

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 71 of 2024

[Arising out of Order dated 04.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Special Bench (Court-II), Kolkata in IA No. 690/KB/2022]

In the matter of:

Shristi Infrastructure Development Corporation Ltd.

....Appellant

Vs.

Avishek Gupta,

...Respondents

Resolution Professional [Sarga Hotel Pvt. Ltd.] & Anr.

For Appellant:

Mr. Sunil Fernandes, Sr. Advocate, Mr. Sugandh Kochhor, Ms. Shrishti, Ms. Rajshree Choudhary, Ms. Diksha Dadu, Advocates

For Respondents:

Mr. Ramji Srinivasan, Sr. Advocate with Ms. Mahima Singh, Ms. Pooja Mahajan, Ms. Shreya Mahalwan, Ms. Shruti Pandey, Advocates for R1.

Mr. Abhinav Vasisht, Sr. Advocate with Mr. Raunak Dhillon, Ms. Madhavi Khanna, Mr. Nihaad Dewan, Ms. Priya Singh, Advocates for CoC.

Mr. Joy Sahay, Sr. Advocate with Mr. Sidhartha Sharma, Mr. Arjun Asthana, Ms. Shalini Basu, Advocates for SRA.

**JUDGMENT
(4th April, 2024)**

Ashok Bhushan, J.

This Appeal has been filed against the order dated 04.01.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Special Bench, Court-II, Kolkata in IA No. 690/KB/2022 filed by the Appellant in the Corporate Insolvency Resolution Process (CIRP) of 'Sarga Hotel Private

Limited' (Corporate Debtor). By the impugned order, IA No.690 of 2022 filed by the Appellant has been rejected, aggrieved by which order, this Appeal has been filed.

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

2.1. Appellant by Registered Deed of Conveyance dated 22.03.2007 by West Bengal Housing Infrastructure Development Corporation Limited, acquired a piece and parcel of land containing an area of 8 acres situated in Street No. MAR situated within Mouza Jatragachi in New Town within Police Station Rajarhat, District Parganas North. Appellant by a Registered Lease Deed dated 31.03.2007 demarcated portion of the above premises containing an area of 3.5 acres leased out to the Corporate Debtor for consideration of rent of Rs.20,000/- per month exclusive of the rates and taxes. Under the Lease Deed dated 31.03.2007, the Corporate Debtor was entitled to erect, construct and build on the demised land. A Share Subscription and Shareholders Agreement dated 07.08.2008 was entered between the Appellant, 'Rishima SA Investments LLC'- the Corporate Debtor (earlier known as Shristi Hotel Private Limited) under which Rishima SA acquired 35% shareholding of the Corporate Debtor and Appellant had 65% shareholding. Corporate Debtor obtained financial assistance from the Yes Bank, on default being committed in repayment of the loan to the Yes Bank. Yes Bank filed an application under Section 7 against the Corporate Debtor on which application, vide an order dated 11.02.2022, CIRP commenced against the Corporate Debtor. Mr. Avishek Gupta was appointed as IRP who was subsequently confirmed as Resolution Professional. The Resolution

Professional issued an invitation for Expression of Interest for submission of the Resolution Plan on 28.04.2022. The Appellant filed an IA No.690 of 2022 in the CIRP of the Corporate Debtor claiming that the lease granted to the Corporate Debtor of land measuring 3.5 acres stood terminated as per Framework Agreement dated 29.03.2007, hence, the assets in question be excluded from the CIRP of the Corporate Debtor. Appellant by the application also challenged the invitation of Expression of Interest dated 28.04.2022. The Application was opposed by the Resolution Professional who filed reply to the application objecting to the prayers made in the application. Resolution Professional claimed that the lease in favour of the Corporate Debtor is still subsisting and as per Extension and Modification Deed dated 12.09.2008, lease can be terminated only on account of non-payment of rental. Rental having duly paid, there is no occasion for termination of the Lease Deed. The Framework Agreement dated 29.03.2007 as claimed by the Appellant was denied and it was stated that in the records of the Corporate Debtor no such Agreement is reflected. Rejoinder was also filed by the Appellant to the Reply. Parties have also filed their written submissions before the Adjudicating Authority. Adjudicating Authority by impugned order dated 04.01.2024 dismissed IA No. 690 of 2022, aggrieved by which order, this Appeal has been filed.

3. We have heard Shri Sunil Fernandes, Learned Senior Counsel for the Appellant, Shri Ramji Srinivasan, Learned Senior Counsel with Ms. Pooja Mahajan, Learned Counsel for the Resolution Professional, Shri Abhinav Vasisht, Learned Senior Counsel with Shri Raunak Dhillon, Learned

Counsel for the CoC and Shri Joy Sahay, Learned Senior Counsel appearing for the SRA.

4. Shri Sunil Fernandes, Learned Senior Counsel for the Appellant submits that under Master Framework Agreement (MFA) dated 29.03.2007, Appellant had right to terminate the lease in event of default as enumerated in Clause 3 of the Framework Agreement. Even though Framework Agreement was not registered document but the said agreement could have been looked into by the Adjudicating Authority. The Adjudicating Authority committed error in ignoring the MFA. The Corporate Debtor does not own the land underlying the Westin Hotel. As per clause 3 of the Framework Agreement, on account of initiation of CIRP against the Corporate Debtor the Lease Deed in favour of the Corporate Debtor stand terminated, hence, the Appellant had claimed for exclusion of the assets from the CIRP of the Corporate Debtor which has been wrongly rejected by the Adjudicating Authority. It is further submitted that the Corporate Debtor being not owner of 3.5 acres land which was leased out by the Appellant to the Corporate Debtor. IRP/RP could not have taken possession of the land as per provision of Section 18(1)(f) of the Code r/w *explanation* (a). It is submitted that the MFA was signed by both the parties. Signature on the agreement was not denied before the Adjudicating Authority and the original agreement was filed before the Adjudicating Authority. Adjudicating Authority has wrongly relied on the judgment of the Hon'ble Supreme Court in ***“Victory Iron Works Ltd V. Jitendra Lohia & Anr.- Civil Appeal No.1743 of 2021”*** which was a case of developmental right which was acquired by the

Corporate Debtor after payment of substantial amount of Rs.12 crores which judgment was not applicable in the present case. The MFA did not create or limit or extinguish any right in *praesenti*, in the leasehold land and creation of right is by way of the registered Lease Deed dated 31.03.2007. MFA was a record of a collateral transaction, which could have been looked into by virtue of the proviso to Section 49 of the Registration Act. The Resolution Professional's contentions regarding validity/genuineness of the MFA are all incorrect. Submissions of the resolution process on the judgment of the Hon'ble Supreme Court in **"Gujarat Urja Vikas Nigam Limited vs. Amit Gupta- (2021) 7 SCC 209"** is also untenable. It is submitted that the '*ipso facto*' clause in a contracts other than government/statutory/ essential supplies contract are clearly enforceable as per the law laid down by the Hon'ble Supreme Court in **"Gujarat Urja Vikas Nigam Limited"** (supra). Learned Counsel for the Appellant has also placed reliance on the judgment of the Hon'ble Supreme Court in **"Greater Noida Industrial Development Authority v. Prabhjit Singh Soni & Anr. Civil Appeal No. 7590-7591 of 2023"**. It is submitted that the Appellant was holding company of the Corporate Debtor and the land was leased out on meagre rent of Rs.20,000/- per month because of the fact that the Corporate Debtor was subsidiary of the Appellant. There is a difference between a Corporate Debtor who owns the land and a Corporate Debtor who is only lessee. In the present case, the commercial interest being the leasehold rights belonging to the Appellant could not have been treated as an asset of the Corporate Debtor without providing the Appellant some form

of right, representation or claim before the CoC as well as the Resolution Plan.

5. Shri Ramji Srinivasan, Learned Senior Counsel for appearing for the Resolution Professional refuting the submissions of the Counsel for the Appellant submits that the leasehold rights in the underlying land is an asset of the Corporate Debtor. It is submitted that the leasehold right is a right in the land and is property within the meaning of Section 3(27) of the Code. Lease of immovable property is defined as a transfer of a right to enjoy the property. Lease creates an 'interest' in the demised property. Learned Counsel for the Resolution Professional placed reliance on the judgment of the Hon'ble Supreme Court in **"Victory Iron Works Ltd"** (supra). He submits that the Hon'ble Supreme Court has laid down that every description of interest is an asset. It is submitted that the alleged FMA dated 29.03.2007 does not exist in the records of the Corporate Debtor. Scanned copy was provided to the Resolution Professional on behalf of the Company Secretary of the Corporate Debtor and it was the Appellant who produced the copy of MFA before the Adjudicating Authority. No COC member was aware of any such alleged agreement. MFA does not mention in Registered Deed dated 31.03.2007 as well as Extension and Modification Deed dated 12.09.2008. MFA neither being registered nor duly stamped cannot be looked for any purpose nor is admissible in evidence. No right in immovable property can be created or extinguished without the document being registered as required by Section 17 of the Registration Act. Unregistered and unstamped document i.e. MFA cannot alter the rights of the Corporate

Debtor under Lease Deed dated 31.03.2007 as modified by Registered Document dated 12.09.2008. The case of the Appellant that lease deed in favour of the Corporate Debtor stood terminated by virtue of clause 3 of MFA is wholly erroneous and unacceptable. As per lease deed modified on 12.09.2008, lease can be terminated only on the ground when there is default in payment of rental. Present is not a case where it is alleged that there is default in rental. Document dated 29.03.2007 has been manufactured for the purpose of case by the Appellant which is not a genuine document. In any view of the matter, the document being unregistered and unstamped cannot create any right of the Appellant to terminate the lease deed *dehorse* the registered lease deed dated 31.03.2007 and modification agreement dated 12.09.2008. The MFA is not even admissible for any purpose by virtue of Section 49 of the Registration Act. It is submitted that the lease of the underlying land on which the Westin hotel is situated is central to the successful resolution process of the Corporate Debtor. The same cannot be terminated in view of the law laid down by the Hon'ble Supreme Court in **"Gujarat Urja Vikas Nigam Limited"** (supra). Insofar as EoI dated 22.04.2022 is concerned, the said EoI was challenged by one Mr. Abhishek Bhardwaj by filing IA No. 477 of 2022 which was rejected on 30.06.2022. Company Appeal against the said order has also been dismissed by this Tribunal.

6. Learned Counsel appearing for the Respondent No.2- CoC also refuted the submissions of the Counsel for the Appellant and submits that the Adjudicating Authority has correctly dismissed IA No.690 of 2022. Alleged

MFA is not a registered document, thus, it does not create any lessor and lessee relationship. Registered lease deed dated 31.03.2007 which was leased for 50 years did not contain any termination clause. It was subsequently added by Extension and Modification dated 12.09.2008 providing that lease deed can only be terminated on account of default in payment of lease rental. The MFA finds no mention in any of the subsequent registered agreement between the parties, hence, cannot be looked into. A document which was compulsory registrable under Section 17 of the Registration Act if not registered cannot be looked into as proof of any term, evidence by such document. When the parties have decided to enter into registered agreement by registered lease deed dated 31.03.2007 any prior instrument affecting the same property shall be of no consequence and terms of lease are governed by the lease document only. The FMA is a sham agreement, its existence and validity has rightly been questioned by the Resolution Professional before the Adjudicating Authority. Lease hold rights are assets of the Corporate Debtor and fall within the meaning of Section 18(1)(f) and Section 25 of Code. It is submitted that the termination of lease on the basis of *ipso facto* clause is also not acceptable.

7. Learned Counsel for the SRA has also opposed the submissions of the Counsel for the Appellant. It is submitted that the FMA is a sham document manufactured as a result of afterthought by the Appellant. FMA was placed on record after 4 months of CIRP by the Appellant which document is not mentioned in any document executed by the Corporate Debtor or the Appellant including Registered Lease Deed dated 31.03.2007, Extension and

Modification Deed dated 12.09.2008 and Share Subscription and Share Agreement dated 07.08.2008. The FMA being unregistered document cannot be received in evidence. It is submitted that there is no termination of the registered lease in favour of the Corporate Debtor. FMA is not an enforceable document, cannot give any right to the Appellant to terminate the lease or claim the termination on commencement of insolvency. It is submitted that the termination of lease is not permissible in view of the law laid down by the Hon'ble Supreme Court in **"Gujarat Urja Vikas Nigam Limited"** (supra). The only ground to terminate the lease deed dated 31.03.2007 is default in payment of lease rental which ground being not there, Lease subsists and assets have rightly been controlled by the Resolution Professional.

8. We have considered the submissions of the Counsel for the parties and perused the record.

9. Before we enter into respective submissions of the parties, it is necessary to notice certain clauses of the Registered Lease, Extension and Modification Deed document as well as the FMA claimed by the Appellant.

10. The FMA is claimed to be executed on 29.03.2007 by the Appellant. Clause 3 on which reliance has been placed by the Appellant is as follows:-

"3. ARRANGEMENT AND CONSEQUENCE

3.1 Notwithstanding anything contained in the Lease Deed, SHL agree and understand that SIDCL shall have a right to terminate the Lease Deed on occurrence of the following events:

(a) SHL fails to pay the lease rent for any month in accordance with the Lease Deed; or

(b) Any corporate action, legal proceedings or other procedure or step is taken:

(i) by SHL and/or against SHL in relation to the suspension of payments, a moratorium of legal action, winding-up, dissolution, administration or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) of SHL; or

(ii) SHL becomes commercially insolvent; or

(iii) by SHL and/or against SHL in relation to a composition, compromise, assignment or arrangement with any creditor of SHL;

(iv) by SHL and/or against SHL in relation to the appointment of a liquidator, receiver, administrative receiver, administrator, compulsory manager or other similar officer in respect of SHL or on any assets of SHL, or

(v) in relation to any analogous procedure or step is taken in any jurisdiction against SHL.

(c) SHL ceases to be an Affiliate and/or Subsidiary of SIDCL; or

(d) There is any change of management or control of SHL.

3.2 Consequence

On occurrence of any of the events specified in Clause 3.1 above:

(a) The lease shall stand determined and the Leased Land shall revert back to SIDCL and SHL shall not have any right in respect of the Leased Land under the Lease Deed;

(b) Any deposit including security deposit, if agreed under the Lease Deed and paid to SIDCL by SHL shall be forfeited and adjusted against the

consession provided in lease rent as may be agreed in the Lease Deed between SIDCL and SHL for the lapsed period during which the leasehold rights will be enjoyed by SHL.”

11. Registered Lease Deed was executed between the parties on 31.03.2007 which registered lease does not even refer to the FMA dated 29.03.2007 entered between the Appellant and the Corporate Debtor as claimed by the Appellant whereas Registered Lease refers to earlier conveyance deed dated 22.03.2007 by Westbengal Housing Infrastructure Development, the terms and conditions of the lease deed under which 3.5 acres land area was demised to the Corporate Debtor. In clause 1 states as follows:-

“1. That in consideration of the rents hereinafter reserved and of the terms and conditions and the covenants hereinafter contained and on the part of the Lessee to the paid observed and performed the Lessor doth hereby demise unto the Lessee ALL THAT the divided and demarcated portion of the said premises (out of the said entire premises) containing an area of 3.5 Acres (equivalent to 14163.80 Sq. Mtrs.) (be the same a little more or less) more fully and particularly mentioned and described in the SECOND SCHEDULE hereunder written and hereinafter referred to as the DEMISED PREMISES within the limits of Panchayat area with all easements and appurtenances belonging to or in anywise relating to or intended to relate thereto TO HOLD the said DEMISED PREMISES unto the Lessee for the

period of 50 years commencing on and with effect from 22nd March, 2007 yielding and paying therefore the rent of Rs.20,000/- (Rupees Twenty thousand) only per month exclusive of the rates and taxes and/or Panchayat tax (both owners and occupiers shares) payable in respect of the said demised premises to be paid on or before the 10th day of each and every succeeding month for the month immediately proceeding and free and clear of all deductions and abatements whatsoever for the entire period of the Lease hereby granted and demised.”

12. Clause 2 also contains covenant of lessee. Clause 2(i), (ii), (iii) and (iv) as follows:-

“2. The Lessee doth hereby covenant with the Lessor as follows:

i) To pay the reserved rent on the day and in the manner as aforesaid without any deduction or abatement whatsoever or howsoever.

ii) To keep and maintain the said demised premises and/or the new building/buildings to be constructed thereat in tenantable repair and conditions throughout the terms.

iii) To pay and discharge all existing and future taxes, rates assessments impositions and outgoings including Panchayat Taxes, khazna etc. imposed or charged upon the said demised premises.

iv) At its own costs for its own convenience to erect construct and build and make fit for occupation in a substantial and workman like manner with best materials in conformity in every respect with plans and specifications to be approved by The Panchayat or other

authority or authorities the new building/buildings on the said Demised Premises.”

13. The lessor covenants are contained in Clause 3. Clause 3(i) is relevant which is as follows:-

“3. The Lessor doth hereby further covenants with the Lessee as follows:-

i) That the Lessee paying the monthly rent hereby reserved and observing and performing all the covenants and stipulations herein contained on its part shall peaceably and quietly hold possess and enjoy the said demised premises during the said term hereby granted and/or demised without any interruption by the Lessor or any person rightfully claiming or in trust for the Lessor.”

14. Modification Deed dated 12.09.2008 was also registered document which was executed between the Appellant and Shrishti Hotel Pvt. Ltd. (earlier name of the Corporate Debtor). A new clause 6 was added by the Modification Deed which newly added clause 6 is as follows:-

“The Lessor shall not have the right to terminate this Deed of Lease except for non payment of rent. In such a case the Lessor shall be liable to give 45 days prior written notice to the Lessee to cure the above mentioned defect before terminating the lease and shall be entitled to terminate the Lease Deed if such default is not cured within the aforesaid 45 days period.”

15. The main relief claimed in IA No.690 of 2022 filed by the Appellant was to exclude lease land in question out of the CIRP on the ground that lease in favour of the Corporate Debtor stand terminated by virtue of Clause 3 of MFA. It was further submitted during the course of the argument that by subsequent letter dated 23.05.2023, Appellant has communicated termination of the lease deed to the Corporate Debtor. Learned Counsel for the Appellant has placed reliance on Section 18(1)(f) proviso (a) to contend that the Appellant being owner of the lease land, the said lease land could not have been taken possession by the Resolution Professional and the said lease land cannot be part of the assets of the Corporate Debtor. Section 18(1)(f) provides as follows:-

“18. Duties of interim resolution professional. -

The interim resolution professional shall perform the following duties, namely:

(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”*

16. There is an *explanation* appended to Section 18(1), which is as follows:-

“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.”*

17. The submission of the Appellant is that as per *explanation* (a), assets shall not include assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements. The *expression* ‘asset’ has not been defined in the IBC. However, IBC defines *expression* ‘property’ in Section 3(27) in following manner:-

“3. Definition. (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;”

18. Corporate Debtor claims leasehold rights by virtue of Registered Lease Deed dated 31.03.2007. Expression ‘lease’ has been defined in Section 105 of the Transfer of Property Act, 1882, which is as follows:-

“105. Lease defined.— *A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.”*

19. As per the above definition, lease of the immoveable property is a transfer of a right to enjoy such property, made for a certain *express* or implied, or in perpetuity, in consideration of a price paid or promised. The present is a case where on payment of monthly rent as reserved in the lease deed, Corporate Debtor has given possession and right to erect building of the land. Thus, by lease, Appellant has acquired a right to enjoy the property. Leasehold rights which has been granted to the Corporate Debtor is property within the meaning of Section 3(27) and has to be treated as an asset for the purposes of Section 18(1)(f). Much reliance has been placed by the Appellant on *explanation (a)* and what is sought to be contended is that the land under the lease is owned by the Appellant, hence, the possession of

the said land ought not to have been taken by the Resolution Professional. The *expression* 'assets' occurring in *explanation (a)* has wide meaning which meaning encompasses itself the immoveable land as well as leasehold rights.

20. The leasehold rights which are owned by the Corporate Debtor consists of right to enjoy the immoveable property by virtue of Registered Lease Deed dated 31.03.2007. *Explanation (a)* does not come into way of the Corporate Debtor in enjoying the leasehold rights i.e. enjoyment of the property by virtue of Registered Lease Deed. We, thus, do not find any substance in the submission of the Appellant that the leasehold rights should be excluded from the assets of the corporate debtor.

21. In the above reference, we may also refer to judgment of the Hon'ble Supreme Court in **"Victory Iron Works Ltd"** (supra). In the above case, the Resolution Professional of the Corporate Debtor had filed an application before the Adjudicating Authority under Section 25 praying for a direction to the Appellant against owners not to obstruct the sole and exclusive possession of the property. Application of the Resolution Professional was contested. The Hon'ble Supreme Court noticed that there was MoU dated 24.01.2008 under which the Corporate Debtor agreed to provide financial assistance towards the purchase of the land. There were other terms and conditions of the MoU by another agreement dated 16.06.2008 enjoy property whereby the Corporate Debtor was conferred exclusive right of the development of the property. Possession of the property was handed over to the corporate debtor. In the above context, issue arose as to whether

Resolution Professional be entitled to take custody and control of the assets. The Hon'ble Supreme Court in the above context, examined the definition of 'property' under Section 3(27), provisions of Sections 18 and 25 of the Code, it was held by the Hon'ble Supreme Court that the development rights created in favour of the corporate debtor constitute 'property' within the meaning of Section 3(27) and the 'assets' in common parlance denotes 'property of any kind'. It was held that bundle of rights that Corporate Debtor shall constitute 'asset'. In paragraph 35 of the judgment, following has been laid down:-

“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."

22. We, thus, have no hesitation to hold that the leasehold rights which was granted to the Corporate Debtor by virtue of Registered Lease Deed dated 31.03.2007 is right to enjoy the property and erect building of the land is a right which is an 'asset' within the meaning of Section 18(1)(f) and the said asset is owned by the corporate debtor by virtue of Registered Lease Deed.

23. Another question which need to be answered is as to whether the Lease Deed in favour of the corporate debtor of the underlying land stood terminated by virtue of MFA dated 29.03.2007. MFA dated 29.03.2007 is an unregistered document which is an admitted fact. Clause 3 on which reliance has been placed by the Appellant is a clause which reserves a right in the Appellant to terminate the Lease Deed on occurrence of events as mentioned therein. Right to terminate the Lease Deed is also a right in immoveable property.

24. Section 17 of the Registration Act, 1908 provides for document of which registration is compulsory. Section 17 (1) is as follows:-

"17. Documents of which registration is compulsory.

(1)The following documents shall be registered, if the property to which they relate is situate in a district in

which, and if they have been executed on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely,

(a)instruments of gift of immovable property;

(b)other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c)non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d)leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e)[non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:] [Inserted by Act 21 of 1929, Section 10.]

Provided that the [State Government] [Substituted by A.O.1950, for "Provincial Government".] may, by order published in the [Official Gazette] [Substituted

by A.O.1937, for "Local Official Gazette" .], exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53-A of the Transfer of Property Act, 1882, shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001, and if such documents are not registered on or after such commencement then, they shall have no effect for the purposes of the said section 53-A.] [Inserted by Act 48 of 2001, Section 3 (w.e.f. 24.9.2001).]"

25. When we look into the MFA dated 29.03.2007 various clauses contained therein, there can be no doubt that the Framework Agreement was compulsory registrable under Section 17. Adjudicating Authority did not commit any error in not placing any reliance on the Framework Agreement dated 29.03.2007 for recognising any right in the Appellant to terminate Lease Deed. It was further to be noticed that by Registered Lease Deed dated 31.03.2007, lease was granted to the Corporate Debtor for a period of 50 years. We have already noticed clause 3(i) which is a covenants of lessor. Clause 3(i) indicate that subject to lessee paying the monthly rent hereby reserved and observing and performing all the covenants and stipulations herein contained on its part shall peaceably and quietly hold

possess and enjoy the said demised premises during the said term without any interruption by the lessor. Further by subsequent Extension and Modification Deed dated 12.09.2008 which is a registered agreement between the Appellant and the Corporate Debtor, a clause 6 has been added which specifically provides for termination of a lease. Under clause 6, lease can be terminated only on the default in payment of rental that too after giving a notice of cure period of 45 days. When the Registered Lease dated 31.03.2007 and Extension and Modification Deed dated 12.09.2008 specifically provides the right of termination of a lease, the right of the parties with respect to the termination of lease has to be governed by the document and it is not open for the Appellant to rely on the Framework Agreement to contend that the lease shall stand terminated on initiation of the CIRP. In the present case, there is no case that there is any default committed by the corporate debtor in payment of lease rental. We, thus, do not find any substance in the submission of the Appellant that the lease in favour of the corporate debtor of 3.5 acres land stand terminated, hence, the same ought to have been excluded from the assets of the corporate debtor. The lease was further extended for 30 years by Extension and Modification Deed dated 12.09.2008 and the current till year 2087.

26. Counsel for the Appellant sought to contend that even if MFA is not a registered document, the document should have been looked into under Section 49 proviso. Section 49 of the Registration Act is as follows:-

“49. Effect of non-registration of documents required to be registered.

- No document required by section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882),] [Added by Act 21 of 1929, Section 10.] to be registered shall

(a)affect any immovable property comprised therein, or

(b)confer any power to adopt, or

(c)be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the [Specific Relief Act, 1877] [Added by Act 21 of 1929, Section 10.], [* * *] [The words "or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882 (4 of 1882)" omitted by Act 48 of 2001, Section 6 (w.e.f. 24.9.2001).] or as evidence of any collateral transaction not required to be effected by registered instrument.]”

27. The proviso to Section 49 on which reliance has been placed by the Appellant is applicable only when unregistered document may be received as evidence of collateral transaction not required to be effected by a registered instrument. Section 105 of the Transfer of Property Act requires lease to be registered which is year to year of a period of more than one year. Thus, when lease deed is required to be registered by virtue of Section 105 of the Transfer of Property Act, no unregistered document as a collateral

transaction can be looked into and proviso to Section 49 is not applicable in the facts of the present case.

28. Counsel for both the parties have also referred to and relied on judgment of the Hon'ble Supreme Court in **"Gujarat Urja Vikas Nigam Limited"** (supra). Counsel for the Appellant submits that the Hon'ble Supreme Court has occasion to examine 'ipso facto' clause and the law in the said with regard to ipso facto clause as contained in paragraphs 141.1, 141.2, 141.3, which are as follows:-

"141. The position of law in India today invalidates ipso facto clauses in:

141.1. Government licences, permits, registrations, quotas, concessions, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, in accordance with the Explanation to Section 14(1).

141.2. Contracts where the counterparty supplies essential/critical goods and services to the corporate debtor, within the meaning of Sections 14(2) and 14(2-A).

141.3. However, no clear position emerges in relation to the validity of ipso facto clauses in other contracts, from the bare text of IBC. Hence, this task is now left to this Court in the present case."

29. Counsel for the Appellant has also placed reliance with regard to paragraphs 147, 148 and 149 which are as follows:-

“147. The issues which we have delineated above are not exhaustive. The enumeration only seeks to highlight the complexity of the task at hand, which will require consideration of a variety of principles, which have to be balanced. The tension between the rights of a corporate debtor during the insolvency process as against the contractual rights of a terminating party, which is central to the task at hand, is one which has been acknowledged even by the UNCITRAL in its UNCITRAL Guide. There is a public interest underlying each of these balancing considerations. The law confronts the Judge with the greatest challenges of adjudication when a balance has to be made between what is right and what is right.

148. There are limitations of the judicial process in providing absolute answers to these questions. Judgments are rendered in cases involving specific fact situations. While they immediately bind the parties before the court, the impact of the pronouncement of principle will have a bearing on others whose contracts may contain similar provisions. In Northern Securities Co. v. United States 100, Oliver Wendell Holmes. J. acknowledged a similar judicial conundrum in the following terms in his dissenting opinion: (SCC OnLine US f SC para 356)

"356. Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."

149. Consequently, we hold that question of the validity/invalidity of ipso facto clauses is one which the Court ought not to resolve exhaustively in the present case. Rather, what we can do is appeal in earnest to the legislature to provide concrete guidance on this issue, since the lack of a legislative voice on the issue will lead to confusion and reduced commercial clarity."

30. There can be no dispute to the proposition of law as laid down by the Hon'ble Supreme Court in the above judgment. The Hon'ble Supreme Court in the above case has ultimately upheld the order of the Adjudicating Authority by which direction was issued to not terminate the PPA which was held to be central to the insolvency resolution of the corporate debtor. In paragraphs 162 and 163, following was laid down:-

"162. Parliament would have been conscious of the provision which was adopted in SICA. Yet, no concrete position has been adopted in relation to the termination of ipso facto clauses by the legislature under IBC. In the absence of an express prohibition by the legislature, it can be argued that there is no

general embargo on the operation of such clauses if they are part of a valid contract under the Contract Act.

163. At the same time, we cannot lose sight of the fact that this Court is apprised with a novel situation where the "going concern" status of a corporate debtor will be negated by a termination of its sole contract, on the basis of an ipso facto clause. It is pertinent to note that IBC has been in effect from 5-8-2016, and has also been amended multiple times. Hence, if the "going concern" status of corporate debtors was being affected on a regular basis due to ipso facto clauses (which are in vogue even in the present contracts similar to the current PPA), then the legislature may, if it considered necessary, have proceeded to legislate on an explicit position with regard to the operation of ipso facto clauses. However, this Court in the present case is not required to resolve the broad question of whether the invalidation/stay of ipso facto clauses in India, generally, is legally permissible. This is a matter which raises complex issues of legal policy and a balancing between distinct and conflicting values. Reform will have to take place through the legislative process. The stages through which legislative reform must take place absolute or incremental- is a matter for legislative change. Our task is limited to the issue of deciding whether NCLT correctly exercised the jurisdiction vested in it, in the facts of this case, to stay the termination of PPA. In the absence of an explicit stand taken by the legislature, this Court's intervention in this

matter would be guided by ascertaining the legislative intention from the provisions of IBC.”

31. Thus, the Hon’ble Supreme Court, in the above case, has clearly held that *ipso facto* clause is not applicable, in the present case also the Corporate Debtor is a going concern and is the running hotel. We, thus are of the view that the judgment of the Hon’ble Supreme Court in **“Gujarat Urja Vikas Nigam Limited”** (supra) in no manner help the Appellant. Furthermore, *ipso facto* clause on which reliance is placed by the Appellant is the clause 3 in the MFA. We have already held that the MFA being unregistered and cannot be looked into, thus, clause 3 cannot be treated to be regulating the rights of the parties. We have already held that the rights of the Appellant and the corporate debtor i.e. lessor or lessee shall be governed by the Registered Lease dated 31.03.2007 and subsequent Extension and Modification Deed dated 12.09.2008, there is no *ipso facto* clause in the Registered Lease Deed between the parties, thus, reference or reliance on *ipso facto* clause is clearly misplaced.

32. Insofar as prayer of the Appellant in IA No.690 of 2022 to set aside invitation for expression of interest dated 22.04.2022 is concerned, the said invitation of expression of interest was challenged before the Adjudicating Authority by one Mr. Abhishek Bhardwaj which was rejected on 30.06.2022 and Company Appeal (AT) (Insolvency) No.849 of 2022 filed by Abhishek Bhardwaj was also dismissed by this Tribunal vide its judgment and order

dated 02.08.2022. We, thus, do not find any error in dismissing IA No.690 of 2022.

33. In view of the foregoing discussions, we are of the view that the Adjudicating Authority did not commit any error in rejecting IA No.690 of 2022 filed by the Appellant. We do not find any substance in any of the submissions of the Appellant questioning the order of the Adjudicating Authority dated 04.01.2024. There is no merit in the Appeal. The Appeal is dismissed.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
Anjali