

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1095 of 2023

&

I.A. No. 3782 of 2023

[Arising out of order dated 09.05.2023 passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court – II), in Company Appeal (IBC) No. 13/2023 in Company Petition No. (IB)-2963/(ND)/2019]

IN THE MATTER OF:

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

Present:

For Appellants : Mr. Abhijeet Sinha Sr. Advocate with Mr. Abhinav Hansaria and Mr. Aditya Shukla, Advocates.

For Respondent : Mr. Sumant Batra, Ms. Nidhi Yadav and Mr. Sarthak Bhandari, Advocates.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed challenging the Order dated 09.05.2023 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi Bench, Court – II) in Company Appeal (IBC) No.13/2023.

Company Appeal (IBC) No. 13/2023 was filed by the Appellant challenging the decision of the Liquidator communicated by email dated 03.01.2023. CA filed under Section 42 of the Insolvency and Bankruptcy Code, 2016, (for short 'The Code' or 'The IBC') by the Appellant was disposed of with 3 directions as contained in Paragraph 5 of the Order. Aggrieved by the Order passed by the Adjudicating Authority, this Appeal has been filed.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

- i. Appellant's predecessor in title executed a Lease Deed dated 04.04.2012 in favour of the Corporate Debtor, letting out an industrial shed with built-up area and open space situated in Survey No. 820/1 B2 in No. 28 Kuthambakkam Village, Thiruvallur District.
- ii. Lease deed was executed for 7 years on monthly lease rent of Rs. 21,83,000/-.
- iii. Appellant obtained title over the demise premises Property by virtue of Settlement Deed registered on 18.03.2015.
- iv. The Corporate Debtor started defaulting payment of the lease rent from the month of December 2014. Lessor invoked Clause 21(a) of the Lease Deed and Notice dated 01.05.2015 was issued to the Corporate Debtor terminating the Lease Deed and calling upon the Corporate Debtor on failure to pay the arrears of rent due, to hand over the possession.
- v. Arbitration Proceedings were initiated and Arbitral Tribunal in Arbitration Case No. 01/2015 gave an Award on 07.09.2016, directing for payment of rental arrears from 16.12.2014 to 01.05.2015 of

Rs.1,26,95,876/- and further directed to pay Rs.21,83,000/- p.m., as damages for use and occupation till the handing over of the possession and to vacate and handover possession.

- vi. The Appellant filed Execution Petition being EP No.40/2018 and EP No. 41/2018 before the Ld. District Judge, Thiruvallur to exclude the Award, which Execution Proceedings remain pending till Corporate Insolvency Resolution Process (CIRP) was commenced against the Corporate Debtor on 03.02.2021.
- vii. Public announcement was made on 06.02.2021.
- viii. Appellant filed their claim on 13.02.2021 in `Form-B' claiming a sum of ₹12,18,30,000/- being the sum for the rent payable between 01.05.2015 and 15.02.2021, after giving credit to the advance amount and deducting TDS.
- ix. By Order dated 18.10.2022, Adjudicating Authority directed for liquidation of the Corporate Debtor and appointed Respondent as Liquidator. Application filed by the Appellant I.A. No. 2379/2022 was disposed of permitting the Appellant to approach the Liquidator with their prayers and Liquidator was directed to decide. As per the Order of the Adjudicating Authority, Appellant approached the Liquidator and sought prayer for handing over possession of the demised property and paying the arrears of lease rent/damages.
- x. On 03.01.2023 Liquidator communicated her decision to the Appellant that arrears of rent/damages for unauthorised occupation of the

demised premises property are admitted as an Operational Debt and not as a CIRP Cost.

- xi. With regard to vacation of Plot, Liquidator informed that Auction Proceeding has begun and will be completed within few days and property will be handed over.
- xii. Adjudicating Authority in the Impugned Order has issued following 3 directions by disposing the Appeal filed by the Appellant:

“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;”

- xiii. Appellant aggrieved by this Order, has come up in this Appeal.

3. We have heard Learned Sr. Counsel Mr. Abhijit Sinha appearing for the Appellant and Learned Counsel Mr. Sumant Batra appearing for the Respondent.

4. Learned Counsel for the Appellant submits that rent/damages @ Rs.21,83,000/- p.m. were required to be treated as CIRP Cost. Learned Comp. App. (AT) (Ins.) No. 1095 of 2023 & I.A. No. 3782 of 2023

Counsel for the Appellant relies on Regulation 31(b) of the IBBI (Insolvency Resolution Process for Corporate Persons), Regulations, 2016, and submits that in view of Moratorium imposed under Section 41(1)(d) Appellant could not take possession of the assets and hence rights of the Appellant are prejudicially affected, which entitled the amount which was liable to be paid to the Appellant as CIRP Cost. Demised premises was in possession of the Corporate Debtor on the commencement of the CIRP, hence in terms of the embargo imposed by Section 14(1)(d) Appellant could not recover the possession of demised premises from the Resolution Professional (RP), even though decree of possession in their favour has already been granted by Arbitral Tribunal which is pending execution. Liquidator in its email dated 03.01.2023 has intimated that premises is being used for storing plant and machinery. When the Liquidator was using the premises, Liquidator was liable to pay the damages as CIRP Cost. RP was occupying and using the premises during the CIRP period. Hence, the Respondents are liable to pay the same as CIRP Cost and not to consider it an Operational Debt.

5. Learned Counsel, Mr. Sumant Batra appearing for the Liquidator refuting the submissions of the Counsel for the Appellant submits that the case of the Appellant does not fall under Section 14(1)(d) of the IBC, rather it is covered by Section 14(1)(a). It is submitted that according to own case of the Appellant, Appellant was not receiving rent from December 2014 and on the date when CIRP commenced, i.e., 03.02.2021, Appellant was not in receipt of monthly rent so as to cause any prejudice to the Appellant. Appellant has already obtained an Arbitral Award in its favour dated 07.09.2016, which entitled the Appellant to receive rent and damages till the handing over of the

possession, which Arbitral Award is already put in execution by Execution Petition No. 40 /2018 & 41/2018 which are pending before the District Court, Thiruvallur. When the Appellant was not receiving the rent on the date when CIRP commenced, it cannot claim that the Moratorium prejudicially affected its rights. It is submitted that CIRP Cost is defined under Section 5(13) of the IBC Code and the Insolvency Resolution Process Cost include any cost incurred by the RP running the business of Corporate Debtor as a going concern. Corporate Debtor was not being run as a going concern, hence there was no occasion to treat the damages claimed by the Appellant as the CIRP Cost. Operation of Corporate Debtor has ceased five years before the commencement of the CIRP. The Appellant was not prejudicially affected on account of Moratorium imposed under Section 14(1)(d), as Corporate Debtor has stopped paying rent much before CIRP commenced, more than 7 years ago, Liquidator has accepted the claim of damages from 03.02.2021 till the commencement of the Liquidation as Operational Debt and the payment of said Operational Debt shall be discharged as per waterfall mechanism under Section 53 of the IBC.

6. Learned Counsel for both the Parties have relied on various Judgments in support of their respective submissions, which we shall refer hereinafter.

7. We have considered the submissions of Counsel for the Parties and perused the record.

8. After commencement of the CIRP, the claim has been filed by the Appellant in 'Form-B' on 13.02.2021 for an amount of Rs. 12,74,12,526/- which claim was admitted by the RP. The Application was filed by the Appellant before the Adjudicating Authority, claiming rent/damages for lease
Comp. App. (AT) (Ins.) No. 1095 of 2023 & I.A. No. 3782 of 2023

rental/damages for unauthorised occupation @ Rs.21,83,000/- from 03.02.2021, on which Adjudicating Authority has directed the Appellant to approach the Liquidator and Liquidator on the prayers made by Appellant has communicated his decision dated 03.01.2023. The copy of the decision of the Liquidator has annexed as Annexure-16 to the Appeal which is as follows:



Annexure - 16

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Abhinav Hansaria / Optimus Legal <abhinav@optimuslegal.in>

Application on behalf of Mr. A. Guhan and Ms. AGS Sumyuha pursuant to the directions of the Hon'ble Adjudicating Authority dated 19.12.2022

Insolvency-Deltronix India Limited <cirp.deltronix@gmail.com>

Tue, Jan 3, 2023 at 2:07 PM

To: Abhinav Hansaria <abhinav@optimuslegal.in>

Cc: sunita.umesh@uccglobal.in, richardson.wilson@pwilsonassociates.in, P Wilson Associates <legal@pwilsonassociates.in>

Kind Attn: Mr. A. Guhan and Ms. AGS Sumyuha

We are in receipt of your application dated 26.12.2022, wherein you have sought following relief from us:

i. Pay the arrears of lease rent/damages for unauthorised occupation at the rate of Rs. 21,83,000 per month from 03.02.2021 till 18.10.2022, being an amount of Rs. 4,25,68,500/- (Rupees Four Crores Twenty Five Lacs Sixty Eight Thousand Five Hundred only) as the CIRP cost.

ii. Vacate and hand over possession of the leased property being the industrial shed admeasuring 1,18,000 Sq. Ft. together with the open area of about 50,000 Sq. Ft. of the land on the southern side of the said industrial shed situated at S. No. 820/1B2 in No. 28 Kuthambakkam Village, Thiruvallur District to the Applicants (*herein referred as the said property*)

Please note that with respect to the amount of Rs. 21,83,000/- per month from 03.02.2021 till 18.10.2022, being an amount of Rs. 4,25,68,500/- (Rupees Four Crores Twenty Five Lacs Sixty Eight Thousand Five Hundred only) payable as CIRP cost, is admitted as an operational debt and not as a CIRP Cost. Claim amount sought for the period 03.02.2021 till 18.10.2022 does not fall under any of the criteria enunciated in Regulation 31 read with regulation 32-34 of the Insolvency and bankruptcy Board of India (insolvency Resolution Process for Corporate Person) Regulation, 2016, as such we are unable to consider the said claim filed for the CIRP period as CIRP Cost. Claim incurred for the period 03.02.2021 till 18.10.2022, is considered as an operational debt and the same shall be payable as per priority enunciated under section 53 of the IB code, 2016.

Further, with respect to vacation of the said property, please note that few plants and machinery are attached/ available at the site, of which auction proceedings have begun and shall be completed within a few days. Removal of these plants and machinery is a time-consuming task, and as the property is under the custody of the Corporate Debtor, the SCC members are willing to pay the occupation charges for the entire period from 18.10.2022 till the time the said premise is in our custody, at prevailing market rate.

As such, the Company is in the process of getting the valuation pertaining to the occupation charges of the said property. Accordingly, we shall keep you updated as and when the quantum of the same is fixed by the SCC members in accordance with the regulations enunciated under IB Code, 2016.

Claim filed for the period 01.05.2015 to 15.02.2021 is admitted and the same shall be payable as per priority enunciated under section 53 of the IB Code, 2016. Further, the claim arising during the CIRP period is considered as operational debt as explained in para 1.

Regards,

Sunita Umesh
Liquidator
Deltronix India Limited (Under Liquidation)
IBBI Regn No. - IBBI/PA-001/IP-P00080/2017-2018/10165
Address: 1315, Ansal Tower, 38, Nehru Place
New Delhi -110019
Email Id: cirp.deltronix@gmail.com

TRUE COPY

9. The bone of contention between the Parties is as to whether the claim of lease rent/damages for an authorised occupation after 03.02.2021 till 18.10.2022 is to be accepted as CIRP Cost or is an Operational Debt as accepted by Liquidator. The CIRP cost has been defined in Section 5(13) of the IBC Code, which is as follows:

“5. Definitions. *In this Part, unless the context otherwise requires,—*

(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”

10. When we look into the definition of Insolvency Resolution Process Cost as contained in Section 5(13), the claim does not fall in any of the Clauses (a) to (d). Counsel for the Appellant has relied on Regulation 31(b) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, referable to Section 5(13)(e). Regulation 31 deals with Insolvency Resolution Process cost. Regulation 31 provides as follows:

“31. Insolvency resolution process costs.

“Insolvency resolution process costs” under Section 5(13)(e) shall mean-

(a) amounts due to suppliers of essential goods and services under Regulation 32;

(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);

(c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;

(d) expenses incurred on or by the resolution professional fixed under Regulation 34;

(e) and other costs directly relating to the corporate insolvency resolution process and approved by the committee.”

11. Appellant’s submission is that due to imposition of Moratorium on 03.02.2021 by the Adjudicating Authority rights of the Appellant insofar as the amounts due are prejudicially affected on account of Moratorium imposed under Section 14(1)(d), since the Appellant could not recover the possession from Corporate Debtor due to Moratorium. Hence, amounts due are Insolvency Resolution Process cost by virtue of Regulation 31(b), hence the Adjudicating Authority committed an error in not accepting the said amount as Insolvency Resolution Process cost.

12. From the facts which have been noticed above, it is on the record that Corporate Debtor has stopped making payment from December 2014 and the Arbitral Award dated 07.09.2016 directed Corporate Debtor to pay rent towards the lease premises from May 2015, till the handing over of the possession. From executing the Award, the Appellant had filed Execution Petition No. 40/2018 & 41/2018 before District Court, Thiruvallur which remain pending. On the date when CIRP commenced on 03.02.2021, Appellant was not receiving any rent from the Corporate Debtor and claim of rent/damages and possession of the assets was under consideration in the Execution Proceedings. Adjudicating Authority in the Impugned Order, in Paragraph 5 in detail noticed the sequence of the events and the fact that the

Appellant was not receiving any rent from Corporate Debtor on the date CIRP commenced. It is useful to extract following observations:

“...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 16.012.2014 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...”

13. After enforcement of Moratorium under Section 14 by virtue of Section 14(1)(a) the Appellant could not have prosecuted the Execution Proceeding against the Corporate Debtor. The provision against the Appellant to execute the Arbitral Award is covered by Section 14(1)(a). Present is the case where there is already an Arbitral Award in favour of the Appellant execution of which had already been initiated. Hence Appellant was by virtue of Section 14(1)(a) could not have been proceeded with the execution. When the *Comp. App. (AT) (Ins.) No. 1095 of 2023 & I.A. No. 3782 of 2023*

Appellant could not have proceeded with the execution of Arbitral Award, there was no occasion to recover the rent and assets from the Corporate Debtor.

14. Now we come to the applicability of Regulation 31(b) on which reliance has been placed by the Counsel for the Appellant. Regulation 31(b) refers to amount due to a person whose rights are prejudicially affected on account of the Moratorium imposed under Section 14(1)(d). As noted above, the Appellant was not receiving lease rental from Corporate Debtor from December 2014 and direction to pay lease rental/damages for occupation from May 2015 also was under execution since 2018. The entitlement of Appellant to receive damages and occupation from the Corporate Debtor was already crystallised in Award and it was due to 14(1)(a) Appellant could not have prosecuted the execution. Hence, we are of the view that the claim of Appellant as per Arbitral Award to receive damages and occupation from Corporate Debtor cannot be treated as Insolvency Resolution Process cost under Section 31(b).

15. It is not the case that RP has incurred any cost for running the Corporate Debtor as a going concern. RP has never communicated to the Appellant or accepted that amount of damages shall be treated as CIRP cost. Learned Counsel for the Appellant has contended that by the email dated 03.01.2023, Liquidator communicated that the land is being utilised by the Corporate Debtor for running its business. The email dated 03.01.2023 does not contain any averment that assets are being used for by the Corporate Debtor as a going concern. What was communicated to the Appellant was that few plants and machinery are attached/available at the site, on which

Auction Proceedings have begun and shall be completed within a few days. It was stated that removal of these plants and machinery are time consumable task.

16. The fact that plant and machineries are attached/available at the site cannot be read to mean that the premises were being used as a going concern by Corporate Debtor, and the said statement was made with regard to claim of vacation of the assets as was prayed by the Appellant. It is due to the aforesaid that Adjudicating Authority in the Impugned Order has fixed a time limit for vacation of the assets i.e., by 09.05.2023. Parties are at Agreement that premises have already been handed over to the Appellant.

17. Counsel for the Appellant has relied on the Judgment of this Tribunal dated 06.05.2022 in the matter of '**Mack Star Marketing Private Limited**' Vs. '**Mr. Ashish Chhawchharia**' in **Comp. App. (AT) (Ins.) No. 389/2021**, and the Clarification Order dated 30.05.2022. In the above case, the RP did not pay the monthly license fee on the ground that security amount is payable by the Appellant to the Corporate Debtor. It is true that in the above case, the monthly license fee payable was treated to the CIRP cost. The RP had not handed over the possession on account of security being payable by Appellant to the Corporate Debtor. In the present case, there is already an Arbitral Award in favour of the Appellant, which direct for payment of damages and occupation till the handing over of the possession. The Judgment of the '**Mack Star Marketing Private Ltd.**' (**Supra**) is clearly distinguishable in the facts of the present case where the claim of damages for occupation of premises has been admitted from date of commencement of CIRP till the date of liquidation and has been treated as an Operational Debt. The issue which

has arisen in the facts and circumstances of the present case were not up for consideration in the '**Mack Star Marketing Private Limited**' (*Supra*), hence said Judgment is distinguishable in the facts of present case.

18. Learned Counsel for the Appellant has relied on another Judgment of this Tribunal in the matter of '**Prerna**' Singh Vs. '**Committee of Creditors**', in **Contempt Case (AT) No. 03/2020 in Comp. App. (AT) (Ins.) No. 104/2019**, where this Tribunal has held that rent of premises comes within the purview of CIRP cost. In the present case, there was already an Arbitral Award entitling the Appellant to receive damages and occupation till possession is handed over but on account of Moratorium under Section 14(1)(a) Execution Proceedings which were initiated in 2018 by the Appellant could not be proceeded. In the present case, there is no dispute to the entitlement of the Appellant of damages and occupation @ Rs.21,83,000/- p.m., which claim has already been admitted by the Liquidator. In the special facts and circumstances of the present case, we agree with the view of the Adjudicating Authority that claim of damages and occupation after 03.02.2021 cannot be treated to be the CIRP cost. The Corporate Debtor is not carrying any business nor has undertaken to pay the lease rental to the Appellant for use of occupation at any point of time.

19. Learned Counsel for the Respondent has placed reliance on the Judgment of this Tribunal in the matter of '**JAS Telecom Private Limited**' Vs. '**Eolane Electronics Bangalore Private Limited**', reported in **2018 SCC OnLine NCLAT 641**. In the above case, this Tribunal had occasion to consider the case where rent has not been paid by the Corporate Debtor since January 01, 2017, whereas Moratorium was imposed on 31.08.2017. In the

above case, also the Appellant has claimed amount of rent as CIRP cost under Section 14(1)(d). This Tribunal in Paragraphs 3 to 7 has noted the facts and has held that Appellant cannot claim that its rights have been affected prejudicially on account of Moratorium since rent has not been paid much beyond Moratorium. Paragraphs 3 to 7 are as follows:

“3. The question arises for consideration in this appeal is whether the amount of rent due to the Appellant has prejudicially affected on account of the moratorium imposed under Section 14(1)(d).

4. The insolvency resolution process cost as prescribed in regulation 31 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 reads as follows:

“INSOLVENCY RESOLUTION PROCESS COSTS

31. Insolvency resolution process costs.-
“Insolvency resolution process costs” under section 5(13)(e) shall mean-

(a) amounts due to suppliers of essential goods and services under Regulation 32;

(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);

(c) expenses incurred on or by the interim resolution professional to the extent ratified under regulation 33;

(d) expenses incurred on or by the resolution professional fixed under regulation 34; and

(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”

5. From the aforesaid provision it is clear that the amounts due to the person whose rights are prejudicially affected on account of the moratorium imposed under Section 14(1)(d), such amount to be included in the insolvency resolution process costs.

6. So far as Appellant is concerned, the rent has not been paid by the Corporate Debtor since 1st January, 2017 that is much prior to order of moratorium.

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.”

20. The above Judgment fully supports the contention raised by the Counsel for the Respondent that benefit of Section 14(1)(d) cannot be claimed by the Appellant in the present case. Learned Counsel for the Respondent has also relied on another Judgment of this Tribunal in the matter of **‘Avil Menezes Liquidator of Sunil Hitech and Engineers Limited’ Vs. ‘Abdul Quddus Khan and Anr.’** reported in **2024 SCC Online NCLAT 615**. In the above Judgment, in Paragraphs 49 & 50 following has been held:

“49. We are, therefore, inclined to agree that mere fact that the dues have arisen during the CIRP period would not be determinative of it to be classified as CIRP cost. Interpreting Section 5(13)(c) of the Code in this manner would render the words “in running the business of the corporate debtor as a going concern” otiose. Further, it is clear from Regulation 31 and the guidance provided by IBBI vide the above-mentioned circular that unless the CoC has approved the dues and they directly relate to the CIRP, the dues cannot be classified as CIRP cost. And the CoC decided to exclude the cost incurred from the terminated projects, which is not maintaining the Corporate Debtor as “a going concern”.

50. In conclusion, the following criteria determine whether a cost incurred by the Resolution Professional during CIRP qualifies as CIRP cost: (a) maintaining the Corporate Debtor as a going concern, (b) payment to suppliers of essential goods and services, and (c) direct relation to CIRP with approval from the Committee of Creditors (CoC). Applying these criteria to this case, the claim fails to meet the definition of CIRP cost.”

21. In the present case, when the Appellant was not in receipt of rent from December 2014, and Arbitral Award obtained by the Appellant was still under execution, the lease rental subsequent to the commencement of the CIRP cannot be treated as CIRP cost and the Adjudicating Authority has rightly accepted the said claim of the Appellant as Operational Debt. It is already on the record that Appellant itself has filed its claim prior to CIRP period as an operational claim which has been admitted.

22. We fail to find any distinction in the nature of the claim of the Appellant, which is claimed for damages and occupation prior to CIRP and subsequent to the CIRP, the nature of claim both pre-CIRP and post CIRP has rightly been treated as Operational Debt.

We thus do not find any error in the Order of the Adjudicating Authority, warranting interference by this Tribunal in exercise of the appellate jurisdiction. The Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

29th October, 2024

himanshu