

VICTORY IRON WORKS LTD.

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v.

JITENDRA LOHIA & ANR.

(Civil Appeal No. 1743 of 2021)

MARCH 14, 2023

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[V. RAMASUBRAMANIAN AND PANKAJ MITHAL, JJ.]

Insolvency and Bankruptcy Code, 2016 – s.25(2)(a) – IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Regulation 30 – Corporate Debtor and one ‘EP’ (appellant in CA No.1782 of 2021) entered into an MoU – Corporate Debtor financed the purchase of the property in question by ‘EP’ for 40% of the share capital in ‘EP’ and a Joint Development Agreement with it in respect of the property – Actual physical possession of the property was also handed over to the Corporate Debtor which factum was confirmed in two subsequent MoUs – Later, Corporate Debtor also executed a Leave and License Agreement granting license to ‘V’ (appellant in CA No.1743 of 2021), for the permissive use of a portion of the property, however, ‘V’ now claims to be in possession of the entire property – ‘EP’ joined this Agreement as a confirming party – CIRP was initiated against Corporate Debtor by a third-party financial creditor – Resolution Professional (RP) filed application u/s.25 r/w Regulation 30 of 2016 Regulations for certain directions – NCLT directed ‘V’ and ‘EP’ not to obstruct possession and activities of RP however, it also held that the order would not prevent ‘V’ from carrying on its business in the portion of land licensed to it – Appeals filed by ‘V’ and ‘EP’ were dismissed by NCLAT, RP was directed to disclose in the Information Memorandum that the Corporate Debtor has development rights over the property – On appeal, held: A bundle of rights and interests created in favour of the Corporate Debtor over the immovable property in question by a series of documents, partake the character and shade of ownership rights – Therefore, these rights and interests in the immovable property are definitely liable to be included by the RP in the Information Memorandum – Resolution Professional is duty bound u/s.25(2)(a) to take custody and control of the same – NCLT and NCLAT have done a delicate act of balancing, by protecting the interests of ‘V’ to the extent of the land permitted to be occupied

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- A – In fact, ‘V’ does not even have the status of a lessee, but is only a licensee and a license does not create any interest in the immovable property – NCLT as well as NCLAT rightly held that the possession of the Corporate Debtor, of the property needs to be protected and thus, a direction u/Regulation 30 was issued to the local district administration to give assistance to the RP for completion of CIRP of the Corporate Debtor effectively.

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Insolvency and Bankruptcy Code, 2016 – s.3(37) – Income Tax Act, 1961 – s.102(2) – “asset” – Held: The word “asset” is not defined, either in IBC or in any of the seven enactments referred to in s.3(37) of the Code – But the word “asset” is defined in s.102(2) of the 1961 Act to include “property or right of any kind” – Though s.102 applies as such to Chapter X-A of the Income Tax Act, the definition throws light on the fact that property or right of any kind is considered to be an asset.

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Insolvency and Bankruptcy Code, 2016 – ss.3(27), 18(f), 25(2)(a) – “property”, “asset” – CIRP was initiated against the Corporate Debtor – Interim Resolution Professional claimed that the development rights held by the Corporate Debtor formed part of its intangible assets and therefore, must be included in the Information Bulletin and protected – Held: Definition of the expression “property” u/s.3(27) includes “every description of interest, including present or future or vested or contingent interest arising out of or incidental to property” – Since the expression “asset” in common parlance denotes “property of any kind”, the bundle of rights that the Corporate Debtor has over the property in question would constitute “asset” within the meaning of s.18(f) and s.25(2)(a), IBC – Income Tax Act, 1961 – s.102(2).

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Indian Bankruptcy Code, 2016 – Explanation u/s.18; s.25 – Appellants challenging the impugned orders of the NCLT and NCLAT argued that by virtue of the Explanation u/s.18, the disputes between the Corporate Debtor and the third-party lessee/licensee are not amenable to the jurisdiction of the authorities under the Code – Held: Explanation u/s.18 begins with a caveat “for the purposes of this Section” – Therefore, the exclusion of assets owned by a third-party, but in the possession of the Corporate Debtor held under contractual arrangements, from the definition of the expression “assets”, is limited to s.18 – The Explanation u/s.18 does not extend to s.25.

Dismissing the appeals, the Court

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HELD: 1.1 Section 3(27) of the IBC defines the word “property”. But the word “asset” is not defined either in Section 3 or in Section 5 or in Section 79 of the Code, though Section 79(14) defines the expression “excluded assets”. However Section 3(37) of the Code states that words and expressions used but not defined in this Code but defined in the Indian Contract Act, 1872 (9 of 1872), the Indian Partnership Act, 1932 (9 of 1932), the Securities Contract (Regulation) Act, 1956 (42 of 1956), the Securities Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), the Limited Liability 15 Partnership Act, 2008 (6 of 2009) and the Companies Act, 2013 (18 of 2013), shall have the meanings respectively assigned to them in those Acts. The word “asset” is not defined, either in IBC or in any of the seven enactments referred to in Section 3(37) of the Code. But the word “asset” is defined in Section 102(2) of the Income Tax Act, 1961 to include “property or right of any kind”. Though Section 102 applies as such to Chapter X-A of the Income Tax Act, the definition throws light on the fact that property or right of any kind is considered to be an asset. [Paras 19, 20 and 26][1033-E, G-H; 1034-A-B; 1038-B-C]

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1.2 A bundle of rights and interests were created in favour of the Corporate Debtor, over the immovable property in question. The creation of these bundle of rights and interests was actually for a valid consideration. But for the payment of such consideration, Energy Properties would not even have become the owner of the property in dispute. Therefore, the development rights created in favour of the Corporate Debtor constitute “property” within the meaning of the expression under Section 3(27) of IBC. The definition of the expression “property” under Section 3(27) includes “every description of interest, including present or future or vested or contingent interest arising out of or incidental to property”. Since the expression “asset” in common parlance denotes “property of any kind”, the bundle of rights that the Corporate Debtor has over the property in question would constitute “asset” within the meaning of Section 18(f) and Section 25(2)(a) of IBC. A bundle of rights and interests

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- A were created in favour of the Corporate Debtor, by a series of documents such as (i) the MoU dated 24.01.2008; (ii) the shareholders agreement dated 24.01.2008; (iii) the flow of the consideration from the Corporate Debtor to the UCO Bank and to Energy Properties; (iv) the Development Agreement dated 16.06.2008; (v) the Memorandum Recording Possession dated 02.03.2010 executed by the original shareholders of Energy Properties; (vi) the Memorandum Recording Possession dated 24.06.2010 executed by Energy Properties in favour of the Corporate Debtor; and (vii) the Leave and License Agreement primarily executed by the Corporate Debtor in favour of Victory,
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- C which was merely confirmed by Energy Properties as a confirming party. Some of these bundle of rights and interests, partake the character and shade of ownership rights. Therefore, these rights and interests in the immovable property are definitely liable to be included by the Resolution Professional in the Information Memorandum and the Resolution Professional is duty bound under Section 25(2)(a) to take custody and control of the same.
- D [Paras 35, 37][104-B-E; 1042-A-C]

Sushil Kumar Agarwal v. Meenakshi Sadhu & Others
(2019) 2 SCC 241 : [2018] 12 SCR 756 – relied on.

- E 1.3 Two applications were filed before NCLT. One was by the Resolution Professional and the other was by Victory. A careful look at the application filed by Victory would show that there was no whisper about Victory occupying any land in excess of what they were permitted to occupy under the Leave and License Agreement. Under the Leave and License Agreement, Victory
- F was allowed to occupy only 10000 sq. ft. of land, upon payment of a monthly license fee of Rs.5,000/-. If at all, a vague averment was made in paragraph VII (c) of their application to the effect that inasmuch as the Corporate Debtor was unable to commence any development activity in the subject land, the owner and the developer, with their full consent, had decided to allow the
- G applicant to run its business in the usual course from the subject land, because the subject land could not have been left vacant for any substantial period of time. The fact that there were security guards posted in the property is borne out by records. This is why NCLT as well as NCLAT have done a delicate act of balancing,
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by protecting the interests of Victory to the extent of the land permitted to be occupied. In fact, Victory does not even have the status of a lessee, but is only a licensee. A license does not create any interest in the immovable property. Therefore, NCLT as well as NCLAT were right in holding that the possession of the Corporate Debtor, of the property needs to be protected. This is why a direction under Regulation 30 had been issued to the local district administration. [Paras 48 - 50][1044-G; 1045-A-E]

Embassy Property Developments Private Limited v. State of Karnataka and Others (2020) 13 SCC 308 : [2019] 17 SCR 559; Gujarat Urja Vikas Nigam Limited v. Amit Gupta and Others (2021) 7 SCC 209; Tata Consultancy Services Limited v. SK Wheels Private Limited Resolution Professional, Vishal Ghisulal Jain (2022) 2 SCC 583 – distinguished.

Rajendra K. Bhutta v. Maharashtra Housing and Area Development Authority & Anr. (2020) 13 SCC 208 : [2020] 4 SCR 305 – relied on.

Case Law Reference

[2019] 17 SCR 559	distinguished	Para 13	
[2018] 12 SCR 756	relied on	Para 15	E
[2020] 4 SCR 305	relied on	Para 46	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1743 of 2021.

From the Judgment and Order dated 08.04.2021 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No. 508 of 2020.

With

Civil Appeal No. 1782 of 2021

Rohit Amit Sthalekar, Alok Dhir, Ms. Varsha Banerjee, Karan Grover, Karan Batura, Jayant Mehta, Kumarjit Banerjee, Ashish Choudhury, Anand Kamal, Akash Agarwal, Rohit, Advs. for the Appellant.

Abhijeet Sinha, Saikat Sarkar, Siddharth Naidu, Ms. Manju Jetley, M/s. Ksn & Co., Advs. for the Respondents.

A The Judgment of the Court was delivered by

V. RAMASUBRAMANIAN, J.

B 1. These appeals arise out of a common Order passed by the National Company Law Appellate Tribunal¹ Principal Bench dismissing two independent appeals filed by the appellants herein, against an Order of the National Company Law Tribunal², thereby confirming an order of the Adjudicating Authority, in two applications, in the course of the Corporate Insolvency Resolution Process³.

2. We have heard the learned counsel for the parties.

C **Parties to the Litigation**

D 3. The subject matter of controversy in these appeals is the land of an extent of about 10.19 acres at Ramrajatala Station Road, Howrah, West Bengal. M/s Energy Properties Private Limited⁴ which is the appellant in CA No.1782 of 2021 is the ostensible owner of the said property, in whose name the title stands. Avani Towers Private Limited, which is the Corporate Debtor in respect of whom CIRP has been initiated, not only provided finance to Energy Properties, for the purchase of the said property, but also holds 40% of the share capital in Energy Properties, apart from holding a Joint Development Agreement with Energy Properties in respect of the property in question.

E 4. M/s Victory Iron Works Ltd.⁵ which is the appellant in CA No.1743 of 2021, claims to be in possession of the property in entirety, partly by virtue of a Leave and License Agreement and partly by virtue of an oral understanding.

F **Brief facts leading to the above appeals**

G 5. A financial creditor by name M/s Sesa International Limited filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016⁶, against Avani Towers Private Limited which is the Corporate Debtor herein. The company petition was admitted by the Adjudicating Authority on 15.10.2019.

¹ For short, “NCLAT”

² For short, “NCLT”

³ For short, “CIRP”

⁴ For short, “Energy Properties”

⁵ For short, “Victory”

H ⁶ For short, “IBC” or “the Code”, as the case may be.

6. The first meeting of the Committee of Creditors was held on 14.11.2019. Thereafter, the suspended Board of Directors of the Corporate Debtor informed the Resolution Professional that Energy Properties were forcefully removing the security guards from the property. Therefore, the Resolution Professional filed an application in CA (IB) No.1807/KB/2019 (RP Application) before the Adjudicating Authority under Section 25 of IBC read with Regulation 30 of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016⁷, praying (i) for a direction to Energy Properties & Others (including Victory) not to obstruct the sole and exclusive possession of the property; and (ii) also for the issuance of direction to the local district administration to give proper assistance to the Resolution Professional in taking possession of the property so as to discharge his duties under the Code.

7. The said application was hotly contested both by Energy Properties (*ostensible owner*) and Victory (*licensee*) on the ground that an Order of eviction cannot be passed by the Adjudicating Authority under the Code and that the relationship was not amenable to the jurisdiction of the Adjudicating Authority.

8. Curiously, even while questioning the jurisdiction of NCLT to entertain an application of the nature described above, Victory also filed an independent application in CA (IB) No.146/KB/2020, seeking an injunction restraining the Resolution Professional from interfering or disturbing or intermeddling in the day-to-day business of Victory. We do not know how such an application was maintainable at the instance of Victory, when they had questioned the jurisdiction of NCLT to adjudicate the dispute between the Licensor and Licensee.

9. By an Order dated 12.02.2020, the Adjudicating Authority directed Victory and Energy Properties not to obstruct the possession and activities of the Resolution Professional and also holding at the same time that the order will not prevent Victory from carrying on their activities in the portion of the land given to them under the Leave and License Agreement. The operative portion of the order of the Adjudicating Authority reads as follows:-

“The respondents (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

⁷ For short, “the Regulations”

- A *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.*
- B *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 untill the original owner of the property decides further course of action as far as leave and licence agreement is concerned. Hence, this application, i.e. CA(IB) 146/KB/2020 stands disposed off.”*
- C 10. Aggrieved by the said order of the Adjudicating Authority, two independent appeals were filed, one by Victory and one by Energy Properties, before the NCLAT. The appeals were dismissed by NCLAT by an Order dated 08.04.2021. But at the same time, it was confirmed by NCLAT that the land of the extent of 10000 sq. ft. covered by the Leave and License Agreement dated 11.08.2021 shall continue to be
- D enjoyed by Victory without any interference by the Resolution Professional. The Appellate Authority also directed the Resolution Professional to disclose in the Information Memorandum and also in the documents as required by the Regulations that what is held by the Corporate Debtor is only the development rights over the said property.
- E It is against the said order of the NCLAT that both Victory and Energy Properties have come up with independent appeals.

Dispute in a nutshell

- F 11. The dispute in a nutshell, in this triangular fight, is between **(i)** the ostensible owner of the land, namely, Energy Properties, who purchased the property from the Authorized Officer of UCO Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002⁸, under a Sale Certificate dated 29.01.2008, on the one hand; **(ii)** the Corporate Debtor represented by the Resolution Professional, who actually financed the purchase of
- G the said property by Energy Properties, under a Memorandum of Understanding dated 24.01.2008 and who also entered into an agreement on 16.06.2008 with Energy Properties for the joint development of the said property; and **(iii)** Victory, to whom a portion of the land measuring an extent of 10000 sq.ft. (out of the total extent of land of 10.19 acres),

H ⁸ For short, “SARFAESI Act”

was given under a Leave and License Agreement dated 19.08.2011, but which Licensee now claims to be in possession of the entire land of the extent of 10.19 acres. A

12. The dispute on hand can be better understood by taking note of a few essential facts, which are not disputed. These facts are:

- (i) on 24.01.2008, Energy Properties and the Corporate Debtor entered into a MoU, by which, the Corporate Debtor agreed to provide financial assistance to the extent of Rs.2.70 crores to Energy Properties, towards the purchase of the land in question, that was being brought to sale by UCO Bank in exercise of the powers conferred by the SARFAESI Act. This amount of Rs.2.70 crores agreed to be provided by the Corporate Debtor, was in addition to another amount of Rs.9.30 crores agreed to be provided by the Corporate Debtor to Energy Properties, for enabling them to tide over a crisis. The consideration for the Corporate Debtor providing financial assistance to Energy Properties, both for the purchase of the aforesaid property and for overcoming a crisis, was actually two-fold, namely, (i) that 40% of shareholding in Energy Properties should be transferred to the Corporate Debtor; and (ii) the Corporate Debtor was to be given the exclusive right of development of the property. B C D E
- (ii) Simultaneously with the execution of the aforesaid MoU, 40% of the total shares of Energy Properties was transferred to the Corporate Debtor.
- (iii) With the funds so provided by the Corporate Debtor, Energy Properties purchased the land in question from UCO Bank, under a Sale Certificate dated 29.01.2008. The total sale consideration indicated in the Sale Certificate was Rs.2,97,03,484/- (Rupees Two Crore Ninety-seven Lakhs Three Thousand Four Hundred and Eighty-four only). F G
- (iv) On 16.06.2008, Energy Properties entered into an agreement with the Corporate Debtor, whereby the Corporate Debtor was conferred exclusive rights of development of the property. The actual physical possession of the property was also handed over under this agreement H

- A to the Corporate Debtor. The factum of handing over of possession of the property in entirety to the Corporate Debtor was also confirmed in two subsequent MoUs dated 02.03.2010 and 24.06.2010, executed respectively by (a) the Shareholders of Energy Properties as well as by (b) Energy Properties themselves.
- B (v) Thereafter, the Corporate Debtor executed a Leave and License Agreement on 19.08.2011, granting a license to Victory, for the permissive use of 10000 sq.ft. of land out of the total extent of 10.19 acres. Energy Properties joined this Leave and License Agreement as a confirming party.
- C This agreement was to be for a period of 11 months commencing from August-2011. The license fee fixed under the said Agreement, was Rs.5,000/- per month.
- D (vi) However, Victory (*the licensee*) now claims that they subsequently got permission to use the whole of the land, of the total extent of Rs.10.19 acres by paying an additional license fee of Rs.5,000/- per month.
- E (vii) Once a CIRP was initiated against the Corporate Debtor at the instance of a third-party financial creditor, the Interim Resolution Professional started claiming that the development rights held by the Corporate Debtor formed part of the intangible assets of the Corporate Debtor and that, therefore, the same must be included in the Information Bulletin and protected.
- F (viii) Energy Properties is objecting to the proposal of Resolution Professional on the ground that the property, namely, the land does not belong to the Corporate Debtor and that therefore the said property should not be included in the assets of the Corporate Debtor, especially when there are disputes arising out of the Joint Development Agreement.
- G (ix) Victory is opposing the claim of the Resolution Professional on the ground that they are in possession of the entire land and that the Adjudicating Authority under the IBC does not have the power to evict a tenant/lessee/licensee in possession of the property.
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(x) Both NCLT and NCLAT agreed with the claim of the Energy Properties and Victory to the limited extent that the Authorities constituted under the IBC have no jurisdiction to order the eviction of a third-party licensee/lessee. Therefore, by their orders impugned in these appeals, both the Adjudicating Authority (NCLT) and the Appellate Authority (NCLAT) have protected the interest of Victory to the extent of land of 10000 sq.ft. covered by the Leave and License Agreement. But at the same time both NCLT and NCLAT refused to acknowledge that Victory is in possession of the entire extent of land of 10.19 acres. Therefore, NCLT and NCLAT thought that the development rights that the Corporate Debtor has over the remaining extent of land is to be preserved and included in the Information Bulletin. This is what both Energy Properties and Victory are opposing in these two appeals.

Rival Contentions

13. It is contended on behalf of Victory, (i) that the asset in question, namely, the land of the extent of 10.19 acres is owned by Energy Properties and not by the Corporate Debtor; (ii) that under Section 25(2)(a) of IBC, the Resolution Professional is entitled to take custody and control only of the assets of the Corporate Debtor and not the assets of a third party; (iii) that under Regulation 30 of the Regulations, the Resolution Professional is entitled to seek the assistance of the local district administration only for discharging his duties under the Code and hence the very application moved by the Resolution Professional under Regulation 30 was misconceived, in the light of the circumspection indicated in Section 25(2)(a) of IBC; and (iv) that even as per the very complaint lodged by the Resolution Professional, Victory is in possession of the entire extent of land and that, therefore, in the light of the law laid down by this Court in *Embassy Property Developments Private Limited vs. State of Karnataka and Others*⁹; *Gujarat Urja Vikas Nigam Limited vs. Amit Gupta and Others*¹⁰; and *Tata Consultancy Services Limited vs. SK Wheels Private Limited Resolution Professional, Vishal Ghisulal Jain*¹¹, the Adjudicating Authority did not have the jurisdiction to enter into this arena.

⁹ (2020) 13 SCC 308

¹⁰ (2021) 7 SCC 209

¹¹ (2022) 2 SCC 583

A 14. Energy Properties is also assailing the impugned orders on almost identical grounds. More particularly, it is contended on behalf of the Energy Properties, **(i)** that when the Corporate Debtor is not in possession of the property, he is not entitled to use the mechanism provided in IBC to recover possession; **(ii)** that though Section 18(f) of the Code enables Interim Resolution Professional to take control and
 B custody of any asset over which the Corporate Debtor has ownership rights, the Explanation under Section 18 excludes the assets owned by a third party in the possession of the Corporate Debtor, held under contractual arrangements, from the purview of the definition of the term “assets” within the meaning of Section 18; and **(iii)** that the decisions of
 C this Court in *Embassy Property Developments Private Limited, Gujarat Urja Vikas Nigam Limited* and *Tata Consultancy* (supra) have clinched the issue without any pale of doubt.

15. Supporting the impugned orders, it is contended on behalf of the Resolution Professional and also on behalf of the Committee of
 D Creditors, **(i)** that the impugned orders have not hampered the rights of Victory under the Leave and License Agreement in any manner; **(ii)** that under the Development Agreement as well as the two MoUs which followed, the possession of the entire extent of land has been handed over to the Corporate Debtor; **(iii)** that what is sought to be included in the Information Memorandum are the development rights that the
 E Corporate Debtor has over the property in question; **(iv)** that those development rights constitute intangible assets of the Corporate Debtor; **(v)** that it is settled by the decision of this Court in *Sushil Kumar Agarwal vs. Meenakshi Sadhu & Others*¹² that the right of development of a property is an intangible asset of the developer and it is especially so
 F when this development project was shown in the balance sheets of the Corporate Debtor year after year; and **(vi)** that, therefore, the impugned orders do not warrant any interference.

Discussion and Analysis

G 16. From the rival contentions, it appears that two issues arise for our consideration. They are, **(i)** what is the nature of the right or interest that the Corporate Debtor has over the property in question, for the purpose of deciding the inclusion of the same in the Information Memorandum prepared by the Resolution Professional under Regulation 36 of the Regulations?; and **(ii)** whether NCLT and NCLAT have

H ¹² (2019) 2 SCC 241

exercised a jurisdiction not vested in them in law by seeking to recover/ A
protect the possession of the Corporate Debtor?

Issue No.1

17. The IBC is divided into five parts, with Part-I containing the preliminaries, Part-II containing provisions dealing with Insolvency Resolution and Liquidation for Corporate Persons, Part-III dealing with Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms, Part-IV dealing with Regulation of Insolvency Professionals, Agencies and Information Utilities and Part-V containing miscellaneous provisions. B

18. Interestingly, the Code contains provisions for the definition of words, at three different places, namely Sections 3, 5 and 79. Section 3 which is in Part-I contains the definitions of words and phrases, and these definitions are applicable throughout the Code, unless the context otherwise requires. Section 5 contains definitions, applicable to words and phrases used in Part-II alone. Similarly, Section 79 contains definitions of words and phrases, appearing in Part-III. In other words, the definitions in Sections 5 and 79 have limited application to the respective Parts in which they appear, but the definitions in Section 3 apply to the Code in entirety. C D

19. Section 3(27) of the IBC defines the word “*property*” as follows: E

“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.” F

But the word “*asset*” is not defined either in Section 3 or in Section 5 or in Section 79 of the Code, though Section 79(14) defines the expression “*excluded assets*”. G

20. However Section 3(37) of the Code states that words and expressions used but not defined in this Code but defined in the Indian H

- A Contract Act, 1872 (9 of 1872), the Indian Partnership Act, 1932 (9 of 1932), the Securities Contract (Regulation) Act, 1956 (42 of 1956), the Securities Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), the Limited Liability Partnership Act, 2008 (6 of 2009) and the Companies Act, 2013 (18 of 2013), shall have the meanings respectively assigned to them in those Acts.

21. Keeping in mind the provisions of Sections 3, 5 and 79, now let us come to Section 18 which deals with the duties of Interim Resolution Professional and Section 25 which deals with the duties of Resolution Professional. Section 18 reads as follows:

- C ***“18. Duties of interim resolution professional. - The interim resolution professional shall perform the following duties, namely: —***
- D (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—*
- E (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;*
- F (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;*
- G (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*
- H (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— A

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

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

(iii) *tangible assets, whether movable or immovable;* C

(iv) *intangible assets including intellectual property;*

(v) *securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies; Duties of interim resolution professional.* D

(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.* E

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;* F

(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.”* G

Section 25 reads as follows:

“25. Duties of resolution professional. – (1) It shall be the duty of the resolution professional to preserve and protect

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- A *the assets of the corporate debtor, including the continued business operations of the corporate debtor.*
- (2) For the purposes of sub-section (1), the resolution professional shall undertake the following actions, namely:—*
- B (a) *take immediate custody and control of all the assets of the corporate debtor, including the business records of the corporate debtor;*
- (b) *represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;*
- C (c) *raise interim finances subject to the approval of the committee of creditors under section 28;*
- (d) *appoint accountants, legal or other professionals in the manner as specified by Board;*
- D (e) *maintain an updated list of claims;*
- (f) *convene and attend all meetings of the committee of creditors;*
- E (g) *prepare the information memorandum in accordance with section 29;*
- (h) *invite prospective resolution applicants, who fulfils such criterion as may be laid down by him with the approval of the committee of creditors, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified by the Board, to submit a resolution plan or plans.*
- F (i) *present all resolution plans at the meetings of the committee of creditors;*
- G (j) *file application for avoidance of transactions in accordance with Chapter III, if any; and*
- (k) *such other actions as may be specified by the Board.”*

22. It may be noticed from Sections 18 and 25 that the word
H “asset” and not the word “property” is what is used in these provisions,

though the word “*property*” is defined in Section 3(27). But the said word “*asset*” used in Sections 18 and 25 is not defined in the IBC. We have seen from Section 3(37) that it makes a reference to seven different enactments, to which one can take recourse, for finding the definition of words and expressions used but not defined in the Code. Therefore, let us find out whether those seven enactments will be of any assistance to find out the meaning of the word “*asset*” used, but not defined in IBC.

23. The Indian Contract Act, 1872 does not define either of the expressions “*asset*” or “*property*”. The Indian Partnership Act, 1932 also does not define either of these two expressions. The Recovery of Debts and Bankruptcy Act, 1993 does not define the word “*asset*” but defines the word “*property*” in Section 2(jb) as follows:

“2. Definitions.—*In this Act, unless the context otherwise requires,—*

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(jb) “*property*” means—

- (a) *immovable property;*
- (b) *movable property;*
- (c) *any debt or any right to receive payment of money, whether secured or unsecured;*
- (d) *receivables, whether existing or future;*
- (e) *intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature, as may be prescribed by the Central Government in consultation with Reserve Bank;”*

24. The Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 and the Limited Liability Partnership Act, 2008 also do not define these two expressions. Even the Companies Act, 2013 does not define these two expressions. Therefore, for finding an answer to the meaning of the word “*asset*” used in Sections 18 and 25, one has to necessarily undertake a journey from the known to the unknown.

25. Before we proceed further, we may have to take note of the manner in which the word “*property*” is defined in The Recovery of

A Debts and Bankruptcy Act, 1993 and the manner in which it is defined in IBC. While the definition of the word in the 1993 Act appears to be exhaustive, the definition in IBC is only inclusive (we have extracted both definitions elsewhere).

B 26. As we have pointed out earlier, the word “*asset*” is not defined, either in IBC or in any of the seven enactments referred to in Section 3(37) of the Code. But the word “*asset*” is defined in Section 102(2) of the Income Tax Act, 1961 to include “*property or right of any kind*”. Though Section 102 applies as such to Chapter X-A of the Income Tax Act, the definition throws light on the fact that property or right of any kind is considered to be an asset.

C 27. Having taken note of the definition of the expression “*property*” and the absence of the definition of the word “*asset*” in IBC, it is now appropriate for us to return to the facts of this case and to find out the nature of the rights that the Corporate Debtor admittedly has in the immovable property namely land of the extent of acres 10.19. This can be done by making a reference to certain documents and the chain of events borne out by these documents.

D 28. The documents to which useful reference can be made are: (i) MoU dated 24.01.2008; (ii) Shareholders Agreement dated 24.01.2008; (iii) Sale Certificate dated 29.01.2008; (iv) Development Agreement dated 16.06.2008; (v) Memorandum Recording Possession dated 02.03.2010 executed by the shareholders of Energy Properties; (vi) Memorandum Recording Possession dated 24.06.2010 executed by Energy Properties; and (vii) Leave and License Agreement dated 19.08.2011. Let us now see the story as revealed by each of these documents.

E 29. The first of these documents is the Memorandum of Understanding dated 24.01.2008, entered into between three parties namely, (i) Energy Properties; (ii) the Corporate Debtor; and (iii) the shareholders of Energy Properties. By this MoU, the Corporate Debtor agreed to provide financial accommodation to the total extent of Rs.12 crores to Energy Properties, for the purpose of enabling them to purchase the land in question (by utilizing a sum of Rs. 2.70 crores) and for the purpose of tiding over a crisis (by utilizing the balance of Rs.9.30 crores). The covenants contained in the MoU indicate-

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- ❖ That the Corporate Debtor was required to pay the amount of Rs.2.70 crores directly to UCO Bank and the Sale Certificate issued by the Bank along with the original title deeds (parent documents) held by the Bank were to be handed over by the Bank to a named solicitor and advocate; A
- ❖ That a Definitive Agreement was to be entered into between Energy Properties and the Corporate Debtor, to enable the Corporate Debtor exclusively to undertake the development of the property; B
- ❖ That if no Definitive Agreement was entered into, then the Corporate Debtor shall be entitled to create a charge over the said property, for securing the repayment of the accommodation amount; C
- ❖ That the *quid pro quo* for the Corporate Debtor providing financial accommodation to Energy Properties, was two-fold, namely, *(i)* that the shareholders of Energy Properties should transfer 40% of the total shareholding in Energy Properties to the Corporate Debtor and 20% shareholding to the named Solicitor and Advocate; and *(ii)* that the Corporate Debtor should be given the exclusive right to develop the property; D
- ❖ That after the Corporate Debtor developed the property, 60% of the total constructed area with the proportionate undivided share of land will go to the Corporate Debtor and the remaining 40% of the constructed area shall go to Energy Properties. E

30. The second document is the Shareholders Agreement executed simultaneously with the MoU on 24.01.2008. This agreement was entered into, for the purpose of transferring 40% of shareholding in Energy Properties to the Corporate Debtor and 20% shareholding to the named Solicitor and Advocate. F

31. Towards fulfilment of their obligation under the MoU dated 24.01.2008, the Corporate Debtor paid necessary amounts to the UCO Bank/Energy Properties/the shareholders of Energy Properties. Therefore, a Sale Certificate was executed by the Authorized Officer of the UCO Bank on 29.01.2008 in exercise of the powers conferred by Section 13(12) of the SARFAESI Act read with Rule 8 of the Security H

- A Interest (Enforcement) Rules, 2002. The sale price indicated in the said sale certificate was Rs.2,97,03,484/- out of which, a sum of Rs. 2.70 crores was admittedly paid by the Corporate Debtor.

32. The fourth document to be considered is the Development Agreement dated 16.06.2008 entered between Energy Properties and the Corporate Debtor. This Development Agreement contains a reference to both the MoU and the Shareholders Agreement dated 24.01.2008. It also affirms the fact that the Development Agreement was what was contemplated under the MoU, to be a definitive agreement. The Development Agreement contemplated the handing over of *khas* and vacant possession of the entire property to the Corporate Debtor. The Corporate Debtor was imposed with the obligation to develop a housing complex in the said property as per the specifications provided in the Fifth Schedule to the Agreement, at their own cost. One of the covenants contained in the Development Agreement is that Energy Properties will not let-out, lease, mortgage and/or charge the said property without the consent in writing of the Corporate Debtor.

33. After the execution of the Development Agreement, two memorandums (titled as Memorandums Recording Possession) were also executed respectively on 02.03.2010 and 24.06.2010, the first one by the shareholders of Energy Properties and the second by Energy Properties themselves. Under these two memorandums, the shareholders of Energy Properties, as well as the Company Energy Properties, handed over possession of the property to the Corporate Debtor. These two memorandums contained specific clauses to the effect that the Corporate Debtor shall be in exclusive possession of the property.

34. After more than a year of such handing over of possession, Energy Properties as well as the Corporate Debtor jointly executed a Leave and License Agreement on 19.08.2011 in favour of Victory. As a matter of fact, the Corporate Debtor was defined in the said Agreement as the Licensor and Energy Properties were described only as a confirming party. Admittedly, this Agreement was confined to land of the extent of 10000 sq. ft. out of the total extent of acres 10.19. The Agreement was to be for a period of 11 months and the license fee agreed therein was Rs.5,000/- per month. Clause 7 of the said Leave and License Agreement is important to be taken note of and hence it is reproduced as follows:

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“7. GENERAL

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This Agreement is personal to AVANI

Nothing contained herein intended to be nor be construed nor VICTORY shall ever claim any right or exclusive possession or tenancy in respect to the licensed area.”

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35. From the sequence of events narrated above and the terms and conditions contained in the Agreements entered into by the parties, it is more clear than a crystal that a bundle of rights and interests were created in favour of the Corporate Debtor, over the immovable property in question. The creation of these bundle of rights and interests was actually for a valid consideration. But for the payment of such consideration, Energy Properties would not even have become the owner of the property in dispute. Therefore, the development rights created in favour of the Corporate Debtor constitute “*property*” within the meaning of the expression under Section 3(27) of IBC. At the cost of repetition, it must be recapitulated that **the definition of the expression “property” under Section 3(27) includes “every description of interest, including present or future or vested or contingent interest arising out of or incidental to property”**. Since the expression “*asset*” in common parlance denotes “*property of any kind*”, the bundle of rights that the Corporate Debtor has over the property in question would constitute “*asset*” within the meaning of Section 18(f) and Section 25(2)(a) of IBC.

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36. In ***Sushil Kumar Agarwal*** (supra), this Court brought out the distinction between different types of Development Agreements, with particular reference to Section 14(3)(c) of the Specific Relief Act, 1963. After summarizing the different types of Development Agreements in paragraph 17 of the decision, this Court held in paragraph 19 as follows:-

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“19. ...An essential incident of ownership of land is the right to exploit the development potential to construct and to deal with the constructed area. In some situations, under a development agreement, an owner may part with such rights to a developer. This in essence is a parting of some of the incidents of ownership of the immovable property...”

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37. Therefore, it is not very difficult to conclude, that a bundle of rights and interests were created in favour of the Corporate Debtor, by a series of documents such as (i) the MoU dated 24.01.2008; (ii) the

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- A shareholders agreement dated 24.01.2008; **(iii)** the flow of the consideration from the Corporate Debtor to the UCO Bank and to Energy Properties; **(iv)** the Development Agreement dated 16.06.2008; **(v)** the Memorandum Recording Possession dated 02.03.2010 executed by the original shareholders of Energy Properties; **(vi)** the Memorandum Recording Possession dated 24.06.2010 executed by Energy Properties
- B in favour of the Corporate Debtor; and **(vii)** the Leave and License Agreement primarily executed by the Corporate Debtor in favour of Victory, which was merely confirmed by Energy Properties as a confirming party. Some of these bundle of rights and interests, partake the character and shade of ownership rights. Therefore, these rights
- C and interests in the immovable property are definitely liable to be included by the Resolution Professional in the Information Memorandum and the Resolution Professional is duty bound under Section 25(2)(a) to take custody and control of the same.

Issue No. 2

- D 38. The main ground of attack of the appellants to the impugned orders of the NCLT and NCLAT is that by virtue of the Explanation under Section 18 of the Code and also by virtue of the judicial pronouncements, the disputes between the Corporate Debtor and the third-party lessee/licensee are not amenable to the jurisdiction of the
- E authorities under the Code.

39. But as rightly pointed out by the learned counsel for the Resolution Professional, the Explanation under Section 18 begins with a caveat namely “*for the purposes of this Section*”. Therefore, the exclusion of assets owned by a third-party, but in the possession of the
- F Corporate Debtor held under contractual arrangements, from the definition of the expression “*assets*”, is limited to Section 18. In other words, the Explanation under Section 18 does not extend to Section 25.

40. It must be mentioned here that the Explanation was originally limited to “*the sub-section*” but by Act 26 of 2018, the word “*sub-section*” was substituted by the word “*section*”. Therefore, the
- G Explanation under Section 18 will not provide an escape route for the appellants. In any case, the bundle of rights and interests created in favour of the Corporate Debtor may even tantamount to creation of an implied agency under Chapter-X of the Indian Contract Act, 1872 and such agency may not even be amenable to termination in view of Section

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202 of the said Act, since the creation of the same in favour of the Corporate Debtor was coupled with flow of consideration. A

41. Having dealt with the objections raised on the strength of statutory provisions, let us now see the decisions on which heavy reliance is placed by the appellants.

42. *Embassy Property Developments Private Limited* (supra) B
arose out of a case where, under the guise of preserving and protecting the interests of the Corporate Debtor, NCLT issued a direction to the Government of Karnataka to grant renewal of a mining lease, in terms of the deeming provision in Section 8A(6) of the Mines and Minerals (Development and Regulation) Act, 1957. Raising the question of C
jurisdiction of the NCLT to issue such a direction, the Government of Karnataka approached the High Court by way of a writ petition, instead of filing a statutory appeal to NCLAT. The jurisdiction of the High Court to entertain the said writ petition and also grant interim stay, was what was questioned before this Court in the said decision. The right to have D
a mining lease granted by the Government, was neither a statutory right nor a contractual right. A person applying for a mining lease may at the most be entitled to have his application considered along with the applications of others and to a fair treatment. Once a mining lease is granted, the terms and conditions of such grant may be subject to the covenants contained in the grant as well as the statutory provisions. E
Therefore, the ratio laid down in *Embassy Property Developments Private Limited* (supra) may not go to the rescue of the appellants in a case of this nature where Energy Properties became the owner only on account of the money paid by the Corporate Debtor and a bundle of very valuable rights and interests in immovable property was created thereafter in favour of the Corporate Debtor. F

43. The decision of this Court in *Gujarat Urja Vikas Nigam Limited* (supra) may not also go to the rescue of the appellants, since the same arose out of a termination of Power Purchase Agreement¹³. In fact, this Court made a distinction in the said case, between (i) a dispute that arose out of the termination of PPA solely on account of G
insolvency on the one hand; and (ii) the other disputes relating to the PPA on the other hand.

¹³ For short, “PPA”

A 44. The decision in *Tata Consultancy*, rather than helping the appellants, actually supports the case of the Corporate Debtor. In fact, the decision in *Gujarat Urja Vikas Nigam Limited* was distinguished in *Tata Consultancy* (by the very same author), on the ground that if the termination was on an *ipso facto* clause i.e., the fact of insolvency itself, then NCLT will have jurisdiction, but that there was no residuary jurisdiction for NCLT, if the termination of a contract is based on grounds unrelated to the insolvency.

B 45. Thus, none of the decisions relied upon by the appellants revolve around the rights and interests that a Corporate Debtor has in an immovable property.

C 46. As a matter of fact, the only decision of this Court which may probably come close to the facts of the present case, is the one in *Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority & Anr.*¹⁴. In the said case, there was a tripartite joint development agreement entered into between (i) a Society representing a large number of persons occupying 672 tenements in the property; (ii) Maharashtra Housing and Area Development Authority¹⁵, which was the owner of the land; and (iii) the corporate debtor. After initiation of CIRP against the corporate debtor, MHADA issued a notice for the termination of the joint development agreement. NCLAT refused to treat the property as the asset of the corporate debtor. But this Court reversed the said decision, by holding that Section 14(1)(d) stood attracted in the facts and circumstances of the said case and that even a reference to Sections 18 and 25 may not be necessary. Though the said case arose out of a fact situation where the termination of the joint development agreement was hit by Section 14, the said decision clinches the issue on what constitute a property and the distinction between occupation and possession of a property.

E 47. Having seen the legal position, let us now come back to the facts of the case to see whether NCLT and NCLAT addressed the issue correctly or not.

G 48. As we have seen earlier, two applications were filed before NCLT. One was by the Resolution Professional and the other was by Victory. A careful look at the application filed by Victory in C.A. (IB)

¹⁴ (2020) 13 SCC 208

¹⁵ For short, the “MHADA”

No.146 of 2020 would show that there was no whisper about Victory occupying any land in excess of what they were permitted to occupy under the Leave and License Agreement. Under the Leave and License Agreement, Victory was allowed to occupy only 10000 sq. ft. of land, upon payment of a monthly license fee of Rs.5,000/-. If at all, a vague averment was made in paragraph VII (c) of their application to the effect that inasmuch as the Corporate Debtor was unable to commence any development activity in the subject land, the owner and the developer, with their full consent, had decided to allow the applicant to run its business in the usual course from the subject land, because the subject land could not have been left vacant for any substantial period of time. A B

49. The fact that there were security guards posted in the property is borne out by records. This is why NCLT as well as NCLAT have done a delicate act of balancing, by protecting the interests of Victory to the extent of the land permitted to be occupied. In fact, Victory does not even have the status of a lessee, but is only a licensee. A license does not create any interest in the immovable property. C D

50. Therefore, NCLT as well as NCLAT were right in holding that the possession of the Corporate Debtor, of the property needs to be protected. This is why a direction under Regulation 30 had been issued to the local district administration.

Conclusion E

51. In the light of the above, we are of the considered view that the impugned orders do not call for any interference. Hence, the appeals are dismissed. No costs.

Pending application(s), if any, stands disposed of accordingly. F