

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 508 of 2020

In the matter of:

Victory Iron Works Limited
Registered Office at:
P-26, Benaras Road, Salkia,
Howrah – 711 106

....Appellant

Vs.

1.Jitendra Lohia
Resolution Professional of
Avani Towers Pvt. Ltd.
Having his office at:
Todi Chambers, 2 Lal Bazar Street,
Room No.204 & 205, 2nd Floor,
Kolkata – 700 001

....Respondent No.1

2.Energy Properties Private Limited
Having its office at:
Ramrajatalia Station Road
LP-482/7/5, Howrah – 711 104

....Respondent No.2

Present: Mr.Alok Dhir, Ms Varsha Banerjee, Mr. Mukund Rawat,
Advocates for Appellant.

Mr. Saikat Sarkar, Mr. Jitendra Lohia, Mr Shaunak Mitra, Advocates for
R1/RP.

Mr. Jayant Mehta, Sr. Advocate, Mr Kumarjit Banerjee, Mr. Ashish
Choudhury, Mr. Dhruv Surana, Advocates for R2.

With

Company Appeal (AT) (Ins) No. 377 of 2020

In the matter of:

Energy Properties Private Limited
Having its office at:
Ramrajatalia Station Road
LP-482/7/5, Howrah – 711 104

....Appellant

Vs.

1.Jitendra Lohia
Resolution Professional of
Avani Towers Pvt. Ltd.
Having his office at:
29, Ganesh Chandra Avenue
Kolkata – 700 013

...Respondent No.1

2. The Committee of Creditors of
Avani Towers Private Limited,
Having its office at Todi Chambers
2, Lal Bazar Street, Room No. 204 & 205
2nd Floor, Kolkata – 700 001

...Respondent No.2

3.Victory Iron Works Limited
Having its office at P-26
Benaras Road, Salkia,
Howrah – 711 106

...Respondent No.3

Present: Mr. Jayant Mehta, Sr. Advocate, Mr Kumarjit Banerjee, Mr. Ashish Choudhury, Mr. Dhruv Surana, Advocates for Appellant.

Mr. Saikat Sarkar, Mr. Jitendra Lohia, Mr Shaunak Mitra, Advocates for R1/RP.

Mr.Alok Dhir, Ms Varsha Banerjee, Mr. Mukund Rawat, Advocates for R3.

J U D G E M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER.

1. That the instant appeals have been preferred by two different Appellants viz. M/s. Victory Irons Works Limited (Appellant in Company Appeal (AT)(Ins) No. 508 of 2020) and M/s. Energy Properties Limited (Appellant in Company Appeal (AT) (Ins) No. 377 of 2020 under Section 61 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against the Impugned order dated 12.02.2020 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata

Bench) in CA(IB) Nos. 1807/KB/2019 and 146/KB/2020 in CP(IB) No. 372/KB/2018. Since both the appeals have been filed against the same impugned order dated 12.02.2020, the appeals have been clubbed for better appreciation and taking a holistic view.

2. In these two appeals as stated above one appeal – CA(AT)(Ins) No. 508 of 2020 has been filed by M/s. Victory Iron Works Ltd who is the Licensee for an area of 10,000 Sq. ft. on a payment of Rs. 5000/- per month by the Licensor – Avani Towers Pvt. Ltd and Energy Property Pvt Ltd confirming party in terms of Leave and License Agreement dated 11.08.2011. The Appeal - Company Appeal (AT) (Ins) No. 377 of 2020 has been filed by M/s. Energy Properties Pvt Ltd the Original owner of the property who has entered into an agreement for the Development Agreement dated 16.06.2008 with M/s. Avani Towers Pvt. Ltd, (Corporate Debtor in CIRP) Developer for the Development of said land measuring more or less 10.19 acres and the owner has appointed the Developer for the Development of said land and the Agreement shall remained valid and enforceable till the Development and sale is completed in all respects (vide clause 6.1 and 6.2 of the said Agreement). As the MoU dated 24.01.2008 has been entered into between Energy Property Pvt Ltd, Avani Towers Pvt Ltd and certain specified shareholders determining the modus operandi for purchase of the said 10.19 acres of land. Even this agreement deal with terms of Escrow, Management of the Company, Obligations of the Company, essential terms of Development Agreement etc.

3. The Adjudicating Authority has disposed of both CA(IB) Nos. 1807/KB/2019 and 146/KB/2020 in CP(IB) No. 372/KB/2018 with following orders/ observations:

“Para 8 – From materials on record, it can safely be concluded that till admission of the Corporate Debtor in CIRP, MOU dated 24.01.2008 was not cancelled/ revoked by the Respondents. Hence, the Corporate Debtor remained in possession of the properties for the purpose of their development. Upon Corporate Debtor’s admission in CIRP, RP came in possession therein by virtue of statutory provisions under the I&B Code, 2016. Hence, respondents cannot disturb/obstruct RP’s possession in those properties.

Para 9- We make it clear that the judgment in Supreme Court in Embassy Property Development Pvt. Ltd. Vs. State of Karnataka cannot be made applicable herein. We further make it clear that if at all the same is made applicable to the instant that this authority does not have jurisdiction to decide civil rights of the parties, still the same goes against the respondents also. Unless the Respondent cancel/ revoke MOU dated 24.01.2008, they cannot claim possession of those properties. Now there above right to do stands foreclosed by virtue of moratorium under Section 14 of the Code.

Para 10 – Corporate Debtor is having development rights to the properties. It is intangible assets of the corporate Debtor. RP holds same development rights relating to those properties. He has to proceed with the CIRP of the Corporate Debtor and invite resolution plan on the basis of those rights. The respondents cannot obstruct his possession and

activities in any manner. Hence, we allow this application i.e. CA(IB) No. 1807/KB/2019.

Para 11- CA(IB) No. 146/KB/2020 is filed by one M/s. Victory iron Works Ltd for modification of our order dated 09.01.2020 by that order, we directed all parties to maintain status quo as far as materials lying in above properties, as we were to decide as to who is in rightful possession of those properties. While disposing off CA(IB) No.1807/KB/2019, we held that RP is in legal and rightful possession of the properties. The applicant is affected by order dated 09.01.2020 because admittedly the corporate debtor and Energy Properties Pvt. Ltd. (Respondent in CA(IB) No.1807/KB/2019) put the applicant in possession of 10,000 sq. ft. land to carry on its activities/business.

Para 12- In fact, our order dated 09.01.2020 shall not affect the applicant's possession and activities in that piece of land. It is brought to our notice that term of leave and licence agreement dated 11.08.2011 of the applicant is already expired, as it was only for 11 months. Be that as it may, the original owner of the properties i.e. Respondent in CA(IB) No.1807/KB/2019 have to take call on that aspect. Corporate Debtor's development activities were not extended in relation to that piece of land. Hence, corporate debtor and RP do not have any say thereto. In view of this, we make it clear that our order dated 09.01.2020 shall not affect the applicant's right to carry its business in that piece of land. In view of above, we pass the following orders:

Order

The Respondent (or any other person acting through them in CA(IB) No.1807/KB/2019) shall not obstruct RP's possession and his activities relating to CIRP of the Corporate Debtor, until further orders, failing which the local police are directed to give every assistance to the rP for completion of CIRP of the Corporate Debtor effectively.

ii. Our order dated 09.01.2020 shall not affect the activities of Victory Iron Works Ltd., in piece of land in their possession on the basis of leave and licence agreement dated 11.08.2011 until the original owner of the property decided further course of action as far as leave and licence agreement is concerned. Hence, this Applicant i.e. CA(IB) No. 146/KB/20220 stands disposed off.

iii. Hence, CA(IB) No.1807/KB/2019 and CA(IB) No. 146/KB/2020 stand disposed off.

Let the certified copy of the order be issued upon compliances with requisite formalities.”

4. The Appellant in Company Appeal (AT)(Ins) No. 377 of 2020 is aggrieved from the said order as it claims that it is a drastic order by allowing the Applications filed by Resolution Professional ('RP') of the Corporate Debtor- M/s. Avani Towers Pvt. Ltd whereby and whereunder the Appellant who is the owner of the subject property will be evicted from their own property as the RP has been allowed to take exclusive possession of the said property.
5. The Appellant in Company Appeal (AT)(Ins) No. 508 of 2020 has claimed that the order passed by the Adjudicating Authority has wrongfully and

erroneously curtailed the rights of the Appellant in respect of the property. The property is situated at Ramrajtala, Howrah.

6. In both the appeals the Appellants has largely sought the relief of setting aside the impugned order dated 12.02.2020 passed by the Adjudicating Authority etc.
7. The Appellant in Company Appeal (AT) (Ins) No. 377 of 2020 that the Appellant is the owner in right, title and interest of the subject premises measuring approximately 10.19 Acres located at Ramrajatala, Howrah. The Corporate Debtor [under Corporate Insolvency Resolution Professional ('CIRP')] was appointed as the Developer to develop the said property under a Development Agreement dated 16.06.2008. The Development Agreement was preceded by a formal Memorandum of Understanding ('MOU') dated 24.01.2008 entered into between the Appellant and the Corporate Debtor. The Appellant has purchased the said property under the sale which took place under the provisions of SARFAESI Act when the said property was sold by UCO Bank. The Appellant had purchased the said property free from all encumbrances. It was also submitted that no development work had ever commenced in the said property which belongs to the Appellant and accordingly it was decided that instead of keeping the said property idle and unutilised for any useful purpose, M/s. Victory Iron Works Limited (Appellant in Company Appeal (AT) (Ins) No. 508 of 2020), as the licensee will be allowed to keep its goods, movables, equipment, build temporary sheds and conduct business from the said land covering in area much more than the area specified in Leave and Licence

Agreement. The Corporate Debtor had gone into CIRP on October 15, 2019. The RP, thereafter, has filed an Application before the Adjudicating Authority being CA(IB) No. 1807/KB/2019 praying for recovery of exclusive possession of the subject premises. It was also submitted that this is beyond the purview of the Code and related Regulations to grant relief for obtaining “*Sole and Exclusive*” possession of subject premises not owned by the Corporate Debtor and also relief as prayed for in the subject application also beyond the purview of Section 14(1)(d) of the Code. It was also submitted that the provisions of the Code cannot be resorted to obtain physical possession post CIRP commencement. They have further gone to submit that the Adjudicating Authority did not have the requisite jurisdiction under the Code to direct recovery of possession of the subject premises by the RP. They have also mentioned that the Development Agreement (‘DA’) dated 16.06.2008 vide clause 9.2 provides for the possession for the said land in the manner laid down therein for brevity of clarity the same is reproduced below:

“Clause 5.2 – MOU and Shareholders Agreement: The owner in order to develop the said land executed a MOU dated 24.01.2008 with the Developer where in the broad terms and conditions of Development are provided therein and also executed a Shareholders Agreement of even date whereby 60% of the Shares of the owner were transferred by the Board, of which the Developer holds 40% of the Transferred Shares and 20% of the Transferred Shares are held by Shri

R.L.Gaggar of 6, Old Post Office Street Kolkata as security till the completion of the Project.

Clause 6.1 – Appointment and Acceptance: The Owner hereby appoints the Developer as the developer of the said land and the developer hereby accepts such appointment. By virtue of such appointment, the owner hereby grants and assigns exclusive right to the Developer to build upon and exploit commercially the said land by (1) demolishing the existing structures, if any (2) constructing. The housing complex and (3) causing marketing/ sale of both Developers allocation and owners' allocation.

Clause 6.2- Commencement and Tenure: Consequent to such appointment and acceptance of appointment, this agreement commences and shall be deemed to have commenced on and with effect from the date of execution as mentioned above and this Agreement shall remain valid and in force till the development and sale is completed in all respects and all obligations of the Parties towards each other are fulfilled and performed.

Clause 9.2 – Full Possession: The Owner- Energy Property Pvt. Ltd shall make over khas and vacant possession of the entirety of the Said Land to the Developer- Avani Property Pvt. Ltd, for the purpose of carrying out the obligations of the Developer under this Agreement within 60 days from execution hereof. The Developer shall have the right to remain in possession for

doing the various acts necessary for fulfilment of this Agreement.”

They also submitted that the Corporate Debtor has not completed construction within the stipulated period and hence M/s. Victory Iron Works Limited were allowed subject premises. In view of this the jurisdiction Adjudicating Authority to allow possession of the premises through eviction of the person in actual physical possession is beyond the purview of Adjudicating Authority under the Code.

8. While in Company Appeal (AT) (Ins) No. 508 of 2020, the Appellant has submitted that M/s. Energy Property Pvt. Ltd is the owner of the said property. They have also submitted that the Corporate Debtor (under CIRP) never acted upon the said development agreement dated 16.06.2008 as such on request of the Appellant – M/s. Victory Iron Works Limited to allow permissive use of said property and accordingly they entered into Leave and License agreement dated 19.08.2011. The Appellant through this agreement was granted leave to carry its business of manufacturing of exporting cast iron and ductile iron from the said property. They were using an area over and above 10,000 square foot for the said business activity. They have also made the allegation that after initiation of CIRP of the Corporate Debtor vide Adjudicating Authority order dated 15.10.2019 taking advantage of the moratorium in terms of Section 14 of the Code; M/s. Sesa International and Avani Groups (through its promoters) wants to take the control over the property of the Corporate Debtor- M/s. Avani Towers Pvt. Ltd. And have

also referred a judgment of earlier attempt of this Group to take over the property in a judgment dated 16.11.2017 passed by Hon'ble Calcutta High Court in APO No. 439 of 2017 titled Sesa International Ltd Vs. Avani Projects and Infrastructures Pvt. Ltd & Ors, wherein the Hon'ble High Court while identifying the nexus and malafides of Sesa International and the Avani Group promoters i.e. Mr. Anirudh Daga, recorded as under:

“27.The action instituted by the plaintiff, the disingenuous manner in which its petition before the interlocutory court was fashioned, the unworthy interlocutory prayers that it carried to the court and the timing of the institution of the suit and the ex parte order that it obtained, reveal a dark side of the legal system. There is no doubt that the process of this court was abused to obtain an undeserving order a couple of days before the summer vacation to inflict maximum prejudice on parties against whom the plaintiff has no claim or the semblance of any cause of action. It was a vicious plan devised in the name of the plaintiff to aid the third defendant and his virtually bankrupt first defendant company to ward off R-Com. The entire exercise was designed to hijack the second defendant and its only valuable asset when the plaintiff had no cause to proceed against the second defendant.

28. No part of the untruthful story carried to court by the plaintiff is worthy of any credence. In addition, the second defendant has demonstrated by referring to another suit on similar lines filed by a sister concern of the plaintiff herein and also controlled by Shankar Lal Bagri, from which it is evident that Shankar Lal Bagri and third defendant Anirudh Daga are acquainted with each other and go back some distance in time.

29. It is difficult to accept that a sum of Rs.21 crore would be paid by one commercial entity to another without any document being executed in support thereof. Indeed, as the second defendant has emphasised, that

money was received by the first defendant from the plaintiff in the middle of the year 2014 proves nothing at all, even qua the first defendant. The story attempted to be sold by the plaintiff to the court is that after payment of a total amount of Rs.21 crore between March, 2014 and August 1, 2014, by November 15, 2014 the first defendant agreed to refund the payment at a high rate of interest of 18 per cent per annum and also unilaterally offered to pay Rs.8 crore by way of compensation. The purported letter of November 15, 2014, doubtless, would not appear in the records of the second defendant though the third defendant as a director of the second defendant purported to sign the same on behalf of the second defendant. The second defendant has squarely disowned such letter and the authority of Daga to issue the same on its behalf.

33. The entire scheme devised by the plaintiff smacks of collusion with the third defendant. There is no credible reason why the plaintiff made the payment till the beginning of August, 2014 and by October of the same year began negotiations to pull out of the project.....

35. The collusion between the plaintiff and the third defendant is also evidenced by the fact that the representation in court on behalf of the second defendant to virtually accept the plaintiff's claim was by a person who had not been authorised in such regard by the second defendant and who had to ultimately withdraw from the proceedings. The entire exercise by the plaintiff is an affront to the system and almost mocking at the court. The manner in which the plaintiff has conducted the matter is an insult to the intellect and borders on taunting the court at its perceived impotence to deal with such maladroit litigants and their representatives. The complexity of the plot hatched on behalf of the third defendant in the name of the plaintiff is such that it could not have emanated from Old Post Office Street and had to have its origin in some more up-market address. There is a limit to the court's endurance to such antics and it is time that a spade is called exactly what it is.

38. The extent of the complicity between the plaintiff or the Bagri in control thereof and third defendant Daga is stark in the plaintiff disowning the order passed by the interlocutory court by which the

residual rights of the first defendant in respect of a particular property have been attached.....”

In the above judgment, the Hon'ble High Court has clearly highlighted the malafide nexus of Sesa International and the Avni Group. It may be noted that with similar intentions, Sesa International had initiated the CIRP of the Corporate Debtor (a group company of Avani Group) and is now, through the Resolution Professional, attempting to take control, custody and possession of the said property, which has neither being in the Corporate Debtor's possession, nor the said property is owned by the Corporate Debtor.

In order to execute the above illegal designs of Sesa International and the Avani Group, the Respondent No.1 malafidely preferred an application being CA(IB) No. 1807/KB/2019, under Section 60 of the Code seeking directions to the Appellant herein to not obstruct the Resolution Professional from taking possession of the said property and further to direct the local administration to assist the RP in taking possession of the said property.

On hearing the said application on interim reliefs, on 09.01.2020, the Adjudicating Authority directed the parties to maintain status quo in so far as the site and the material lying thereon was concerned. It is noteworthy that while passing the said status quo order, the Adjudicating Authority recorded as under:

“Since the question whether property under dispute is the assets of the corporate debtor is involved, where parties have counter-stakes, we direct all parties to maintain status quo as far as the site and the material lying thereon. Matter to appear on 20.01.2020 for further consideration”

In view of the above status quo order of the Adjudicating Authority, the RP while taking undue advantage of the said order, attempted to intermeddle and interfere in the day to day business affairs of the Appellant, which were being carried on by the Appellant on the said property. Aggrieved of the said fact, the Appellant preferred CA (IB) No. 146/KB/2020 before the Adjudicating Authority, seeking clarification

of the order dated 09.01.2020, with directions to the RP that the status quo in so far as the material lying thereon is concerned, will not disturb/ affect the day to day business operations of the Appellant from the said property.

It is worthwhile to mention that the RP had malafidely interpreted the order dated 09.01.2020 passed by the Adjudicating Authority in CA(IB) No.1807/KB/2019 and on basis the said order the RP was disrupting the day to day business activities of the Appellant at the said property. The Adjudicating Authority disposed of CA(IB) No.1807/KB/2019 alongwith CA(IB) No. 146/KB/2020 vide the impugned order dated 12.02.2020, there by erroneously allowing the prayers sought in CA(IB) No.1807/KB/2019 and further wrongly passing directions in respect of the rights of the Appellant over the said property.

9. Respondent No.2 – M/s. Energy Properties Pvt. Ltd has submitted in CA(AT)(Ins) No. 508 of 2020 that it is supporting the cause of the Appellant as it is also similarly aggrieved from the same impugned order dated 12.02.2020. It is also stated by them that M/s. Victory Irons Works Limited is in the actual physical possession of the subject property since 2011 and they were carrying on their business in the subject property also since 2011 and the Corporate Debtor (under CIRP) was having the knowledge of the same. However, the Respondent No.2 - M/s. Energy Properties Pvt. Ltd is accepting that the Development Agreement dated 16.06.2008 was not terminated before the commencement of CIRP. They are also challenging that inspite of Corporate Debtor (under CIRP) having been with the Development Agreement has not done anything for the last 11 years and has virtually abandoned the Development Agreement and forgone its rights of

Developers. M/s. Energy Properties Pvt. Ltd is the owner of the Property and hence the impugned order clearly interferes and infringes its right.

10. The RP in Company Appeal (AT) (Ins) No. 508 of 2020 has asserted that the order passed by the Adjudicating Authority was necessary to protect and preserve the sub-stratum of the Corporate Debtor and to ensure a positive outcome to the CIRP. The Development right is the only valuable right and an “Intangible Asset” belonging to the Corporate Debtor. They have also submitted that if the benefit of such rights and interest are not protected, the Corporate Debtor will be forced to go into liquidation while will be contrary to the objectives and spirit of Code. The RP has also stated that the Corporate Debtor (in CIRP) has all along been in possession of the subject property pursuant to the Development Agreement executed between the Appellant and the Corporate Debtor and have also asserted that the Development Agreement is subsisting and has not been terminated. It has also been stated by the RP that M/s. Victory Iron Works Pvt. Ltd – Appellant in CA(AT) (Ins) 508 of 2020 is wrongly claiming to be a licensee though the licence agreement executed in its favour expired way back in the year 2012 and the Appellant has no existing right to be in possession of any part of the said property. The Agreement with the Appellant stood expired in the year 2012 and no rights can be claimed by the Appellant on the basis thereof or otherwise in relation to the subject property. Moreover, the Appellant was given a licence only to the extent of approx. 10,000 sq. ft. on the said land which is the small fraction of the total area upon expiry of the Agreement the Appellant was obligated not to

use any part of the said property in any manner whatsoever and to remove its material from the said property. The RP is also alleging that M/s. Energy Properties Pvt. Ltd- Respondent No.2 in CA(AT)(Ins) No. 508 of 2020 has been planted by the Appellant - M/s. Victory Iron Works Pvt. Ltd. to obstruct and defeat the right of the Corporate Debtor to enjoy its valuable development right in respect of the said property. It is also stated by the RP that the Corporate Debtor is having 40% shareholding in the Respondent No.2- Energy Properties Pvt. Ltd which is the owner of the property. By virtue of the MoU recording possession dated 24.06.2010 executed between the Corporate Debtor and respondent No.2 confirms that the Corporate Debtor was granted exclusive development right in respect of the entirety of the said property and the right subsist even as on date. In the preamble of the Memorandum of Recording Possession made on 24th June, 2010 between Energy Properties Pvt. Ltd -R2 and Avain Properties Pvt. Ltd – Corporate Debtor (in CIRP) speaks of as follows:

“Clause A.- the Developer and Landlord have formed a company under the name and style of Energy Properties Pvt Ltd (hereinafter referred to as the Company) who had purchased and acquired all that the various places and parcels of land containing by estimation 10.19 acres (more or less) (Hereinafter referred to as the Ramrajatolla Property) which formerly belonged to Shree Gobindo Glass works Ltd, a Company under the control and management of the landlord.

Clause 1.- It is hereby recorded confirmed and declared that the entirety of the said Ramrajatolla property has been delivered by the Landlord to

the Developer to be exclusively held by Developer in terms of Development Agreement dated 16.06.2008 and in terms of the Shareholders Agreement dated 24.01.2008.”

11. In Company Appeal (AT)(Ins) No. 377 of 2020, the RP has submitted that the Corporate Debtor has important intangible Possessory as well as development right over the property and on account of moratorium imposed under section 14 of the Code such possessory and development right created under the terms of Development Agreement dated 16.06.2008 cannot be terminated or sought to be terminated during the CIRP period. The term of the Development Agreement was till the Development, sale and until completion of all obligations of the parties towards each other accordingly the Corporate Debtor was handed over full and exclusive possession of the property which was also recorded in the MOU dated 24.06.2010. Section 25(2)(a) of the Code the RP is duty bound to take control of the assets of the Corporate Debtor and such assets include all the tangible and intangible assets including possessory and development right. It was also stated by the counsel of the RP stated that the property was acquired by Energy Property Pvt ltd in an auction by UCO Bank. For acquiring the property, the Energy Property Pvt Ltd – Appellant has approached the Corporate Debtor seeking financial assistance and purchase of the property and CD (Under CIRP) has paid an amount of Rs. 2.7 Crore directly to UCO for on behalf of the Energy Property Pvt Ltd for acquisition of property and a sale certificate was issued in favour of Energy Properties Pvt. Ltd on 29.01.2008 in addition thereto CD (under CIRP) has also advanced

a sum of Rs. 9.3 Crore for liquidation of all liabilities and obtaining vacant possession of the property. It was also stated by the learned counsel for the RP that to secure repayment of monies advanced by the Corporate Debtor and also to protect the interest of the Corporate Debtor, a Shareholders Agreement dated 24.01.2008 was also executed between members of Jhunjhunwala Group, CD, Energy Properties and Mr. Ratan Lal Gaggar (“Shareholder Agreement”). As per the terms of the Shareholder Agreement, 40% of the shareholding of Energy Properties was to be held by Jhunjhunwala Group and Corporate Debtor respectively and the remaining 20% was held by Mr. Ratan Lal Gaggar. Therefore, by virtue of the said 40% shareholding of Energy Properties, the Corporate Debtor has vested interest in the property. The Appeal has been filed by Energy Properties Pvt. Ltd without any authorization. In addition to the above, as per the terms of the Shareholders Agreement, out of the five directors of Energy Properties, two directors were to be nominated by Corporate Debtor who held voting rights. Evidently, no resolution was voted upon for filing of the present Appeal. Therefore, in absence of any valid board resolution, the Appeal filed by the Energy Properties is without any valid authorization and hence liable to be dismissed. The RP has further submitted that as per Leave and License Agreement dated 11.08.2011 a portion of property was granted to Victory iron works Ltd for a term of 11 months. Admittedly the License Agreement has expired on 18.07.2012 and has not been renewed and/or extended thereafter. Therefore, any occupation of any portion of the property by Victory Iron is illegal and

amount to encroachment and/or trespass. Despite the admitted fact that Victory iron is in illegal possession of the portion of property. Victory Iron has preferred the Appeal with malafide intent to mislead this Tribunal and seek the reliefs which Victory Iron is otherwise not entitled to. It is well settled that one cannot take advantage of its own wrong. It is also noteworthy that in cases where the corporate debtor is engaged in development of the property, the possessory and development rights are the most crucial rights of the corporate debtor without which effective resolution of the Corporate Debtor is not possible. It is the general custom or practice to enter into Development Agreements. If Development Agreements were said not to confer any rights on the Corporate Debtor then all CIRP in respect of Corporate Debtor(s) who are real estate developers are bound to fail. As in the present case, for effective resolution of the Corporate Debtor, the possessory and development rights entailed under the Development Agreement are required to be protected.

12. We have gone through the various judgments cited by the Appellants and Respondents and our observations applicable to the present appeal of those judgments are follows:

a. Embassy Property Developments Pvt. Ltd Vs. State of Karnataka and Ors. In Civil Appeal No. 9170 of 2019.

“Para – 46 - A lot of stress was made on the effect of Section 14 of IBC, 2016 on the deemed extension of lease. But we do not think that the moratorium provided for in Section 14 could have any impact upon the right of the Government to refuse the

extension of lease. The purpose of moratorium is only to preserve the status quo and not to create a new right. Therefore, nothing turns on Section 14 of IBC, 2016. Even Section 14 (1) (d), of IBC, 2016, which prohibits, during the period of moratorium, the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor, will not go to the rescue of the corporate debtor, since what is prohibited therein, is only the right not to be dispossessed, but not the right to have renewal of the lease of such property. In fact the right not to be dispossessed, found in Section 14 (1) (d), will have nothing to do with the rights conferred by a mining lease especially on a government land. What is granted under the deed of mining lease in ML 2293 dated 04.01.2001, by the Government of Karnataka, to the Corporate Debtor, was the right to mine, excavate and recover iron ore and red oxide for a specified period of time. The Deed of Lease contains a Schedule divided into several parts. Part-I of the Schedule describes the location and area of the lease. Part-II indicates the liberties and privileges of the lessee. The restrictions and conditions subject to which the grant can be enjoyed are found in Part-III of the Schedule. The liberties, powers and privileges reserved to the Government, despite the grant, are indicated in Part-IV. This Part-IV entitles the Government to work on other minerals (other than iron ore and red oxide) on the same land, even

during the subsistence of the lease. Therefore, what was granted to the Corporate Debtor was not an exclusive possession of the area in question, so as to enable the Resolution Professional to invoke Section 14 (1) (d). Section 14 (1) (d) may have no application to situations of this nature.

Para 47- Therefore, in fine, our answer to the first question would be that NCLT did not have jurisdiction to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, on the basis that NCLT was *coram non iudice*.

Para – 54- The upshot of the above discussion is that though NCLT and NCLAT would have jurisdiction to enquire into questions of fraud, they would not have jurisdiction to adjudicate upon disputes such as those arising under MMDR Act, 1957 and the rules issued thereunder, especially when the disputes revolve around decisions of statutory or quasi judicial authorities, which can be corrected only by way of judicial review of administrative action. Hence, the High Court was justified in entertaining the writ petition and we see no reason to interfere with the decision of the High Court. Therefore, the appeals are dismissed. There will be no order as to costs.

- b. Rajendra K Bhutta Vs. Maharashtra Housing and Area Development Authority and Anr., in Civil Appeal No. 12248 of 2018 decided on 19.02.2020.

“Para XI- On 03.07.2018, the Appellant filed an approved Resolution Plan before the NCLT, Mumbai by way of I.A. No.21433 of 2018. We are informed that this was within the extended period of 55 days so granted by the NCLAT. It may only be mentioned that the Resolution Plan was approved by 86.16% of the Committee of Creditors. Ultimately, the NCLAT, by the impugned order dated 14.12.2018, (after omitting to refer to the order dated 09.05.2018), stated that 270 days are over, as a result of which the entire discussion of Section 14(1)(d) would now become academic. However, it also decided:

“14. On perusal of record, we find that pursuant to the ‘Joint Development Agreement’ the land of the ‘Maharashtra Housing and Area Development Authority’ was handed over to the ‘Corporate Debtor’ and ‘except for development work’ the ‘Corporate Debtor’ has not accrued any right over the land in question. The land belongs to the ‘Maharashtra Housing and Area Development Authority’ which has not formally transferred it in favour of the ‘Corporate Debtor’. Hence, it cannot be treated to be the asset of the ‘Corporate Debtor’ for application of provisions of Section 14(1)(d) of the ‘I&B Code’.”

Para – 12. A bare reading of Section 14(1)(d) of the Code would make it clear that it does not deal with any of the assets or legal right or beneficial interest in such assets of the corporate debtor. For this reason, any reference to Sections 18 and 36, as was made by the NCLT, becomes wholly unnecessary in deciding the scope of Section 14(1)(d), which stands on a separate footing. Under Section 14(1)(d) what is referred to is the “recovery of any property”. The ‘property’ in this case consists of land, ad-measuring 47 acres, together with structures thereon that had to be demolished.

‘Recovery’ would necessarily go with what was parted by the corporate debtor, and for this one has to go to the next expression contained in the said sub-section.

Para 17- Regard being had to the aforesaid authorities, it is clear that when recovery of property is to be made by an owner under Section 14(1)(d), such recovery would be of property that is “occupied by” a corporate debtor.

Para 24. The conspectus of the aforesaid judgments would show that the expression “occupied by” would mean or be synonymous with being in actual physical possession of or being actually used by, in contra-distinction to the expression “possession”, which would connote possession being either constructive or actual and which, in turn, would include legally being in possession, though factually not being in physical possession. Since it is clear that the Joint Development Agreement read with the Deed of Modification has granted a license to the developer (Corporate Debtor) to enter upon the property, with a view to do all the things that are mentioned in it, there can be no gain saying that after such entry, the property would be “occupied by” the developer. Indeed, this becomes clear from the termination notice dated 12.01.2018, issued by MHADA to the developer, in which it is stated:

“35. This is therefore to inform you that on the expiry of 30 days from the date of receipt of this notice, the Joint Development Agreement dated 10.04.2008 and Deed of Confirmation and Modification dated 03.11.2011 and Letter dated 18.01.2014 stands terminated and you will not be allowed to enter the property and your authority/license to enter the property or remain thereupon is terminated. MHADA thereupon will not allow you to do anything on or in relation to the property and MHADA shall take possession of all the structures standing at whatever stage they are situated at Goregaon (West) and bearing CTS No ...” It now remains for us to deal with some of the provisions of the MHADA Act as well as some of the judgments cited on behalf of the respondents. MHADA Act, as its preamble states, is an Act to unify, consolidate and amend the laws relating to housing, repairing and reconstructing dangerous buildings and carrying out improvement works in slum areas. By Section 4 of the Act, the Authority, i.e. the MHADA, is to be a corporate body, and is deemed to be a local authority for the purposes of the Act. By Section 5 the Rent Act, or any corresponding laws are not to apply. By Section 66, the Competent Authority is given power to evict persons from premises under certain circumstances. Sections 76 and 79, on which

great reliance was placed by Mr. Dave, are set out herein below:

“76. Duties relating to repairs and reconstruction of dilapidated buildings. Subject to the provisions of this Chapter, it shall be the duty of the Board –

(a) to undertake and carry out structural repairs to buildings, in such order of priority as the Board, having regard to the exigencies of the case and availability of resources, considers necessary, without recovering any expenses thereof from the owners or occupiers of such buildings;

(b) to provide temporary or alternative accommodation to the occupiers of any such building, when repairs thereto are undertaken, or a building collapses;

(c) to undertake, from time to time, the work of ordinary and tenantable repairs in respect of all premises placed at the disposal of the Board;

(d) to move the State Government to acquire old and dilapidated buildings and which are, in the opinion of the Board, beyond repairs; and to reconstruct or to get reconstructed new buildings thereon for the purpose of housing as many occupiers of those properties as possible, and for providing alternative accommodation to other affected occupiers;

79. Power of Board to undertake building repairs, building reconstruction and occupiers housing and rehabilitation schemes.

(1) The Authority may, on such terms and conditions as it may think fit to impose, entrust to the Board the framing and execution of schemes for building repairs or for reconstruction of buildings or for housing and rehabilitation of, dishoused occupiers, whether provided by this Act or not, and the Board shall thereupon undertake the framing and execution of such schemes as if it had been provided for by this Act.

(2) The Board may, on such terms and conditions as may be agreed upon and with the previous approval of the Authority-

(a) hand over the execution under its own supervision of any building repairs scheme, building reconstruction

scheme, or dishoused occupier's housing scheme to a Municipal Corporation or to a co-operative society or to any other agency recognized for the purpose by the Board, as it may deem necessary, and

(b) transfer by sale, exchange or otherwise in any manner whatsoever any new building constructed on any land acquired under this Chapter to any co-operative society, if it is formed by all the occupiers, or to apartment owners for the purposes of the Maharashtra Apartment Ownership Act, 1970 (the apartment owners being all such occupiers)."

13. We are also reproducing Section 14 of the 'Code' for ease of convenience: -

Section 14: Moratorium;

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation – For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations or such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be Specified.

(3) The provisions of sub-section (1) shall not apply to-

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

14. What we observed from the aforesaid judgments that in case of Embassy Properties (as stated supra) that the Adjudicating Authority did not have jurisdiction to entertain an application against the Govt. of Karnataka for a direction to execute Lease Deeds for extension of mining lease. However, the Adjudicating Authority would have jurisdiction to enquire into question of fraud to adjudicate upon disputes. While in case of 'Rajendra K Bhutta' (as stated supra), it has been made clear that Section 14(1)(d) of the 'Code' does not deal

with any of the assets or legal right in such assets of Corporate Debtor but deal with recovery of 'Property'.

15. There are certain facts which are very clear from the deliberation of submissions including the pleadings by the parties that M/s. Energy Properties Pvt ltd is the owner of the property and the Corporate Debtor (in CIRP) is a Developer of the Property in terms of the Development Agreement dated 16.06.2008 and they will be governed by *inter - se* agreements. Here the Adjudicating Authority has not gone into the issue of ownership of the property, he has restricted its role as provided in Section 14 of the 'Code' vide Section 14(1)(d) including its explanations. It is also undisputed fact that the Corporate Debtor (In CIRP) is holding the development right and the Development Agreement dated 16.06.2008 has not been terminated before the commencement of CIRP. In all such situations Section 14 of the 'Code' is applicable till it reaches the stage of approval of Resolution Plan or Liquidation. However, the RP is to appropriately disclose the status of the 'Property' in the Information Memorandum and other documents as required in the IBBI (Insolvency Resolution for Corporate Perrons) Regulations, 2016.
16. As far as M/s. Victory Iron works limited is concerned, they have been provided space of 10,000 sq ft approximately on the said land by virtue of leave and license agreement dated 11.08.2011 and it is their privilege to use the land in terms of same leave and license

agreement and this is also not disputed by Corporate Debtor in Resolution through RP.

17. All these suggest that there is no infirmity in the impugned order dt. 12.02.2020 and the appeal deserves to be dismissed and is dismissed with above observations.

18. Pending Interlocutory Application(s), if any, stands disposed of.

No order as to costs.

**[Justice Bansi Lal Bhat]
Acting Chairperson**

**[Dr. Ashok Kumar Mishra]
Member (Technical)**

**(Ms Shreesha Merla)
Member (Technical)**

08th April, 2021

New Delhi

Raushan.K