Mr. Rajendra K. Bhutta vs Maharashtra Housing And Area ... on 19 February, 2020

Equivalent citations: AIR 2020 SUPREME COURT 3274, AIRONLINE 2020 SC 266

Author: R.F. Nariman

Bench: V. Ramasubramanian, S. Ravindra Bhat, R. F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 12248 OF 2018

RAJENDRA K. BHUTTA …Appell

Versus

MAHARASHTRA HOUSING AND
AREA DEVELOPMENT AUTHORITY
AND ANOTHER …Responden

JUDGMENT

R.F. Nariman, J.

1. This appeal raises a question as to the correct interpretation of Section 14(1)(d) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code"). The facts necessary to appreciate the setting in which this question arises are as follows:

> i. On 01.11.2007, a Resolution bearing No.6280 was passed by the Maharashtra Housing and Area Development Authority (hereinafter referred to as 'the MHADA') to execute a joint development agreement with the Corporate Debtor, i.e. Guru Ashish Construction Private Limited, and Goregaon Siddharth Nagar Sahakar Griha Nirman Sanstha Limited (a Society for persons who are displaced and who are to be re-
>
> housed in the project for joint development of land, ad-
>
> measuring about 40 acres), which envisaged re-development insofar as 672 tenements in Siddharth Nagar, Goregaon, Mumbai were concerned.

ii. On 03.03.2008, the Maharashtra State Government granted its approval to the aforesaid Resolution.

iii. On 10.04.2008, a Tripartite Joint Development Agreement (hereinafter referred to as the "Joint Development Agreement") was entered into between the Society representing persons occupying 672 tenements, MHADA and the Corporate Debtor.

iv. On 25.03.2011, a Loan Agreement was entered into and executed between the Union Bank of India and the Corporate Debtor for a sum of Rs. 200 Crores.

v. On 09.11.2011, a Deed of Modification was entered into between the three parties to the Joint Development Agreement, as after carrying out the survey of the land in question, it was found that certain parcels of land, which were identified with certain city survey numbers, were omitted, as a result of which they were also added, now making the project for a total of 47 acres of land.

vi. As a result of the Corporate Debtor defaulting in repayment of the loan to its financial creditor, namely, the Union Bank of India, an Insolvency Application under Section 7 of the Code, which was filed on 15.05.2017, was admitted on 24.07.2017, appointing an Interim Resolution Professional (i.e. the Appellant before us). A moratorium in terms of Section 14 was also declared by this order.

vii. On 12.01.2018 - after the imposition of the moratorium period under Section 14 of the Code - MHADA issued a termination notice to the Corporate Debtor stating that upon expiry of 30 days from the date of receipt of the notice, the Joint Development Agreement as modified would stand terminated. It was further stated that the Corporate Debtor would have to handover possession to MHADA, which would then enter upon the plot and take possession of the land including all structures thereon.

viii. One hundred and eighty days from the start of the Corporate Insolvency Resolution Process (hereinafter referred to as "the CIRP") expired on 19.01.2018. The NCLT, by order dated 24.01.2018, extended the CIRP period by ninety days, as is permissible under the Code.

ix. On 01.02.2018, the Appellant filed M.A. No. 96 of 2018, seeking a direction from the NCLT to restrain MHADA from taking over possession of the land till completion of the CIRP, contending that such a recovery of possession was in derogation of the moratorium imposed under Section 14 of the Code. The NCLT, by order dated 02.04.2018, dismissed the aforesaid application, stating that Section 14(1)(d) of the Code does not cover licenses to enter upon land in pursuance of Joint Development Agreements, stating that such licenses would only be 'personal' and not interests created in property. An appeal against this order was preferred to the NCLAT.

x. Meanwhile, in a parallel proceeding, on 18.04.2018, the amount of time taken by the NCLT in deciding the application under Section 7 under the Code, being 55 days, was sought to be omitted from the total number of days allowable under the Code. This application was partially granted, excluding 38 out of 55 days. An appeal to the NCLAT proved successful, whereby the NCLAT, by order dated 09.05.2018, allowed the appeal and allowed the entire 55 days so taken before the NCLT to be excluded.

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'."

2. Mr. Dhruv Mehta, learned Senior Advocate appearing for the Appellant, has taken us through the Joint Development Agreement together with the Deed of Modification in great detail. His first submission is that it would be wholly incorrect to state that a mere 'license to enter' had been granted. According to him, if these two documents were read as a whole, it is clear that legal possession was actually handed over to him in order to do three things: (1) construct tenements which were to be handed over to MHADA free of cost; (2) construct tenements in which the 672 occupiers of the erstwhile tenements were to be housed; and (3) thereafter recoup costs and make profit by sale of what was called the 'free sale component' that would be left over. Apart from the above, he went through the NCLT order dated 02.04.2018 in great detail, and stated that there is a conceptual confusion in the said order, inasmuch as Section 14(1)(b) of the Code was not the subject-matter of consideration, in which case it would have been necessary to see other sections dealing with "assets" that pertain to the Corporate Debtor, such as Sections 18 and 36 of the Code. If Section 14(1)(d), on the other hand, were to be seen, it does not mention the expression "assets" at all but only refers to "property", which according to Mr. Mehta was defined extremely widely. He argued that, in any event, on the plain language of Section 14(1)(d), it was not necessary for him to make out any case as to legal possession having been handed over to him, as the expression used by Section 14(1)(d) and applied to the facts of his case is '... is occupied by'. He argued that applying the latin maxim reddendo singula singulis, it is clear that any recovery of a property by an owner where such property is 'occupied by' the Corporate Debtor would clearly fall within Section 14(1)(d), the expression "...or in the possession of" going with the expression "lessor" and not "owner". This being

the case, he contended that it is clear that when two expressions of different import are used within the same sub-section, they are meant to mean different things. The expression 'occupied' would have to be confined to physical occupation or use, and not to legal possession, which is a separate concept in law. He cited a number of authorities to buttress his arguments.

3. Mr. Dushyant Dave, learned Senior Advocate appearing on behalf of MHADA, painstakingly took us through the various provisions of the Maharashtra Housing and Area Development Act, 1976 (hereinafter referred to as the "MHADA Act"). He relied, in particular, upon the various clauses in the preamble and then referred to Sections 4, 5, 37, 66 and 74 and relied strongly upon Sections 76 and 79 of the MHADA Act to argue that joint development schemes that the Authorities concerned enter into with the builders must first be with the previous approval of the Authority, and such schemes have to be executed under the supervision of the Authority. This being the case, according to him, there is no question of any possession or occupation being handed over and, as a result, Section 14(1)(d) of the Code would not apply. He also strongly relied upon a recent judgment by my brother S. Ravindra Bhat, J. in Municipal Corporation of Greater Mumbai (MCGM) vs. Abhilash Lal & Ors. (Civil Appeal No. 6350 of 2019), to buttress his proposition that Section 238 of the Code, which contains a non- obstante clause getting out of harm's way other statutes, cannot be extended beyond the provisions of the Code. He exhorted us to give full play to the MHADA Act, and if that were done it is obvious that any clash between the MHADA Act and the Insolvency Code would then have to be resolved, at least on the facts of this case, in favour of MHADA. He also referred to a Bombay High Court order dated 05.04.2018, in which it was stated that MHADA had taken symbolic possession on 05.04.2018.

4. Mr. Basava Prabhu Patil, learned Senior Advocate appearing on behalf of some of the homebuyers, also referred to and relied upon the judgment of my brother S. Ravindra Bhat, J. Both Mr. Dave and Mr. Patil referred to and relied upon a recent judgment of this Court in Sushil Kumar Agarwal vs. Meenakshi Sadhu and Others (2019) 2 SCC 241 in which, in the context of specific performance, development agreements were categorized into three types, and it was stated that where interests in property were not created by any category, such agreements could not be specifically performed.

5. Having heard the learned senior counsel appearing for all the parties, it is necessary to first set out some of the provisions of the Code. Section 3(27) reads as follows:

> "3. Definitions. In this Code, unless the context otherwise requires,— xxx xxx xxx (27) "property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property;" Section 14 is set out as follows:
>
> "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 (54 of 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.

(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.

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

(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;

(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." (emphasis supplied) Section 18, on which great reliance is placed, is also set out hereunder:

"18. Duties of interim resolution professional. (1) The interim resolution professional shall perform the following duties, namely:—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

(vi) assets subject to the determination of ownership by a court or authority;

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this section, the term "assets" shall not include the following, namely:

—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator." Section 31 which indicates the period of moratorium is also important and is set out as follows:

"31. Approval of resolution plan.

(1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:

Provided that the Adjudicating Authority shall, before passing an order for approval of resolution plan under this sub-section, satisfy that the resolution plan has provisions for its effective implementation. (2) Where the Adjudicating Authority is satisfied that the resolution plan does not confirm to the requirements referred to in sub-section (1), it may, by an order, reject the resolution plan. (3) After the order of approval under sub-section (1),-

(a) the moratorium order passed by the Adjudicating Authority under section 14 shall cease to have effect; and

(b) the resolution professional shall forward all records relating to the conduct of the corporate insolvency resolution process and the resolution plan to the Board to be recorded on its database. (4) The resolution applicant shall, pursuant to the resolution plan approved under sub-section (1), obtain the necessary approval required under any law for the time being in force within a period of one year from the date of approval of the resolution plan by the Adjudicating Authority under sub-section (1) or within such period as provided for in such law, whichever is later:

Provided that where the resolution plan contains a provision for combination, as referred to in section 5 of the Competition Act, 2002 (12 of 2003), the resolution applicant shall obtain the approval of the Competition Commission of India under that Act prior to the approval of such resolution plan by the committee of creditors." Section 36(4) which is also relied upon, particularly by the NCLT judgment, is set out as follows:

"36. Liquidation estate.

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

(a) assets owned by a third party which are in possession of the corporate debtor, including—

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor."

6. The Joint Development Agreement, in the present case, makes it clear that a license is granted to the developer (i.e. the Corporate Debtor) to enter upon the land, demolish the existing structures and to construct and erect new structures and allot tenements. This is done in the Joint Development Agreement as follows:

"1.1.9 License Agreement shall mean and include an agreement by which a license will be granted in favour of the developer to enter upon the said land, to demolish the existing structures, to construct and erect new structures, to allot tenements in such constructed structures to the tenants and to do all other acts as are necessary for implementation of the project.

> 1.1.10 Project shall mean the building/s to be constructed by the developer and handed over to the society for housing the tenants and to MHADA in terms of this agreement but shall not mean and include the free sale buildings that the developer is entitled to develop and construct in terms of this agreement and in terms of the plan." "2.1.2 For the performance of the project, it is expressly agreed between the parties that:
>
> xxx xxx xxx (xxvi) It is agreed that the license will be granted to the Developer as per the requirement of the project.

After completion of the development, the beneficiaries housing societies will have to enter into lease deed with MHADA.

(xxvii) The Developer shall abide the terms of indemnity bond regarding the responsibility and risk for implementation, execution and completion of the project and specification and quality of work to be executed which is submitted to the VP and CEO/MHADA.

xxx xxx xxx (xxxix) For the purpose of rehabilitation of the tenants and implementing the project, MHADA hereby grants the license in the favour of the Developer to enter upon the said land, to demolish the existing structures, to construct and erect new structures, to allot tenements in such constructed structures to the tenants and to do all other acts as are necessary for implementation of the project. After completion of the project by the Developer and recovery of all the dues by MHADA, MHADA shall execute separate lease deeds in favour of the Society and in favour of the Developer of free sale tenements constructed by the Developer. All the tenements both Rehab and sale will have to be allotted on ownership basis.

xxx xxx xxx (xlvi) The Developer will be permitted to use their share of 50% of the built-up area for non-residential purpose. For this purpose, additional premium will not be charged by MHADA." The aforesaid provisions of the Joint Development Agreement would show that, at the very least, a license is granted in favour of the developer to enter upon the land to demolish existing structures, construct and erect new structures, and allot to erstwhile tenants, tenements in such constructed structures in three categories – (1) the earlier tenants/licensees of structures that were demolished; (2) tenements to be allotted free of cost to MHADA; and (3) what is referred to as "free sale component" which the developers then sell and exploit to recover or recoup cost and make profit. It is wholly unnecessary for us to refer to any other clauses of the Joint Development Agreement. It is also not necessary for the purpose of this case to state as to whether an interest in property is or is not created by the said Joint Development Agreement.

7. 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.

8. One thing is clear that "owner or lessor" qua "property" is then to be read with the expression "occupied or in the possession of". One manner of reading this clause is to state that whether recovery is sought by an owner or lessor, the property should either be occupied by or be in the possession of the corporate debtor. The difficulty with this interpretation is that a "lessor" would not normally seek recovery of property "occupied by" a tenant – having leased the property, a transfer of property has taken place in favour of a tenant, "possession" of which would then have to be recovered. This is where the latin maxim reddendo singula singulis comes in. In an earlier judgment of this Court reported in The Member, Board of Revenue vs. Arthur Paul Benthall [1955] 2 SCR 842, this Court dealt with two different expressions used in Sections 5 and 6 of the Indian Stamp Act, 1899, and held:

> "We are unable to accept the contention that the word "matter" in Section 5 was intended to convey the same meaning as the word "description" in Section 6. In its popular sense, the expression "distinct matters" would connote something different from distinct "categories". Two transactions might be of the same description, but all the same, they might be distinct. If A sells Black-acre to X and mortgages White-acre to Y, the transactions fall under different categories, and they are also distinct matters. But if A mortgages Black-acre to X and mortgages White-acre to Y, the two transactions fall under the same category, but they would certainly be distinct matters. If the intention of the legislature was that the expression 'distinct matters' in Section 5 should be understood not in its popular sense but narrowly as meaning different categories in the Schedule, nothing would have been easier than to say so. When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the expression "distinct matters" in Section 5 and "descriptions" in Section 6 have different connotations." (at page 846)

9. In Koteswar Vittal Kamath vs. K. Rangappa Baliga & Co (1969) 1 SCC 255, this Court had before it the proviso to Article 304(b) of the Constitution of India. This proviso is set out herein below:

> "Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President." The expression "no Bill or amendment" was read distributively with the expression "shall be introduced or moved in the Legislature of a State", it being clear that a bill is "introduced" and an amendment "moved", in the following paragraphs:
>
> "13. The High Court, in this connection, relied on two earlier decisions of the same court in George v. State of Travancore-Cochin, AIR 1954 Tra-Co 34 and State v. Philipose Philip, AIR 1954 Tra-Co 257. In fact, the High Court, in the present case, expressed its decision in almost the same language as was contained in the case of George v. State. In the second case of State v. Philipose Philip, this aspect was not

clearly discussed. The point, however, was considered in detail by a Full Bench of that High Court in Ulahannan Mathai v. State, AIR 1955 Tra- Co 82. The High Court interpreted the expression "No Bill or amendment shall be introduced or moved" in the proviso as requiring that the Bill should neither be introduced nor moved without the prior sanction of the President, and, since in the case of Act 5 of 1950, the Bill was moved for consideration, without the prior sanction of the President, on 23rd March, 1950, after the Constitution had come into force, there had been non-compliance with the proviso. The court rejected the contention put forward before it that what the proviso really stipulates is that no Bill "shall be introduced" or "amendment moved" in the Legislature of a State without the previous sanction of the President. That argument was advanced on the basis of the maxim "reddendo singula singulis" which, according to Black's Interpretation of Laws, means:

"Where a sentence in a statute contains several antecedents and several consequences, they are to be read distributively, that is to say, each phrase or expression is to be referred to its appropriate object."

14. The court based its decision on the view that, if the interpretation urged before it was accepted, it would be possible to introduce a Bill which required no Presidential sanction, get it amended by a Select Committee in such a way as to make it require the Presidential sanction in case it was originally introduced in the amended form and then pass it into law, and thus escape the necessity for the prior Presidential sanction provided by Article 304 of the Constitution. It was held that there can be no doubt that such a result could never have been intended by the makers of the Constitution. In our opinion, the High Court did not correctly appreciate the position.

The language of the proviso cannot be interpreted in the manner accepted by the High Court without doing violence to the Rules of construction. If both the words "introduced" or "moved" are held to refer to the Bill, it must necessarily be held that both those words will also refer to the word "amendment". On the face of it, there can be no question of introducing an amendment. Amendments are moved and then, if accepted by the House, incorporated in the Bill before it is passed. There is further an indication in the Constitution itself that wherever a reference is made to a Bill, the only step envisaged is introduction of the Bill. There is no reference to such a step as a Bill being moved. The articles, of which notice may be taken in this connection, are Articles 109, 114, 117, 198 and 207. In all these articles, whatever prohibition is laid down relates to the introduction of a Bill in the Legislature. There is no reference at any stage to a Bill being moved in a House. The language thus used in the Constitution clearly points to the interpretation that, even in the proviso to Article 304, the word "introduced" refers to the Bill, while the word "moved" refers to the amendment."

10. Likewise, in Kailash Nath Agarwal and Others v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and Another (2003) 4 SCC 305, this Court referred to Section 22(1) of the Sick Industries Companies (Special Provisions) Amendment Act, 1994 and applied the aforesaid latin maxim to the words "suit" and "proceeding" as follows:

> "20. There is an apparent distinction between the expressions "proceeding" and "suit" used in Section 22(1). While it is true that two different words may be used in the same statute to convey the same meaning, that is the exception rather than the rule. The general rule is that when two different words are used by the same statute, prima facie one has to construe these different words as carrying different meanings. In Kanhaiyalal Vishindas Gidwani (1993) 2 SCC 144, this Court found that the words "subscribed" and "signed" had been used in the Representation of the People Act, 1951 interchangeably and, therefore, in that context the Court came to the conclusion that when the legislature used the word "subscribed" it did not intend anything more than "signing". The words "suit" and "proceeding" have not been used interchangeably in SICA. Therefore, the reasons which persuaded this Court to give the same meaning to two different words in a statute cannot be applied here.

xxx xxx xxx

26. Apart from the semantic difference between the words "suit" and "proceeding" there is the absence of expansive words "or the like" which appear after the expression "proceedings", after the word "suit". The exclusion of such "omnibus expression" after the word "suit" must be given some weight in interpreting the word. As held by this Court in LIC v. Escorts Ltd. (2001) 1 SCC 78: (SCC p. 313, para 63) "The distinction made by Parliament ... in the several provisions of the same Act cannot be ignored or strained to be explained away by us. That is not the way to interpret statutes. The proper way is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. The significance of the use of the qualifying word in one provision and its non-use in another provision may not be disregarded."

27. Since the legislature has expressly chosen to make a distinction between the suits for recovery of the money and enforcement of guarantees and proceedings for the recovery of money, that must be given effect to.

28. Furthermore, Parliament must be taken to be aware of the decision in Maharashtra Tubes [Arising out of SLPs (C) Nos. 21370 and 21371 of 2002] and the fact that the word "proceeding" used in Section 22(1) had been widely construed to include proceedings for recovery of dues by the State Financial Corporation as arrears of land revenue. The deliberate choice of the word "suit" in the circumstances would indicate that Parliament intended to limit the ambit of the amendment introduced to particular modes for the recovery of money or enforcement of guarantees."

11. 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.

12. The expression "occupied" has been the subject-matter of decision in a number of judgments in different contexts. Thus, in Industrial Supplies Pvt. Ltd. and Another vs. Union of India and Others (1980) 4 SCC 341, this Court was faced with the following question:

"2. The appeals raise a question of far-reaching importance namely, whether a raising contractor of a coal mine is an owner within the meaning of sub- section (1) of Section 4 of the Coking Coal Mines (Nationalisation) Act, 1972 (hereinafter referred to as the "Nationalisation Act"); and if so, whether the fixed assets like machinery, plants, equipment and other properties installed or brought in by such a raising contractor vest in the Central Government. They also give rise to a subsidiary question, namely, whether subsidy receivable from the erstwhile Coal Board established under Section 4 of the Coal Mines (Conservation, Safety and Development) Act, 1952 up to the specified date, from a fund known as Conservation and Safety Fund, by such raising contractor prior to the appointed day, can be realised by the Central Government by virtue of their powers under sub-section (3) of Section 22 of the Nationalisation Act, to the exclusion of all other persons including such contractor and applied under sub-section (4) of Section 22 towards the discharge of the liabilities of the coking coal mine, which could not be discharged by the appointed day." In answering the aforesaid question, this Court distinguished Chief Inspector of Mines vs. Lala Karam Chand Thapar (1962) 1 SCR 9 in the context of raising contracts of coal in paragraphs 18 and 19 of the judgment; and such raising agreements by registered instruments being held not to amount to a lease, were held to be licenses coupled with a grant. This being the case, a raising contractor being in possession on behalf of an owner of property, or a lessee of a mine was held to be an "occupier" within the meaning of Section 2(1) of the Mines Act, 1952. In so holding, this Court went into various dictionary meanings of the word "occupier" and "occupation" and held as follows:

"19. ... These observations, if we may say so, with great respect, are rather widely stated. They are indeed susceptible of a construction that a raising contractor being in possession on behalf of a proprietor or the lessee of a mine in possession is not an "occupier" within the meaning of Section 3(n) of the Nationalisation Act read with Section 2(1) of the Mines Act, 1952. We are quite sure that that was not the intention of the legislature. There is no reason why the word "occupier" should not be understood to have been used in its usual sense, according to its plain meaning. In common parlance, an "occupier" is one who "takes" or (more usually) "holds" possession: Shorter oxford dictionary, 3rd Edn., Vol. 2, p. 1433. In the legal sense, an occupier is a person in actual occupation. The petitioners being raising contractors were, under the terms of the agreement dated February 7, 1969 entitled to, and in fact in actual physical possession and enjoyment of the colliery and were, therefore, an occupier thereof. That being so, the petitioners being in possession, in their own right, by virtue of the substantial rights acquired by them under the agreement, were not in possession on behalf of somebody else and, therefore, the decision in Lala Karamchand Thapar case [(1962) 1 SCR 9] cannot apply."

13. Likewise, in Dunlop India Limited vs. A.A. Rahna and Another (2011) 5 SCC 778, this Court was concerned with Section 11(4)(v) of the Kerala Buildings (Lease and Rent Control) Act, 1965 which was set out in paragraph 19 of the judgment as follows:

"(v) if the tenant ceases to occupy the building continuously for six months without reasonable cause." Coming to the word "occupy" in the said section, this Court then held:

"21. The word "occupy" used in Section 11(4)(v) is not synonymous with legal possession in technical sense. It means actual possession of the tenanted building or use thereof for the purpose for which it is let out. If the building is let out for residential purpose and the tenant is shown to be continuously absent from the building for six months, the court may presume that he has ceased to occupy the building or abandoned it. If the building is let out for business or commercial purpose, complete cessation of the business/commercial activity may give rise to a presumption that the tenant has ceased to occupy the premises. In either case, legal possession of the building by the tenant will, by itself, be not sufficient for refusing an order of eviction unless the tenant proves that there was a reasonable cause for his having ceased to occupy the building.

xxx xxx xxx

25. The Court highlighted the distinction between the terms "possession" and "occupy" in the context of rent control legislation in the following words:

(Ram Dass case (2004) 3 SCC 684, SCC pp. 687- 88, para 7) "7. The terms 'possession' and 'occupy' are in common parlance used interchangeably. However, in law, possession over a property may amount to holding it as an owner but to occupy is to keep possession of by being present in it. The rent control legislations are the outcome of paucity of accommodations. Most of the rent control legislations, in force in different States, expect the tenant to occupy the tenancy premises. If he himself ceases to occupy and parts with possession in favour of someone else, it provides a ground for eviction. Similarly, some legislations provide it as a ground of eviction if the tenant has just ceased to occupy the tenancy premises though he may have continued to retain possession thereof. The scheme of the Haryana Act is also to insist on the tenant remaining in occupation of the premises. Consistently with what has been mutually agreed upon, the tenant is expected to make useful use of the property and subject the tenancy premises to any permissible and useful activity by actually being there. To the landlord's plea of the tenant having ceased to occupy the premises it is no answer that the tenant has a right to possess the tenancy premises and he has continued in juridical possession thereof. The Act protects the tenants from eviction and enacts specifically the grounds on the availability whereof the tenant may be directed to be evicted. It is for the landlord to make out a ground for eviction. The burden of proof lies on him. However, the onus keeps shifting. Once the landlord has been able to show that the tenancy premises were not being used for the purpose for which they were let out and the tenant has discontinued such activities in the tenancy premises as would have required the tenant's actually being in the premises, the ground for eviction is made out. The availability of a reasonable cause

for ceasing to occupy the premises would obviously be within the knowledge and, at times, within the exclusive knowledge of the tenant. Once the premises have been shown by evidence to be not in occupation of the tenant, the pleading of the landlord that such non-user is without reasonable cause has the effect of putting the tenant on notice to plead and prove the availability of reasonable cause for ceasing to occupy the tenancy premises." xxx xxx xxx

29. In Ananthasubramania Iyer v. Sarada Amma 1978 KLT 338, the learned Single Judge of the Kerala High Court held: (KLT pp. 339-40, para 3) The physical absence of the tenant from the building for more than six months would raise a presumption that he had ceased to occupy the building and that he had abandoned it and that it was for the tenant to dislodge the presumption and establish that he had the intention to continue to occupy the tenanted premises.

30. The word "occupy" appearing in Section 11(4)(v) of the 1965 Act has been interpreted by the Kerala High Court in a large number of cases. In Mathai Antony v. Abraham (2004) 3 KLT 169, the Division Bench of the High Court referred to several judgments including the one of this Court in Ram Dass v. Davinder (2004) 3 SCC 684 and observed:

"4. ... The word 'occupy' occurring in Section 11(4)(v) has got different meaning in different context. The meaning of the word 'occupy' in the context of Section 11(4)(v) has to be understood in the light of the object and purpose of the Rent Control Act in mind. The rent control legislation is intended to give protection to the tenant, so that there will not be interference with the user of the tenanted premises during the currency of the tenancy. The landlord cannot disturb the possession and enjoyment of the tenanted premises. Legislature has guardedly used the expression 'occupy' in Section 11(4)(v) instead of 'possession'. Occupy in certain context indicates mere physical presence, but in other context actual enjoyment. Occupation includes possession as its primary element, and also includes 'enjoyment'. The word 'occupy' sometimes indicates legal possession in the technical sense; at other times mere physical presence. We have to examine the question whether mere 'physical possession' would satisfy the word 'occupy' within the meaning of Section 11(4)(v) of the Act. In our view mere physical possession of premises would not satisfy the meaning of 'occupation' under Section 11(4)(v). The word 'possession' means holding of such possession, animus possidendi, which means, the intention to exclude other persons. The word 'occupy' has to be given a meaning so as to hold that the tenant is actually using the premises and not mere physical presence or possession. A learned Single Judge of this Court in Abbas v. Sankaran Namboodiri (1993) 1 KLT 76 took the view that the word 'occupation' is used to denote the tenant's actual physical use of the building either by himself or through his agents or employees. The Division Bench of this Court of which one of us is a party (Radhakrishnan, J.), in Rajagopalan v. Gopalan (2004) 1 KLT (SN) 54 interpreting Section 11(4)(v) took the view that occupation in the context of Section 11(4) means only physical occupation, which

> requires further explanation. Occupation in the context of Section 11(4)(v) means actual user. If the landlord could establish that in a given case even if the tenant is in physical possession of the premises, the premises is not being used, that is a good ground for eviction under Section 11(4)(v) of the Act. Section 11(4) uses the words 'put the landlord in possession' and not 'occupation', but Section 11(4)(v) uses the words 'the tenant ceases to occupy'. In Section 11(4)(v) in the case of landlord the emphasis is on 'possession' but in the case of tenant the emphasis is on 'occupation'. The word 'occupy' has a distinct meaning so far as the Rent Act is concerned when pertains to tenant, that is, possession with user."

14. A Full Bench judgment of the Punjab and Haryana High Court reported in Ude Bhan and Others vs. Kapoor Chand and Others AIR 1967 P&H 53 (FB) is also instructive. Paragraph 1 of the judgment speaks of three questions referred to the Full Bench. We are directly concerned with question 2 which is set out by us herein below:

> "(2) If any building attached to the main residential house belonging to and occupied by a non-
>
> agriculturist judgment-debtor is let out to a tenant, will that portion be considered to be in his occupation within the meaning of the above provision?" In answering this question, the Full Bench went into various authorities and dictionaries as to what the expression "occupied" would mean, as follows:
>
> "20. The other term about which considerable argument has been addressed to the Bench is "occupied by him" and it has even been suggested that the property which is let by the owner to a tenant, though not in the former's actual occupation, is in his constructive occupation just as it may be said that he is possessing it though indirectly through his tenant. Reference was made to the connotation of the term "occupied" as given at pages 83 and 84 of Volume 67 of Corpus Juris Secundum.

"The term has many meanings; in legal acceptation the term implies use and possession, and it has been said that it implies actual possession and not constructive possession, but it also has been held that "occupied" does not always require an actual occupancy, but it may sometimes permit a constructive occupancy. It is defined as meaning held in possession. "Occupied" is an appropriate word to use for the purpose of identifying land in actual possession, and when applied to a building, implies a substantial and practical use of the building for the purpose for which it is designed".

21. I do not consider that the above quotation with its many meanings, some of them self-contradictory, is of any real help, and it is clear that the meaning of the word varies according to the context of the statute in which it is used.

22. Mr. S.L. Puri, learned counsel for the decree- holder in the Letters Patent Appeal, in his turn referred to the meaning of the word "occupy" in the Webster's Third New International Dictionary and some of the meanings as given there are, to fill up a place or extent, to take up residence, to

settle in, to reside in as an owner or tenant. This indicates that the term “occupy” in relation to a house has an element of physical and actual occupation though not necessarily of every cubic inch of the premises which would, of course, be impossible at any given time.

23. Reference was also made by Mr. Roop Chand to the meaning of the term “occupation” as given at page 15 of Volume 14 of the Halsbury's Laws of England (Third Edition). It was stated that “an occupier is one who actually exercises the rights of an owner in possession. The primary element of occupation is possession, but it includes something more, for mere legal possession cannot constitute an occupation. The owner of a vacant house is in possession, though not in occupation; but if he furnishes the house and keeps it ready for habitation, he is an occupier, though he may not have resided in it for a considerable time before the qualifying date”.

xxx xxx xxx

26. The term “occupy” has been interpreted in numerous cases of the Punjab and other Courts in India and it would be tedious as well as unnecessary to refer to all of them. On behalf of the judgment- debtor reference has been made to the interpretation of the terms “occupation” and “occupy” in clause (3) of the Mysore House Rent and Accommodation Control Order in Ratilal Bros. v. The Government of Mysore and another, AIR 1951 Mysore 66 and section 11(3) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, in Balmukand Khatry v. Hari Narain and others, AIR 1949 Patna 31 and on behalf of the decree-holders reliance was placed on the definition of similar terms in section 7(3) of the Madras Buildings (Lease and Rent Control) Act,1946, as given in Dr.Mohammad Ibrahim v. Syed Ahmed Khan and another, AIR 1950 Mad 556 and in sub- section (5) of section 15 of the East Punjab Urban Rent Restriction Act, 1949, as made in Shakuntla Bawa v. Ram Parkash and others, ILR (1963) 1 Punj

827. These interpretations depend on the particular context in which the terms occur in the relevant statute but what has been observed in most of these cases is that the term “occupation” is of a wider import than the term possession and means something more than legal possession, which may be either actual or constructive. More helpful are some cases which arose in the Punjab under section 60(1)(c) or (ccc) of the Code.”

15. 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)."

16. There is no doubt whatsoever that important functions relating to repairs and re-construction of dilapidated buildings are given to MHADA. Equally, there is no doubt that in a given set of circumstances, the Board may, on such terms and conditions as may be agreed upon, and with the previous approval of the Authority, handover execution of any housing scheme under its own supervision. However, when it comes to any clash between the MHADA Act and the Insolvency Code, on the plain terms of Section 238 of the Insolvency Code, the Code must prevail. This is for the very good reason that when a moratorium is spoken of by Section 14 of the Code, the idea is that, to alleviate corporate sickness, a statutory status quo is pronounced under Section 14 the moment a petition is admitted under Section 7 of the Code, so that the insolvency resolution process may proceed unhindered by any of the obstacles that would otherwise be caused and that are dealt with by Section 14. The statutory freeze that has thus been made is, unlike its predecessor in the SICA, 1985 only a limited one, which is expressly limited by Section 31(3) of the Code, to the date of admission of an insolvency petition up to the date that the Adjudicating Authority either allows a resolution plan to come into effect or states that the corporate debtor must go into the liquidation. For this temporary period, at least, all the things referred to under Section 14 must be strictly observed so that the corporate debtor may finally be put back on its feet albeit with a new management.

17. My learned brother S. Ravindra Bhat, J.'s judgment in Municipal Corporation of Greater Mumbai (supra), which has been strongly relied upon by Mr. Dave and Mr. Patil, dealt with an entirely different fact situation, as is clear from paragraphs 32 and 33 of the said judgment, which are set out herein below:

> "32. A cumulative reading of the stipulations reveals that the contract/agreement contemplates that the lease deed was to be executed after the completion of the project. The contract reveals that (a) the project period was for 60 months starting from the date excluding the monsoon period; (b) by Clauses 5 and 17, SevenHills could mortgage the property for securing advances from financial institutions for the

construction of the project and thereafter towards its working. Such mortgage/charge or interest was subject to approval by MCGM. In the event the contract was to be terminated, it was agreed that MCGM would not in any manner be liable towards the mortgaged amount and all its rights and ownership would continue to vest in it free from encumbrances (Clause 17).

33. The show cause notice in this case preceded admission of the insolvency resolution process. In view of the clear conditions stipulated in the contract, MCGM reserved all its rights and its properties could not have therefore, in any manner, been affected by the resolution plan. Equally in the opinion of this Court, the adjudicating authority could not have approved the plan which implicates the assets of MCGM especially when SevenHills had not fulfilled its obligations under the contract."

18. The matter had come to this Court after the Adjudicating Authority had approved of a certain resolution plan, unlike in the facts of the present case, and what was clear, on the facts of that case, was that a show cause notice of the Municipal Corporation, which preceded admission of the insolvency resolution process, made it clear that assets of MCGM could not possibly be subsumed within a resolution plan without its approval/permission. It was in this context that this Court, in para 47 of the said judgment, stated that Section 238 of the Code cannot be read as overriding the MCGM's right - indeed its public duty - to control and regulate how its properties are to be dealt with. "Properties" was referred to in this judgment as referring to assets of the corporate debtor. We have seen how, in the facts of this case, we are not concerned with the assets of the corporate debtor, least of all the assets of MHADA.

The limited question before us is as to whether Section 14(1)(d) of the Code will apply to statutorily freeze 'occupation' that may have been handed over under a Joint Development Agreement.

19. Likewise, the recent judgment Sushil Kumar Agarwal (supra) deals with specific performance and whether a Development Agreement may be specifically performed. The ratio of that judgment appears to be that where Development Agreements create an interest in property, they may be specifically performed, but not otherwise. As we have pointed out herein above, it is clear that Section 14(1)(d) of the Insolvency & Bankruptcy Code, when it speaks about recovery of property "occupied", does not refer to rights or interests created in property but only actual physical occupation of the property. For this reason also, this judgment is wholly distinguishable.

20. Regard being had to the above, we allow the appeal and set aside the impugned order of the NCLAT. Considering that this matter has been pending for some time, we direct the NCLT to dispose of the resolution professional's application (I.A. No.21433/2018) within a period of six weeks from today.

……J. (R. F. Nariman) ……J. (S. Ravindra Bhat) .....J. (V. Ramasubramanian) New Delhi.

19th February, 2020.