hotel Limited in CA No. 15/2020 and IA No. 553/2020 (herein referred to as "Applicant") against Navneet Gupta, Liquidator of James Hotel (herein referred to as "Respondent No.1/Liquidator") further, in IA No. 553/2020; Nehru Place Hotels and Real Estates Private Limited is another Respondent (herein referred as "Respondent no. 2/Successful Bidder").

12. As the learned counsel for the applicant has stated that he has restricted his arguments to the rejoinder filed in CA No. 15 of 2020, only relevant prayers in CA 15/2020 are discussed along with those in IA No. 553/2020. In IA No. 553/2020, it is prayed to revoke the entire auction process and the liquidation of the Corporate Debtor by setting aside the result of the auction dated 03.02.2020 and to declare the sale of the Corporate Debtor as a going concern by the Respondent No. 1 as null and void being violative of Section 54 of the Code. It is further prayed to set aside the sale letter issued by Respondent No. 1- liquidator to Respondent No. 2 pursuant to the e-auction dated 03.02.2020.

13. The background of the case as stated in the applications are as under:

i) The CIRP of the corporate debtor was initiated by an order dated 27.04.2017. During the CIRP Process, no resolution plan was approved by the CoC within the statutory time limit. As no resolution plan has been approved, the CoC has decided to liquidate the Corporate Debtor in terms of Section 33(2) of the Code.

ii) Subsequently, this Adjudicating Authority has passed an order dated 17.10.2018 for the liquidation of the Corporate Debtor.

iii) During the liquidation process, the liquidator has taken out several notices for the auction of the Corporate Debtor as a going concern but the same were unsuccessful.

iv) For the purpose of the sixth e-auction, the liquidator has issued sale notice dated 17.12.2019 which was revised on 28.12.2019 for the sale of the Corporate Debtor as a going concern in an e-auction to be held on 03.02.2020.

v) In the meanwhile, the liquidator has completed the auction process of the corporate debtor and respondent No. 2 has emerged as the successful bidder in the e-auction dated 03.02.2020 with a bid of Rs. 150.05 crores for the purchase of the Corporate Debtor as a going concern.

14. As, it is clarified during the present proceedings in CA No. 15 of 2020, the learned counsel for the applicant has restricted his arguments to the issues submitted in the rejoinder filed by Dairy No. 82 Dated 30.01.2020. The issues raised in the said rejoinder, and the issues raised in IA No. 553/2020, by the applicant are summarised as under:

i. The land of the corporate debtor is owned by Chandigarh Administration and the corporate debtor is only in the possession of the Corporate Debtor in pursuance of the lease deed executed on 25.01.1986. As per the relevant clauses of the lease deed dated 25.01.1986, it is provided that the lessee cannot transfer or assign their rights in the site without the prior consent of the estate office. Therefore, the auction which leads to the transfer of rights is being carried out without the prior consent of the estate office. Moreover, as per the terms of the lease deed in the event of such transfer, the Chandigarh Administration is entitled to recover 50% of the 'Unearned increase' in the value of the site at the time of such transfer.

ii. The information memorandum prepared by the liquidator does not disclose any obligations given under the provisions of the lease deed dated 25.01.1986 which includes that the lessee could not transfer or assign the rights without the prior consent of the estate officer.

iii. The leasehold land cannot form part of the liquidation estate as per provisions of Section 36(3) read with Section 36(4) of the Code. Section 36(3) and 36(4) makes it clear that the assets owned by the third party shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation. The land, which has been made part of the liquidation estate by Respondent No. 1, could not have formed part of the liquidation estate. Hence, the sale of the Corporate Debtor vide e-auction dated 03.02.2020 and consequential sale letters issued by Respondent No. 1 are filled with factual inaccuracies and procedural illegalities and irregularities.

15. The respondent has filed its reply vide Diary No.465 dated 17.01.2020, wherein, it is stated that prior to the initiation of the auction process by the liquidator, the corporate debtor has claimed that the property in question does not belong to it. The valuation of the property was conducted by the valuers in February, 2019 and subsequently, on November, 2019 by appointing valuers duly registered with the IBBI. These valuers carried out the valuation process following all norms as prescribed under law. The Collector Rate as stated by the applicant is for the freehold property whereas the plot of the land on which the hotel has been constructed has been given on lease to the company which

shows that the applicant is taking contradictory views in their pleadings. The information memorandum contains all the details and nothing has been concealed therein. Even if it is assumed that such concealment has been made, it would not effect the purchaser of the property.

16. The respondent-liquidator has filed synopsis vide Diary No. 00690/11 dated

22/08/2022, wherein it has been averred that the leasehold property has been allotted by Chandigarh Administration in 1986 upon a public auction for a term of 99 years. The respondent has placed reliance on State of Punjab (now Haryana) and Ors. Vs. Amar Singh & Ors. (1974) 2 SCC 70 dated 21.01.1974 wherein it has been held that "there can, therefore, be no doubt that the expression 'transfer or other deposition of land' must definitely cover leases which, by very definition, are a species of transfer of land". It is further submitted that in the case of Associated Hotels of India Limited Vs. R.N. Kapoor, AIR 1959 SC 1262 dated 19.05.1959, the Hon'ble Apex Court has clearly defined a licence as "a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof". A lease, on the other hand is "a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his rights to enjoy the property during the term of the lease, and it follows from it that the lessee gets the right to the exclusion of the lessor." Reliance is also placed on the Judgement of Hon'ble Supreme court in the case of Delhi Development Authority Vs. Karamdeep Finance and Investment India (P) Ltd, (2020) 4 SCC 136 dated 12.02.2019 wherein it has been held that when the auction notice covered four properties located in different parts of Delhi, three properties being leasehold and the fourth freehold and all put to public auction by the DDA, both leasehold and freehold properties can be auctioned. The Respondent further contends that the leasehold property is not less than freehold property and therefore it can be put to the auction. It is averred that the Hon'ble Supreme Court has exercised a conscious and overriding jurisprudence for the purposive interpretation. Therefore, the respondent submits that the leasehold property cannot be included in the liquidation estates as per Section 36(4) of the Code is not tenable. It is also pointed out that prior to the initiation of the auction process, the Corporate Debtor has never claimed that the property in question does not belong to it nor did the Chandigarh administration ever opposed the auction of the property in question or its validity/legality.

17. The respondent-liquidator has also relied upon the following judgments:

- a) R. Kempraj Vs. Messrs Barton Son and Co., (1969) 2 SCC 594.
- b) Pradeep Oil Corporation Vs Municipal Corporation of Delhi & Anr, (2011) 5 SCC 270.
- c) Vali Pattabhirama Rao & Anr Vs Sri Ramanuja Ginning Factory & Rice., AIR 1984 AP 176 [DB].
- d) Swadesh Ranjan Sinha Vs Haradeb Banerjee., (1991) 4 SCC 572.
- e) Commissioner Income Tax, 1262 Bombay & Ors. Vs Podar Cement Pvt. Ltd. & Ors. (1997) 5 SCC 482.
- f) Mysore Minerals Ltd., M.G. Road, Bangalore Vs. Commissioner of Income Tax, Karnataka, Bangalore., (1999) 7 SCC 106.

18. We have heard the learned counsel for the Applicant and the respondents and perused the records carefully.

19. The main issue raised by the applicant in these two applications for our consideration is whether a Leasehold Land forms a part of the Liquidation Estate as per the provisions of Section 36 (3) read with Section 36 (4) of the Code as the Corporate Debtor is not the owner of the land.

20. In the present case, it is noted that the leasehold land in question was allotted to Mehfil Restaurants and Hotel Limited in the year 1986 through an auction process and its name was subsequently changed to James Hotels Limited. Three different promoters bought this company by taking over the corporate debtor and changing the management. All this happened before the Liquidator came into the picture. The lease deed, through which the property was auctioned, contains express covenants regarding the transfer of property to a third party, thus signifying that the corporate debtor has the right to transfer the property to a third party and not merely the right to use the property. The relevant clause from lease deed dated 25.01.1986 is reproduced as under:

"4.a The Lessee shall not transfer or assign his/their rights in the site without the prior consent of the Estate Officer. Such permission shall not be given until the lessees have paid the full premium and the rent due under the lease unless in the opinion of the Estate Officer exceptional circumstances exist for the grant of such permission and the proposed transferee undertakes to pay the balance of the premium and the rent in respect of this lease".

21. It is further noted that the Resolution Professional is in touch with the Assistant Estate Officer, UT Chandigarh as evident from the correspondences made with the Estate Department filed with the application. The estate office of the Chandigarh Administration has also replied by letters dated 06.05.2019 and 14.01.2020 clarifying on different issues. In fact in the letter of the Estate Officer dated 06.05.2019 in response to letters dated 26.12.2018, 11.01.2019, 24.01.2019, 02.04.2019, it is mentioned that the site in question is auctioned property and as such a sum of Rs 76,82,216/- is chargeable on account of transfer fee subject to the Audit and Revision. It is noted that in these correspondences between the Estate Office, the Corporate Debtor and the Chandigarh Administration, the latter has never objected to or raised any question regarding the right to transfer the property.

22. It is also noted that in the auction notices issued, "Assets" are mentioned as "Sale of James Hotels Limited, Corporate Debtor as a going concern along with all assets including leasehold land ad-measuring 9602 Sq. Yards, having 138 rooms, plant and machinery and other current assets including fixed deposit (lien free) worth Rs. 11 Crores (approx)" and the block is mentioned as 'Five Star Equivalent property as a going concern'. The terms and conditions of the E-auction further clarify that the "E-auction is being held on "AS IS WHERE IS WHATEVER THERE IS AND WITHOUT RECOURSE BASIS".

23. In common parlance, a going concern sale means selling on "as is where is basis" that allows the Liquidator to sell the business of the company under Liquidation. A going concern is always considered a better resolution of the Corporate Debtor than permitting part sale. However, there is no definition as such for 'going concern' either in the Code or in the Regulations. The Insolvency Law Committee in the report dated 26.03.2018 (Para 8.1 of the Report) examined the term "going concern" as "The phrase 'as a going concern' imply that the Corporate Debtor would be functional as it would have been prior to the initiation of CIRP, other than the restrictions put by the Code."

24. In the IBBI discussion paper on Corporate Liquidation Process along with Draft Regulations dated 27.04.2019, the term "going concern" was explained to mean all such assets and liabilities, which constitute an integral business of the Corporate Debtor, that must be transferred together, and the consideration must be for the business of the Corporate Debtor. The buyer of the assets and liabilities should be able to run the business without any disruption.

25. It is clear from the landmark Judgment, in M/s Innovative Industries Limited Vs. ICICI Bank and Anr. in Civil Appeal Nos. 8337-8338 OF 2017 dated 31.08.2017, Arcelormittal India Pvt. Ltd. in Civil Appeal Nos. 9402-9405 OF 2018 Dated 04.10.2018, and Swiss Ribbons Pvt. Ltd & Anr. in Writ Petition (Civil) No. 99 OF 2018 dated 25.01.2019, that if there is a Resolution Applicant who can continue to run the corporate Debtor as a going concern, every plausible effort must be made to ensure the same.

26. The issue whether such lease hold properties can be termed "assets" as per Section within the ambit of Section 18(f)(iv) of the code has been considered at length by the Hon'ble NCLAT in "New Okhla Industrial Development Authority Vs. Mr Amit Agarwal Liquidator of Boulevard Projects Pvt. Ltd." in Company Appeal (AT)(CH) (Insolvency) No. 305 of 2021 dated 21.10.2022. In the present case, it has been contended by Appellant-New Okhla Industrial Development Authority that RP has illegally taken custody and control of the leasehold property-represented by leasehold land given by the authority- as the "Asset" does not belong to the 'Corporate Debtor'

27. In its Judgment the Hon'ble NCLAT referred to a catena of Judgements of the Hon'ble Supreme Court holding that Lease Rentals arising out of the execution of such Lease Deeds, are not Financial Leases, but in fact, the amount claimed under such leases would construe Operational Debt and made a particular reference to the decision in the case of New Okhla Industrial Development Authority Vs. Anand Sonbhadra in Civil Appeal No. 2222 OF 2021 with Civil Appeal No. 2367-2369 OF 2021 Dated 17.05.2022. The Hon'ble NCLAT further observed that Section 18(f) of the Code discusses both Tangible and Intangible Assets which can be taken control and custody of by the RP. Since, the term 'Intangible Assets' has not been expressly defined under the Code, it relied on Explanation 32(1) of the Income Tax Act, 1961, which defines Tangible and Intangible Assets. Reliance has also placed on the definition of 'Intangible Assets'

as defined by the Indian Accounting Standard ('IAS') .

28. After analysing threadbare the relevant provisions, the Hon'ble NCLAT observed that "we are of the considered view that the 'Leasehold Right' is an Intangible Asset of the 'Corporate Debtor' and that the Resolution Professional is empowered under Section 18(f) of the Code to take control and custody of any Asset over which the 'Corporate Debtor' has the 'Ownership Right'. We clarify that the Asset in the instant case are 'Leasehold Rights' and not the 'Plot' per-se. We are also conscious of the fact that substantial development and construction activity was carried on the subject Plot. Pursuant to the Lease Deed, the 'Corporate Debtor' had spent considerable amount of Financial Resources to develop the said Plot and there is no denial by the Appellant that they had in CA No.1101/PB/2019 taken a stand that 'all risks and rewards incidental to ownership' of the subject Plot was transferred to the 'Corporate Debtor' under the said Lease Deed."

29. In the present context, the Chandigarh Administration has not raised any objection despite being informed about the liquidation proceedings and there are provisions in the lease deed regarding transfer of the property to a third party subject to certain conditions. The title to the land continues to remain with the corporate debtor, i.e. James Hotels Limited even after the successful bidder takes over the Corporate debtor. Thus, the assertion of the applicant that the lease deed is a contractual agreement, and the leased land cannot form a part of the Liquidation Estate of the Corporate Debtor is in the teeth of the provisions of Section 36(4)(a)(iv) of the Code appears misconceived. It is pertinent to note that the applicant is ex-promoter and when Chandigarh Administration has no objection, then it can be safely concluded that the applicant has no locus standi to agitate the issue.

30. Keeping in view the above discussion and following the decisions of the Hon'ble Apex Court in the case of the Delhi Development Authority (Supra), and the decision of the Hon'ble NCLAT in the case of New Okhla Industrial Development Authority (Supra), we hold that the leasehold rights of the Corporate Debtor over the land in the present case are its "intangible assets" within the meaning of Section 36(3)(d) of the Code and the same can be a part of the assets for E-auction as a "Going Concern", especially when even after the implementation of the bid the corporate debtor continues to exist as the same corporate entity i.e. James Hotel Limited with the existing shareholders replaced by the Successful Bidder, and the existing lease deed with the Chandigarh Administration continues in its name as such.

31. Consequently, CA No. 15/2020 and IA No.553/2021 are dismissed and disposed of accordingly.