

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Ins.) No. 1064 of 2023

(Arising against the impugned order dated 07.08.2023 passed by the Hon'ble National Company Law Tribunal, Kolkata Bench in CP (IB) No. 1377/KB/2020)

IN THE MATTER OF:

Chandrakant Khemka,

Member of Suspended Board of Directors of
Nandini Impex Private Limited,
Residing at Ballygunge Park, Kolkata, Pin – 700019.
Email id: ckhemka@hotmail.com

...Appellant

Versus

Santanu Bhattacharjee,

Resolution Professional of Nandini Impex Private Limited,
Martin Burn House,
Office No. 303, 1, RN Mukherjee Road,
3rd Floor, Kolkata,
Pin– 700001. Email Id: Neeljanai@gmail.com

...Respondent No. 1

Sincere Securities Private Limited,

12, B.B.D. Bagh (East), 1st Floor, Kolkata,
Pin – 700001.
Email id: sincerecurities96@gmail.com

...Respondent No. 2

Noble Dealcom Private Limited,

Office No. 303, 1, RN Mukherjee Road,
3rd Floor, Kolkata,
Pin – 700001.
Email id: nobledealcom@gmail.com

...Respondent No. 3

Jodhpur Properties and Finance Private Limited,

88A, Madan Mohan Burman Street,
Room No. 29, 4th Floor, Kolkata.
Pin – 700007.
Email id: Jodhpurproperties1994@gmail.com

...Respondent No. 4

UCO Bank

10, B T M Sarani,
Kolkata - 700 001 West Bengal
Email id: calind@ucobank.co.in

...Respondent No. 5

Cont'd.... /

Present:

For Appellant: Mr. Abhijeet Sinha, Sr. Advocate, Mr. Aman Gupta & Mr. Akarsh Pandey, Advocates.

For Respondents: Mr. Rishav Banerjee & Mr. Saurav Jain, for R-1/RP. Mr. Gaurav Mitra, Mr. Ashish Chaudhury & Mr. Abhishek Arora, for R-2 to 4. Mr. Rachit Mittal & Mr. Parish Mishra, for R-5/CoC.

J U D G M E N T
(12th November, 2024)

INDEVAR PANDEY, MEMBER (T)

This appeal is filed by Sh Chandrakant Khemka (**Appellant**) who is Ex-promoter Director of M/s Nandini Impex Private Limited/Corporate Debtor (in short **CD**) under section 61(1) of the Insolvency and Bankruptcy Code, 2016 (in short Code) challenging the impugned Order dated 07.08.2023 passed by the Learned National Company Law Tribunal, Kolkata Bench (in short **AA**) in respect of two applications being IA (IBC)/1082(KB)2023 Noble Dealcom Private Limited (**Respondent No.3**) v. Sree Santanu Bhattacharjee (**Resolution Professional/Respondent No.1**) and IA (IBC)/1083(KB)2023 Sincere Securities Private Limited (**Respondent No.2**) v. Sree Santanu Bhattacharjee preferred in CP (IB) No. 1377/KB/2020, UCO Bank (**Financial Creditor**) v. Nandini Impex Private Limited under Section 7 of IBC, 2016.

2. The Adjudicating Authority passed the following order in the IA (IBC)/1082(KB)2023 and IA (IBC)/1083(KB)2023 in the CP (IB) No. 1377/KB/2020:

“a) When these IAs were taken up for hearing today, it was stated by the Ld. Counsel appearing for the Resolution Professional that in terms of resolution passed by the CoC at Page No.38 of the Reply in I.A. (I.B.C.) No. 1082(KB)2023 and Page No.39 of the Reply in I.A. (I.B.C.) No. 1083(KB)2023, the property as mentioned in relief (Para-a) in both the IAs is not required to be held and the same shall be handed over to the Applicant.

(b) In view of this statement made by Ld. Counsel appearing for the Resolution Professional, prayer-(a) in both the IAs is disposed of with a direction to the Resolution Professional to hand over this property, if already not handed over, within two weeks from the date of this order.

(c) As far as other reliefs in the nature of payment of occupational charges is concerned, post these IAs for hearing on 04.09.2023.”

It is this order of AA which is under challenged in this appeal.

3. The brief facts of the case are as follows:
 - i. Respondent Nos. 2 to 4 agreed to provide loans totaling Rs. 6 crores to CD under two Memoranda of Understanding (MOU), with each loan amounting to Rs. 3 crore, secured by mortgaging the part of White House Property which is the corporate office of the CD. The first MoU was executed on 13.02.2019 between the CD and Respondents Nos. 3 and 4, and the second MoU on 15.02.2019 between the CD and Respondent No. 2. Following alleged defaults in repayment by the CD, two conveyance deeds dated 27.02.2020 were executed, resulting in the sale of portions of the White House Property to Respondent Nos. 2 to 4 for a total of Rs. 6 crores. On 27.02.2020, two separate Leave and License Agreements were executed, leasing the White House Property to the CD for an 11-month

term, with Respondent No. 2 leasing the front portion and Respondent Nos. 3 and 4 leasing the rear. On 08.05.2020, Respondent Nos. 2 to 4 issued legal notices terminating these agreements and demanded that the CD vacate the premises.

- ii. On 04.09.2020, two civil suits were filed against the CD and its director, Mr. Suraj Kumar Gupta, in the District Judge, Commercial Court at Tis Hazari, New Delhi. The cases—M/s. Sincere Securities Pvt. Ltd. (CS Comm. No. 1290/2020) and M/s. Noble Dealcom Pvt. Ltd. (CS Comm. No. 1292/2020)—involve claims for recovery of possession of the White House Property and lease arrears. The Commercial Court denied a summary judgment for dispossession.
- iii. In the case of ***Nandini Impex Private Limited v. Sincere Securities Private Limited & Ors.***, the Ld. Commercial Court, on 09.12.2021, ordered the CD to pay Rs. 6 lakh per conveyance deed as interim lease rental, with an interest return policy if the plaintiffs were found not entitled. The CD challenged this in two revision petitions. The Delhi High Court ordered the CD to deposit Rs. 12 lakh for arrears from June 2020 on 21 and 22 March 2022, but dismissed the petitions for non-compliance on 08.08.2022. Subsequently, on 30.08.2022, the Commercial Court allowed an amendment recognizing the White House Property's value exceeding Rs. 6 crore. The relevant portion of the order dated 30.08.2022 is extracted below:

“Let the plaintiff to file the amended plaint with due changes in the valuation clause paragraph as ordered above along with necessary court fees by next date and thereafter plaint will be returned to plaintiff for filing before Hon’ble High Court as this court has jurisdiction only upto Rs. 2 crores and due to amendment of the plaintiff as sought by plaintiff, the suit had gone beyond the jurisdiction of this court.”

- iv. Respondent No. 2 to 4 have filed an application seeking review of the aforesaid order dated 30.08.2022 with the Commercial Court Tis Hazari and the same is still pending.
- v. In the meantime, UCO Bank filed a petition for initiating CIRP against CD under Section 7 of the Code which was admitted on 20.09.2022 by NCLT Kolkata Bench (AA). Accordingly, CP (IB) No. 1377/KB/2020 was admitted by AA and Respondent No. 1 was appointed as Resolution Professional.
- vi. During the pendency of CIRP, Respondent No. 2 (Sincere Securities Pvt. Ltd.) and Respondents Nos. 3 and 4 (Noble Dealcom Pvt. Ltd. and Jodhpur Properties and Finance Pvt. Ltd. respectively) filed eviction applications IA (IBC)/1083(KB)2023 and IA (IBC)/1082(KB)2023) concerning two office spaces in the "White House" property, which is currently occupied by the CD. The AA ordered the RP to hand over possession of the property within two weeks.

Submission of the Appellant:

4. The counsel for the appellant contests the NCLT's ruling on two eviction applications (IA (IBC)/1082(KB)2023 and IA (IBC)/1083(KB)2023) in CP (IB) No. 1377/KB/2020, on 07.08.2023, which directed the CD to vacate two office spaces in the White House Property in Delhi which functions as the corporate office of the CD. The appellant argues that this order breaches Section 14 of the Code by neglecting protections against eviction during the CIRP.

5. The Appellant contests this order, claiming it lacks adequate reasoning and asserting that recovery is barred under Section 14(1)(d) of the Code, which prohibits third parties from reclaiming possession while the matter is sub-judice. Furthermore, the AA did not issue formal notices to relevant stakeholders, including the Appellant, regarding the eviction applications.

6. The counsel for the appellant stated that in the impugned order, the AA noted that the RP's counsel had referenced a resolution from the CoC suggesting that the property was unnecessary for the CIRP and should be returned to the applicant. Relying on this, the AA directed the RP to vacate the property within two weeks. The issue of occupational charges was set for a later date, 04.09.2023. However, the appellant claims the AA's decision was based on a false statement by the RP about vacating the property and failed to address the clear restriction on eviction under Section 14(1)(d) of the IBC.

7. He further stated that this Appellate Tribunal had noted that prayers (b) and (c) in the order dated 07.08.2023, related to occupational charges, remain

undecided. These issues will be resolved in further hearings and will depend on the outcome of the appeal. If Respondents No. 2-4 succeed in the appeal, no payments will be made until its resolution. This Appellate Tribunal had also directed that IA No. 1412 of 2023, filed by the Appellant seeking dismissal of the Eviction Applications, be considered by the AA. Additionally, this Appellate Tribunal observed that the AA's impugned order failed to provide reasoning for the direction to vacate the White House Property, despite submissions by the Appellant, and did not address the applicability of Section 14(1)(d) of the Code to the property.

8. The appellant has cited para 19 of the Hon'ble Supreme Court Judgment in ***Raj Kishore Jha vs State of Bihar 2003 (11) SCC 519*** and stated that Hon'ble SC has time and again observed that reason is the heartbeat of every conclusion and without the same, it becomes lifeless. Recording of reasons is a part of fair procedure. Reasons are harbinger between the mind of maker of the decision in the controversy and the decision or conclusion arrived at. They substitute subjectivity with objectivity. Failure to give reasons amounts to denial of justice. The para 19 of the Judgment (supra) is extracted below:

Para 19

“Before we part with the case, we feel it necessary to indicate that non-reasoned conclusions by appellate courts are not appropriate, more so, when views of the lower court are differed from. In case of concurrence, the need to again repeat reasons

may not be there. It is not so in case of reversal. Reason is the heartbeat of every conclusion. Without the same, it becomes lifeless.”

9. The appellant has further cited the Para 9 of Judgment of Hon’ble Supreme Court in ***M/s. Mangalore Ganesh Beedi Works vs The Commissioner of Income Tax, Mysore 2005 (2) SCC 329*** that Failure to assign any reason warrants that the matter be remanded before the lower court, which in this case is the NCLT. This is more so when some of the prayers made in the Eviction Applications continue to be decided by the NCLT. The para 9 of the Judgment (Supra) is extracted below:

Para 9

“Recording of reasons is a part of fair procedure. Reasons are harbinger between the mind of maker of the decision in the controversy and the decision or conclusion arrived at. They Substitute subjectivity with objectivity. As observed in Alexander Machinery (Dudley) Lid. v. Crabtree? failure to give reasons amounts to denial of justice”.

10. The appellant stated that the respondents had filed eviction applications concerning the White House Property before a final decision was made on vacating it. Respondents Nos. 2 to 4 filed replies with the Tribunal, and in the

5th CoC meeting on 17.05.2023, members discussed handing over the Delhi office to its owner due to high maintenance costs, though a final decision was postponed pending approval from higher authorities. The application by respondent claims the handover topic arose in the 3rd CoC meeting and was delayed by objections from the suspended board, while rent dues remain contested with pre-CIRP claims admitted for final resolution. The application seeks a decision from the AA and notes that no vote was held on the vacation resolution in the 5th meeting, with further discussion scheduled for the 6th CoC meeting on 20.06.2023. Respondent No. 5's response indicates no final decision on vacating the property, challenging the AA's order dated 07.08.2023, which the applicants argue should be set aside and reconsidered by the AA. Separately, civil suits regarding possession recovery and lease rent, filed by Respondents Nos. 2 to 4 in Tis Hazari Court, were transferred to the Delhi High Court after jurisdictional issues. Despite the suits pending when insolvency commenced on 20.09.2022, the RP admitted the claims of Respondents Nos. 2 to 4, stating CoC approval, though this is disputed. The appellants argue that the impugned order was premature and that vacating the property without a CoC resolution contravenes the Code and CIRP Regulations, specifically Sections 14 and 74, which outline necessary CoC approval for property possession recovery and set penalties for violations.

11. The appellant has argued that CoC of the CD could not have passed a resolution acting against Section 14 (1) (d) of the Code. It is pertinent to note that Section 14 (1) (d) of the Code is mandatory in nature and not merely a

directory provision. In this regard, the appellant has cited the para 23 of Judgment of Hon'ble Supreme Court in **Rajendra K. Bhutta v. MHADA, (2020)**

13 SCC 208 which is extracted below:

(Para 23)

“The conspectus of the aforesaid judgments would show that the expression "occupied by" would mean or be synonymous with being in actual physical possession of or being actually used by, in contradistinction to the expression "possession", which would connote possession being either constructive or actual and which, in turn, would include legally being in possession, though factually not being in physical possession.”

The counsel stated that therefore, Section 14 (1) (d) of the Code is absolute and covers property which is in possession of the CD or which has been occupied by the CD. This is further evinced from a reading of Regulation 31(b) of the CIRP Regulations, which states that the amounts due to a person whose rights are effected under Section 14(1)(d) shall be treated as CIRP costs, the said provision reads as under: 31. “Insolvency resolution process costs” under Section 5(13)(e) shall mean (b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d).”

12. The counsel stated that the appellant is a former promoter-director of the CD managed the CD until the initiation of CIRP on 20.09.2022. Acting on behalf

of the CD, the Appellant executed agreements concerning the White House Property, where the CD's corporate office is located and statutory documents are stored. As a suspended board member, the Appellant attended CoC meetings, signed the CD's balance sheet for FY ending 31.03.2023, and invested Rs. 65 crores in the CD through personal and affiliated entities - claims which were fully accepted by the RP. The Appellant also showed interest in settling with UCO Bank and documented these discussions. Contending that the Impugned Order lacks adequate reasoning, the Appellant seeks a remand to the NCLT for a reasoned ruling on the Eviction Applications and IA No. 1412 of 2023.

Submission of Respondents:

13. The counsel for Respondent No.1/RP stated that CoC of the Corporate Debtor, with 100% voting rights in their commercial wisdom has decided to handover the Delhi property of the Corporate Debtor. In this regard he cited the decision of first CoC meeting wherein he was asked to visit the property as a huge rental amount of Rs. 12 lakhs per month was payable for the same.

14. The counsel stated that during his inspection the Respondent No.1 found only 8 to 9 people working in such a huge space. He duly informed the same to CoC. Thereafter, in the third CoC meeting the CoC, with 100% voting rights, in its commercial wisdom further discussed and decided that it is apparently not required or feasible to hold this office in such a huge amount of rental expense and directed the Respondent No. 1 to take steps to handover the possession as early as possible.

15. In this regard, the counsel cited that as held by Hon'ble Supreme Court of India in several Judgments, the commercial wisdom of the CoC is paramount and non-justiciable. Further, he cited Hon'ble Supreme Court Judgment in **K.Sashidhar v. Indian Overseas Bank** and **Essar Steel** Judgment.

16. The RP has also raised the issue about the locus of the appellant to challenge the decision of the CoC taken in their commercial wisdom. In this regard he has cited decisions of the CoC in 4th and 5th CoC meetings. The counsel further stated that it is the admitted position that the asset (corporate office in Delhi) does not belong to the CD and the ownership of the asset lies with Respondents No. 2 to 4. As such the appellant has does not have any locus to file this appeal and the appeal is required to be dismissed on this ground alone.

17. The final submission of counsel for Respondent No. 1 is that the decision of the CoC to hand over Delhi office is not required to be approved by the CoC by way of any resolution of the CoC as the same is not contemplated under Section 28 (1) of IBC, 2016.

18. The Counsel for Respondent No. 2 to 4 stated that appeal challenges the NCLT order dated 07.08.2023, which directed the RP to return the property at 1/18-20 M.M. Road, New Delhi, used as the CD corporate office, to Respondents 2-4. This property was licensed to the CD by Respondents 2-4 for a license fee of Rs. 6 lakhs for each portion, but due to non-payment, the license was terminated on 08.05.2020. Despite termination, the CD continued occupying the property, even after the insolvency process began, and the unpaid license fees were accounted as part of the CIRP costs. As of 31.08.2023, the license fees owed

to each respondent stood at Rs. 73,51,300, with an additional Rs. 1,63,72,900 accruing until August 2024, totalling Rs. 3,27,45,800 excluding GST. Due to high maintenance costs and the CD's reduced need for the office space, the CoC unanimously resolved to return the property to Respondents 2-4 to maximize asset value. This decision was upheld by the NCLT, based on the CoC's commercial judgment. Additionally, on 13.02.2019, the CD had executed Memoranda of Understanding (MoUs) with Respondents 2-4 for financial assistance secured by mortgages. When the CD defaulted, conveyance deeds were executed on 27.02.2020, transferring the property to Respondents 2-4, who then licensed it back to the CD. Persistent non-payment led to eviction suits in September 2020, while subsequent appeals and criminal complaints by the CD were dismissed, with the CD acknowledging the conveyance deeds. Ultimately, the CoC re-evaluated and re-ratified the property handover in meetings, resulting in the NCLT order on 07.08.2023, which was implemented on 09.08.2023.

19. The counsel further stated that Respondent No. 2 and Respondent No. 3-4 are the registered owners of the Corporate Office of CD, as evidenced by separate Deeds of Conveyance dated 27.02.2020. A registered document is presumed valid, and the burden of proof lies with those challenging it to provide substantial evidence rather than just arguments, as established in **Ratan Singh & Ors. v. Nirmal Gill & Ors. (2021) 15 SCC 300**. The CD has not initiated any civil proceedings or filed a counterclaim against the conveyance deeds in the eviction suit filed by Respondent No. 2-4. Additionally, the CD's balance sheet for the year ending March 31, 2020, does not list the front and rear properties

as assets of the CD, and this balance sheet was signed by the Appellant. According to Explanation (a) to Section 18(1), assets owned by a third party but in the CD's possession do not qualify as assets of the CD.

Section 14(1) generally prohibits the recovery of possession of premises by an owner or lessor, when the CD is occupying the premises during the moratorium period. However, Section 14(1)(d) allows the CoC to use its discretion to hand over possession of the property if it is in the best interest of the CD. This principle was demonstrated in the case of ***Sangita Fiscal Services Pvt. Ltd. v. Duncan Industries Company Appeal (AT)(Ins.) No. 1522 of 2022***, where the Tribunal permitted the CoC/Resolution Professional (RP) to hand over possession as the office space was not required by the CD.

20. The corporate office license for the CD was terminated on 08.05.2020 due to pre-insolvency non-payment, although the CD continued occupying the office. After insolvency commenced, the license fee for this period was recognized as CIRP costs, acknowledged by the Appellant. The outstanding license fees from the insolvency start date to 31.08.2023 amount to Rs. 73,51,300, payable to Respondents No. 2-4, with additional fees up to August 2024 totalling Rs. 3,27,45,800 (excluding GST). Given the high fees and the CD's lack of need for the office, the Committee of Creditors (CoC) unanimously decided to return the office to Respondents No. 2-4. Despite the Appellant's objections, the CoC's decision was consistently supported in CoC minutes, and through NCLT and NCLAT proceedings. As a suspended board member with no property ownership,

the Appellant lacks legal standing and appears to be obstructing the CIRP process. Thus, dismissal of the appeal with exemplary costs is recommended.

21. The counsel for Respondent No. 5/CoC stated that the appeal challenges an NCLT order dated August 7, 2023, directing the RP to hand over possession of certain property to Respondents No. 2-4 within two weeks. Respondents No. 2-4 own different portions of the ground floor of the "White House" building, leased to the CD for a monthly fee of 6 lakhs per portion. Although the lease was terminated on May 8, 2020, the CD continued to occupy the space. The CoC with 100% voting approval, resolved to return the properties, concluding they were not CD assets and the high fees were an unnecessary CIRP cost, especially given that only limited accounting work was being conducted on the premises by a small staff. The properties had been conveyed to Respondents No. 2-4 in February 2020 by registered deeds, and they filed eviction suits later that year. While the Tis Hazari Court initially ordered CD to pay monthly occupation charges, this order was stayed by the High Court but later reinstated due to CD's non-compliance. Despite the Appellant's objections, the CoC reaffirmed its decision across multiple meetings, supporting the return of the properties to reduce costs. Ultimately, the NCLT upheld this view and ordered the RP to comply with its decision.

22. He further stated that the Corporate Office is not an asset of the CD and cannot be included in its asset pool. Respondent No.2 owns the front property, and Respondents No.3-4 own the rear property, both via registered Deeds of Conveyance dated 27.02.2020. The term 'assets' does not include third-party

assets in possession of the CD, as per Section 18(1), and the Supreme Court ruling in ***Embassy Property Developments Pvt. Ltd. v. State of Karnataka, 2019***. Respondent No.5, the sole CoC member with 100% voting rights, decided to hand over possession of the Corporate Office. The Leave and License agreements for the front and rear properties were terminated on 08.05.2020 due to non-payment of license fees of Rs. 6 lakhs each, as detailed in the agreements and supported by the Tis Hazari Court's order of 09.12.2021. The appellant admitted that the license fee during the CIRP period constitutes CIRP costs, per Regulation 31(b) of IBBI regulations. In the first CoC meeting, the CoC directed the RP to evaluate the necessity of retaining the Corporate Office due to high rental costs. The RP visited the property on 21.03.2023 and found minimal operations, just accounting by 8-9 employees. Subsequently, in the 3rd and 5th CoC meetings, the CoC decided there was no need to retain the office and instructed the RP to hand it over. Despite objections from the suspended board of directors, the CoC reaffirmed its decision to vacate the office to maximize the CD's asset value. The CoC's final decision was recorded in its reply, with a majority vote supporting the handover, though delays were caused by repetitive objections.

23. The counsel argued that the property in question is not an asset of the CD and is unnecessary for its operations, as only 8-9 employees used it for accounting tasks that could be performed at the CD's registered address. The high license fee for the property is unsustainable, as the CD does not generate sufficient income to cover it, and incurring such costs during CIRP would only

increase expenses and hinder the resolution efforts. Although Section 14(1) of the Code prohibits recovery of possession during the moratorium, it does not prevent the CoC or RP from voluntarily relinquishing possession of non-asset properties, as established in ***Sangita Fiscal Services Pvt. Ltd. v. Duncan Industries***. The CoC's decision to hand over the property was made after evaluating the CD's financial situation and is protected from judicial review, according to ***K. Sasidhar v. Indian Overseas Bank***. Additionally, the appellant, a suspended director, lacks standing to appeal since the property was conveyed before the insolvency commencement and the leave and license had already been terminated. Thus, the appellant has no grounds to challenge the CoC's decision regarding the property.

Analysis and Findings:

24. We have heard the Learned counsels of all the parties in detail and gone through the records of the case including the written submissions made by the parties.

25. The main contention of the appellant is that impugned order is completely unreasoned and non-speaking in nature and only a part of the application has been decided. The appellant's case is that under Section 14 (1) (d) of the code. There is an absolute bar on recovery of any property by an owner or lessor where such property is occupied by or in the possession of the Corporate Debtor.

26. The Respondents on the other hand have contended that the impugned order has been passed based on the decision of CoC to let go of the said property

due to high cost of rental. Their contention is that the commercial wisdom of the CoC is supreme and that the CoC has taken the decision with 100% voting rights. The Respondents have also referred to various decisions of Hon'ble Supreme Court in **particular K. Sasidhar V. Indian Overseas Bank [(2019) 12 SCC 150]** and Essar Steel Judgment to highlight the supremacy of CoC's wisdom.

27. Respondents have also argued that the corporate office is not an asset of the CD and cannot formed part of the pool of assets of the CD. Regarding embargo under Section 14 1 (d) of the code for handing over the property, they have submitted that the said Section does not prohibit the RP or the CoC in its commercial wisdom to handover possession of a property with the CD to keep the CD as a going concern. In this regard, they have cited the Judgment of this Tribunal in **Sangita Fiscal Services Pvt. Ltd. v. Duncan Industries, Company Appeal (AT) (Ins.) No. 1522 of 2022**. Respondents have also question locus of the appellant in the present appeal.

28. They have also argued that the appellant has no locus in the case as the matter is between CD and third parties.

29. There are two issues which need to be decided in this appeal:

- (i) Whether the application of the appellant is maintainable;
- (ii) Keeping in mind the provisions of Section 14 (1) (d) of the code, whether CoC can take a decision to hand over the property in possession of CD to third parties and whether AA has powers to allow such advice of CoC?

30. We first examine the locus of the appellant in the instant matter. The appellant is former Promoter Director of the CD and he also has filed a claim

with RP as a Creditor which has been accepted by the RP. Hon'ble Supreme Court has held in **GLAS Trust Company LLC v. BY JU Raveendran & Ors. (Civil Appeal No. 9986 of 2024)** that insolvency proceedings under the Code become proceedings in-rem from the date of admission by the Adjudicating Authority. This *inter alia* means that the claims/applications of all the affected parties have to be adjudicated by the AA. In this case, the appellant is an affected party as erstwhile promoter Director of CD and a Creditor of CD, so his application is very much maintainable and is covered by the Judgment of Hon'ble SC in GLAS Trust supra. Therefore, we answer this question in affirmative.

31. The second issue relates to resolution of the CoC to handover the property White House, which is the corporate headquarter of the CD to respondent 2,3 & 4. It is the submission of the appellant that there was no clear decision of the CoC in this regard as the matter was left undecided as seen from the relevant extracts of minutes of the 3rd 5th & 6th CoC meetings. The relevant extract of 3rd meeting of CoC is extracted below:

"Agenda 5 (iv)

The undersigned also informed that he visited the corporate office of Corporate Debtors Delhi office at Front Portion and Rear Portion at Ground Floor of premises No. -1/18-20, Rani Jhansi Road, White House, New Delhi-110055 as on 21st March, 2023, as this office is under leave and license agreement and lease rental of around 12.00 Lacs. After assessing the need it is informed that it is not feasible to kept the office as only 8 to 9 staffs are there and the revenue which is generating not capable of pay off the same. The CoC discussed

the matter and Intimate RP to hand-over the possession as early as possible and decided that there is no requirement apparently to hold the office spending such huge amount of lease rental.”

32. The CoC in this meeting decided to handover possession of the registered office in Delhi as early as possible, but there was no voting on this agenda.

33. The matter regarding the vacation of Registered office of the CD was further discussed in the 5th meeting of CoC. The relevant extracts of the meeting are extracted below:

(Agenda-5)

To discuss the steps taken by the Resolution Professional as a part of the corporate insolvency resolution process and report/status thereto:-

The undersigned began the discussion regarding the main agenda of meeting i.e., issue relating to the handover of the Delhi office of Corporate Debtors located at Front Portion and rear Portion at Ground Floor of premises No. -1/18-20, Rani Jhansi Road, White House, New Delhi - 110055. In the 3rd COC meeting on 6th April, 2023 & 4th COC meeting which was held on 11th may, 2023 it was decided by COC to vacate the possession of Delhi office as early as possible but after discussing with Mr. Chandra Kant Khemka, suspended director in the last meeting submitted the legal opinion of advocate Mr. Tamoghna Saha and also he requested for 2 to 3 days of time for submitting another legal opinion from M/s KHAITAN & Co. and he submitted the legal opinion of Mr. Aman Gupta few

hours before this CoC meetings and in the 5th COC meeting undersigned shared the legal opinion of Advocate Aman Gupta with the COC member.

After that RP asked the representative of Corporate Debtor i.e., Mr. S. Mitra, Advocate to express his opinion regarding the handover of the Delhi office matter and he started with that the CIRP is about to end in 3 to 4 months of time and questioning the decision to divest the Corporate Debtor principal's office at this juncture as all the corporate operations are carried out from there only. He also stated that the change at this stage will affect the going concern and smooth operation of the business. At this juncture Form-G has been Published and RFRP has been issued to PRA'S. As this matter concerned with pre CIRP and claim has been lodged and also there was a direction from Tis Hazari Court which was modified by Honorable High Court and High Court order will be revised, so whether this Cost of shifting or acquiring a new office or due diligence done for this will affect the whole purpose of the resolution that CD gets back to his position. At this Stage having such a big office and suddenly moving to a small office with very few staffs would not promote the going concern and business operations rather affecting the moral of employees but may also create panic among them. Until the RP finds anything which concrete evidence for vacate the Delhi Office. The main point ask by RP that rent is to be paid or not to the concern person. the advocate represented by suspended director's clear answer was that if it is treated as part of CIRP Cost

and it will be paid from present funds or after resolution plan or liquidation stage so for that Company should operate as a going concern, but again asked by RP whether the rent is to paid or not, he said that it was the decision of RP himself. As per section 5(13) if it is the RP Contention that rent was CIRP Cost and important for going Concern status then it may have to be paid but after giving the office would also harm the going concern status as it is RP's foremost duty to run the office not to close down. As Law inherits the third party for recovering and as this is the property of CD and It should be there with the CD only. Keeping in mind the stage of CIRP will end in 3 to 4 months why take away such a valuable property which was in prime locality which will detract company from going concern status. As per section 14 (1) the whole object is to keep the property is in place. As if prime properties was vacate it will affect the investors and companies financial position. He also said it was a matter of Pre CIRP and fraud case has been filed against landlord so it was not a matter to discussed now. After that Mr. S. Mitra has ended his speech.

The undersigned asked to Mr. Chandrakant Khemka, the suspended Director to share his view and he replied that the matter is sub-judice. The Court order is very Specific as per Tis Hazari court no possession should be given, so if you are relying on one document so in finality Tis Hazari court has told that they have no jurisdiction the matter should be referred to the high court. As they have not paid any stamp duty or past or future money 5) payable and they are

under criminal investigation of police. As there is only 3 to 4 months left for the entire process (CIRP) and can closed the main office, as our Plant & Machinery spread all over India in various states & In various sites as you are telling to vacate the office in 2 to 3 days and it became very difficult to control and manage. Another unwanted situation may arise with various contracts made by the company with various parties for the business operations and a panic situation may arise whether their contracts will continue or not.

The undersigned asks Mr. Manoj Kumar Singhee, Director of Nobel Dealcom Private Limited and Mr. Bhagwandas Agarwal, Director of Sincere Securities Private Limited [Operational Creditor] to expresses his views and he referred the order of the court CS (COMM) No 1291/20 dated 01.10.2022 and as on 01.11.2022. He briefs the facts of the case before COC members. The another operational creditors representing B.D. Agarwal representing Sincere Securities Private Limited who is one of the owner of the Delhi office repeatedly questioning "how can one hold office without payment of occupational charges" and expresses his opinion similar to other operational creditor i.e., Mr. Manoj Kumar Singhee and after that COC member takes the note of it.

After that COC members express their opinion that there is Specific rules and regulation that has to be followed by each and every one. Every decision of the COC is being taken after the recommendation of the COC and by the RP, so COC members with 100% voting shares have taken the decision that Delhi office should be vacated in the

last meeting/and they may take various legal opinions at various sources but the legal opinion presented by M/s. Nandini Impex Private Limited can force COC members to take the decision or impose on Us. As this is not a court proceeding it is only a COC meeting where decision will be taken by RP on the recommendation of COC and COC has given consent for, vacation of the premises instead of spending so much in lease rent in order to maximize the value of the assets of the Corporate Debtor/if any party is having any grievances relating to the decision they can approach to the appropriate authority and/or forum as they think fit. After that undersigned take a note of it and placed the following resolution for voting :-

"RESOLVED THAT handover of the Delhi office i., Front Portion and rear Portion at Ground Floor of premises No. -1/ 18-20, Rani Jhansi Road, White House, New Delhi - 110055 to the owner of the premises as there is no requirement to hold the office premises spending huge amount of lease rental."

(Agenda-8)

To ratify and approve other expenses for the period from 11.05.2023 to till date incurred/to be incurred as insolvency resolution process costs:

Since the next COC meeting will be held in the next week the ratification of other expenses will be done in the next meeting and/or later on as per the decision of the COC."

(emphasis supplied)

34. We can see from the minutes of the 5th CoC meeting that there is a resolution for handover of Delhi office which was supposed to be voted upon but the same has not been voted upon in the 5th CoC meeting. Voting only related to CIRP expenses in this meeting.

35. In the 6th CoC meeting the matter relating to vacation of the building was discussed under the agenda item “Any other matter with the permission of the chair”- Agenda 10.

(Agenda-10)

To discuss such other matters with the permission of majority of Members of the Committee of Creditors as may be deemed necessary for the smooth functioning of the corporate insolvency resolution process:

Since all the discussions had been made as per the items mentioned in the agenda. Hence there was no requirement to take up any other agenda.

During the meeting the issue with respect to the vacation of registered office was pointed out by the COC. Since the agenda was not in the list, the undersigned with the permission of the COC, put the agenda in any other matter. The COC has informed that they are in a process of seeking legal opinion from the advocate till then the voting with respect to the same could not be done. It was further discussed that Nobel Dealcom and Sincere securities has also moved an application before the Hon 'ble NCLT. The undersigned was requested to appear and take necessary steps.”

(Emphasis supplied)

36. It is seen from the extract of minutes of the 6th CoC that the CoC was seeking legal opinion from the advocate regarding vacation of the registered office, and till then the voting with respect to the same could not be done. It was further discussed that in view of applications filed by Nobel Dealcom and Sincere Securities before the AA, the RP should appear and take necessary steps. It is clear from the above, that there was no final decision of the CoC with proper voting, with regard to vacation of the registered office of the CD.

37. In our view the CoC does not appear to have taken a decision about vacation of registered office even in the 6th CoC meeting after which RP gave a statement in Court that the property is not required to be held based on which AA passed the impugned order. CoC at this stage also stated that they are in process of seeking legal opinion and till such time voting on the agenda could not be done. It is clear from the above that the decision to release the property by the RP was his own decision, which was not confirmed by CoC. The submission of CoC at this stage, that such decision was taken with 100% voting right does not seem to be based on records.

38. We finally consider the most critical issue in this matter relating to application of Section 14 (1) (d) of the code. The submission of the appellant is that there is absolute bar on handing over possession of such property and CoC/ RP were not competent to take a decision in this regard.

Section 14 (1) (d) of the code reads as follows:

“14 Moratorium :— Subject to provisions of sub -section (2) and (3) on the insolvency commencement date the adjudicating authority shall by order declare moratorium for prohibiting all of the following namely:—

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

39. The Moratorium under Section 14 is probably the most important Section in the code which tries to ensure that during the CIRP process the CD is insulated from any proceedings claims etc. and at the same time CD can be operated as a going concern. The Section makes it binding upon AA to declare moratorium for prohibiting actions under Clauses (a) to (d) of sub-section 1.

40. The language of Section 14 (1) (d) makes it absolutely clear that no owner or lessor of a property, which is occupied by or is in possession of Corporate Debtor can recover such property from the CD. It is an express provision in the Code and there are no exceptions from the same.

41. In the present case the I.As filed by Respondent No. 2 , 3 & 4 are for recovery of property from the possession of the CD have been allowed by AA on the basis of submissions by RP. It has been stated that the submission of RP was based on the decision of the CoC. We have seen in the paragraphs above that CoC had not taken any decision to release the property before the RP made his submissions before AA allowing release of property by the AA to Respondents No. 2 to 4.

42. It is the submission of respondents that Section 14 (1) (d) does not prohibit the RP or the CoC in its commercial wisdom to handover possession of a property belonging to the 3rd party in possession of CD in the best interest of keeping CD as a going concern. In this regard they have cited the order of this Tribunal in

Sangita Fiscal Services Pvt. Ltd. v. Duncan Industries (supra). The order in the instant case is reproduced below:

“04.01.2023: Heard Learned Counsel for the Appellant.

2. This Appeal has been filed against the Order dated 14th September, 2022 passed by the Adjudicating Authority in I.A. No. 557(KB)2021. The Application was filed by the Lessor seeking the possession of the Flat which was in the possession of the Corporate Debtor and now in the possession of the Resolution Professional. A reply was filed to the said I.A. in which Resolution Professional made a statement in paragraph 9 which has been extracted by the Adjudicating Authority in paragraph 3(b) which is to the following effect:

“b. In para 9 of this Affidavit reads as “It is submitted that the said property has not been included in the pool of assets of the Corporate Debtor by the Resolution Professional. Hence, the Resolution Professional shall not transfer the possession of the property and/or create any third party rights on the said property during the course of the Corporate Insolvency Resolution Process of the Corporate Debtor.”

3. The Adjudicating Authority after noticing the aforesaid statement made, directed the Resolution Professional to hand over the possession of flat within four weeks.

4. Learned Counsel for the Appellant submits that a suit has already been filed for eviction which is pending in City Civil Court.

5. Be that as it may, when the asset does not belong to the Corporate Debtor and as submitted by the Learned Counsel for the Appellant that earlier in the premises, there was office of the Corporate Debtor which is now shifted, we are of the view that the directions passed by the Adjudicating Authority for vacating the premises cannot be faulted. The Resolution Professional can incur liability in the CIRP if there is any requirement. Unnecessary incurring expenses and costs is unnecessary burden which need to be paid as CIRP Cost. Thus, we see no reason to interfere with the Impugned Order, the Appeal is dismissed.”

43. There are two distinguishing features between the present case and Sangita Fiscal supra. Firstly, in the Sangita Fiscal matter there is no pleading relating to application of Section 14 (1) (d) of the Code. And secondly the premises to be handed over was vacant and not being used by the CD.

44. We have also seen the prayer made by Respondent No. 2 in I.A. No. 1083 and Respondent No. 3 & 4 in I.A No. 1081. The main prayer in these applications are identical and are reproduced below:

“I.A. No. 1083

(a) An order be made for delivery of possession of the said premises situated at the Ground Floor (part of front portion) comprising of 2400 sq. ft. of property at 1/18, 1/19 and 1/20, Ward No. XV at M.M. Road (Eastern Rear Portion) bearing municipal no.1/ 18-20, White House, Rani Jhansi Road, New Delhi-110055 by the Respondent No.1 to the applicant forthwith

I.A. No. 1082

(a) An order be made for delivery of possession of the said premises situated at the Ground Floor (part of rear portion) comprising of 2400 sq. ft. of property at 1/18, 1/19 and 1/20, Ward No. XV at M.M. Road (Eastern Rear Portion) bearing municipal no.1/ 18-20, White House, Rani Jhansi Road, New Delhi-110055 by the Respondent No.1 to the applicants forthwith.”

45. The main prayer in the I.A filed by the Respondents relates to recovery of possession. Section 14 (1) (d) of the code specifically prohibits the recovery of any property by the owner of lessor where such property is occupied by or in the possession of the CD. In such a situation, where there is a prohibition on recovery of property, can the owner/lessors even file an application before the AA for recovery of such property? In our view, such application before AA is not maintainable in terms of Section 14 (1) (d).

46. The situation might have been different, if such a prayer was made by the RP with express consent of Committee of Creditors.

47. The respondents have also referred to explanation to Section 18 (1) of the Code to argue that the term ‘assets’ does not include the assets owned by a third party but in possession of the CD. They have argued that the corporate office is not an asset of the CD and cannot form part of the pool of the asset of the CD.

The explanation to Section 18 (a) is extracted below:

“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;”

48. It should be mentioned that this definition of asset is in the context of duties of Interim Resolution Professional under Section 18 and such definition of ‘asset’ is specific to Section 18 only. It is not connected to Section 14 (1) (d) in any manner. It is an admitted fact that the corporate office of the CD is the property of 3rd parties and that’s why it attracts Section 14 (1) (d).

49. We have seen in the above paragraphs that moratorium under Section 14 binds the AA also by the use of the word “shall by order declare moratorium for prohibiting all of the following” inter alia meaning that it is a mandatory action on the part of AA. The AA should have first examined, whether it is possible to allow such applications in view of express provisions in Section 14 (1) (d) even if such applications are supported by CoC. Prima facie the Code does not seem to provide such discretion to AA. In any case AA should have examined the issue in detail with regard to provision of Section 14 (1) (d) before passing a non-speaking order merely on the basis of consent of RP to release of property based on application by owner/lessor.

50. We have also seen that AA has done part adjudication in this matter and It had not adjudicated on the prayer (b) and (c) of the I.As. In this regard we refer to para 9 of the order dated 02.04.2024 passed by this Bench in I.A. No. 305 of 2024 which is extracted below:

“9. We have heard Counsel for the parties and after examining the record are of the considered opinion that prayers (b) and (c) were not

decided by the Tribunal by way of the impugned order dated 07.08.2023 because it has been observed in the said order that “as far as other reliefs in the nature of payment of occupational charges is concerned, post these IAs for hearing on 04.09.2023”. Therefore, the Tribunal shall continue with the decision of the applications regarding prayers (b) and (c) and decide the same but the decision of the applications regarding prayers (b) and (c) shall be subject to the outcome of the present appeal and in case prayers made by the Applicant (Respondent No. 2 -4) is allowed then no payment shall be made to the applicant till the decision of this appeal. It is needless to mention that the Tribunal shall also consider the application i.e I.A. No. 1412 of 2023 filed by the Appellant. The application is disposed of accordingly.”

51. The following emerges from the discussion above:
- i. the appellant has locus to file this appeal
 - ii. The order of AA in the I.A No. 1083 filed by Respondent No.2 and I.A. No. 1082 filed by Respondent No. 3 to 4 has been passed on the prayer of owner/lessor. The RP has only supported the contention of Respondents No. 2 to 4. The AA has not examined the maintainability of such application by owner/lessor in view of express provision under Section 14 (1) (d) of the Code.
 - iii. The issue of supremacy of commercial wisdom of CoC could not be considered at this stage as the prayer in the I.As was filed by owners/lessors and not by RP/ Respondent No.1 acting with express consent of CoC.

iv. The order of AA does not give detailed reasons for allowing the main prayer in I.As without considering the provisions of Section 14 (1) (d) of the Code.

52. In view of discussion above, the appeal is allowed. We remand the case back to the AA to examine and decide the issues in a comprehensive manner including the application of the appellant in I.A. No. 1412 of 2023 preferably within four weeks. The Adjudicating Authority may decide in accordance with law without being influenced by anything contained herein above. Parties are directed to appear before the Tribunal on 26.11.2024.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

[Mr. Indavar Pandey]
Member (Technical)

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