

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
Company Appeal (AT) (Insolvency) No.81 of 2023
& I.A. No. 335 of 2023**

[Arising out of Order dated 17.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Court-I in IA No.138/KB/2022 in CP (IB) No.1219/KB/2018]

In the matter of:

Kolkata Municipal Corporation

...Appellant

Vs.

Bengal Shelter Housing Development Ltd. & Ors.

...Respondents

For Appellant: Mr. Abhijeet Sinha, Mr. Kunal Chatterji, Ms. Maitrayee Banerjee, Mr. Saikat Sarkar, Mr. Rohit Bansal, Ms. Kshitij Singh, Mr. Soham Sahu, Advocates.

For Respondents: Mr. Praveen Chaturvedi, Ms. Jyoti Chaturvedi, Advocates for R-2.
Mr. Amar Vivek, Ms. Damini Srestha, Advocates for R-4

**J U D G M E N T
(22nd December, 2023)**

Ashok Bhushan, J.

This Appeal has been filed by the Kolkata Municipal Corporation challenging the order dated 17.11.2022 passed by the Adjudicating Authority (National Company Law Tribunal), Kolkata Bench, Court-I in IA No.138/KB/2022 in CP (IB) No.1219/KB/2018. By the order impugned, Adjudicating Authority has set aside order dated 17.01.2022 issued by Kolkata Municipal Corporation terminating the Development Agreement and Supplemental Agreement and Power of Attorney executed between Kolkata

Municipal Corporation and 'Bengal Shelter Housing Development Limited'-
Respondent No.1.

2. Brief facts necessary to be noticed for deciding this Appeal are:

2.1. 'Kolkata Municipal Corporation' is a statutory body governed under Kolkata Municipal Corporation Act, 1981. There were premises known as College Street Market consisting of land about 13 bighas with a two storied brick built building and structures thereon which had municipal market consisting of different shops. Kolkata Municipal Corporation decided to improve the College Street Market premises for which purpose a Development Agreement was executed on 24.02.2006 between the 'Kolkata Municipal Corporation' and 'Bengal Shelter Housing Development Limited'- Respondent No.1 herein. Agreement contains various terms and conditions for carrying out development. A Supplemental Agreement was also executed on 12.06.2006 between the 'Kolkata Municipal Corporation' and 'Bengal Shelter Housing Development Limited' providing for certain Supplemental terms and conditions between the parties. On 01.01.2007, the Scheme of the project was approved by the Kolkata Municipal Corporation, according to which, the project would consist of three blocks i.e. A, B and C, out of which the allocated portion of the Respondent No.1 was 70% and the remaining 30% of the building plan belonged to the Appellant. The Respondent No.1 engaged Respondent No.2- 'Barnaparichay Book Mall Pvt. Ltd.', a wholly owned subsidiary of Respondent No.1 for implementing the said Development Agreement. An Application under Section 7 was filed by 'Asset Reconstruction Company India Ltd.' against Respondent No.2 (herein

after referred to as Corporate Debtor) on which application by an order dated 09.08.2019 CIRP commenced under the order of the Adjudicating Authority.

2.2. In the Corporate Insolvency Resolution Process (CIRP), Respondent No.4 was appointed the Resolution Professional who prepared Information Memorandum. On 10.07.2020, during the CIRP, the Corporate Debtor got itself registered under the MSME Act, 2006. Respondent No.3- 'Ramayana Promoters Pvt. Ltd.', a subsidiary of Corporate Debtor submitted a Resolution Plan in the CIRP of the Corporate Debtor. As per the Development Agreement and Supplemental Agreement, the Respondent No.1 was to complete the project within 54 months. Respondent No.1 failed to complete the project within time. Letter dated 14.07.2020 was sent by the Appellant calling upon the Respondent No.1 to remedy the breach and remove the default failing which the Appellant would be constrained to take steps as may be available under law. Respondent No.1 sent a reply dated 12.08.2020 giving various reasons for delay in execution of the development work. Resolution Plan was submitted by Respondent No.3 (hereinafter referred to as Resolution Applicant) on 14.08.2020 which plan was initially rejected, however, under the order of the Adjudicating Authority revised plan was submitted which was considered and approved by the CoC on 01.09.2021 with 77.33% vote. Despite several reminders when the Respondent No.1 failed to complete the project, a show-cause notice dated 12.11.2021 was issued by the Appellant invoking clause 9(g) of the Development Agreement. In reply to the show-cause notice, Respondent

No.1 vide his letter dated 19.11.2021 listed out reasons for the delay in completion of work. In the said letter, Respondent No.1 for the first time brought to the knowledge of the Appellant that a CIRP is ongoing with respect to the Corporate Debtor in which Resolution Plan has been submitted. By an order dated 17.01.2022, Appellant cancelled the Development Agreement by an order of the same date. Appellant issued notice to the Respondent No.1 to take over the College Street Market Premises in consequence of the Development Agreement being terminated and resumed the property. The Resolution Applicant- Respondent No.3 filed an IA No.138 of 2022 before the Adjudicating Authority in which application Respondent No.3 prayed for following reliefs:-

“a. Declaration that the said two letters bearing Nos. CM (M)/L/057/2021-22 and CM (M)/L/059/2021-22 both dated 17th January 2022 terminating the said Development Agreement and Supplemental Agreement and Power of Attorney and calling upon the Respondent No. 2 to hand over possession of the said property are illegal, null and void;

b. Declaration that the forceful physical possession of the said Property by the Kolkata Municipal Corporation is illegal, null and void:

c. Order quashing and setting aside the said two letters bearing Nos. CM (M)/L/057/2021-22 and CM (M)/L/059/2021-22 both dated 17th January 2022 terminating the said Development Agreement and Supplemental Agreement and Power of Attorney and

calling upon the Respondent No. 2 to hand over possession of the said property:

d. Order directing the Respondent No. 3 to forthwith remove its padlocks and security guards from the said property;

e. Order directing the Respondent No. 3 to hand over possession of the said Property to the Respondent No.1 Resolution Professionals forthwith;

f. Injunction restraining the Respondent No. 3 and/or its men, servants and agents from taking any step or further steps whatsoever with regard to the sale, encumbrance, transfer, development or alienation of the said Property in any manner whatsoever.”

2.3. On 16.02.2022, Adjudicating Authority directed the Appellant to stay its hand with respect to the communications dated 17.01.2022 and not to take any coercive action in the matter. Adjudicating Authority further directed the Appellant to handover the physical possession of the same to the Resolution Professional, in pursuance of which the Resolution Professional took possession of the premises. The Application filed by the Respondent No.3 was resisted by the Appellant. It was submitted that the termination of agreement by order dated 17.01.2022 was issued by Appellant in accordance with the relevant clauses of agreement. It is stated that as per the agreement, Appellant was the owner of the premises and the structures. It was further stated that under clause 13(b) of the Development Agreement, neither party had right to assign or part with any of its rights and obligations under the Agreement to any third party. The Respondent

No.1 had no right to assign the right of the development to the Corporate Debtor. It was prayed by the Appellant that the Company Petition filed by the Corporate Debtor deserves to be dismissed. Adjudicating Authority heard the parties including the Appellant and by impugned order dated 17.11.2022 allowed IA No.138 of 2022 and set aside the order dated 17.01.2022 issued by the Appellant cancelling the Development Agreement entered with Respondent No.1. The order passed by the Adjudicating Authority in paragraph 7.13 is as follows:-

“7.13 In light of the above facts and circumstances, we hereby pass the following orders:

- a. The said two letters bearing Nos. CM (M)/L/057/2021-22 and CM (M)/L/059/2021-22 both dated 17th January 2022, intended to terminate the said Development Agreement and Supplemental Agreement and Power of Attorney and intended to call upon the Respondent No. 2 to hand over possession of the said property, are declared a nullity;*
- b. The possession of the said property shall rest with the RP till the approval/rejection of the Resolution Plan by this Adjudicating Authority;*
- c. Respondent No. 3 is restrained from taking any further coercive action with regard to the sale, encumbrance, transfer, development or alienation of the said Property in any manner whatsoever, till the approval/rejection of the Resolution Plan by this Adjudicating Authority, or without the leave of the Adjudicating Authority.”*

2.4. Aggrieved by the impugned order, this Appeal has been filed by the Kolkata Municipal Corporation.

3. We have heard Learned Counsel for the Appellant, Counsel appearing for Respondent Nos. 1 to 3 and Counsel appearing for Resolution Professional.

4. Learned Counsel for the Appellant challenging the impugned order submits that the Adjudicating Authority erroneously set aside the order dated 17.01.2022 issued by the Appellant cancelling the Development Agreement with Respondent No.1. It is submitted that the termination order dated 17.01.2022 has not been challenged by Respondent No.1 with whom the agreement was entered. Under the agreement, the Respondent No.1 had no right to assign its development rights to any other entity without approval of the Appellant. Alleged assignment in favour of the Respondent No.2 by the Corporate Debtor in the year 2008 is void and without any jurisdiction. It is submitted that the Corporate Debtor cannot claim any right on the basis of an illegal assignment by Respondent No.1 which was done without consent of the Appellant. The Respondent No.2 i.e. Corporate Debtor was incorporated only on 07.05.2007 and by alleged assignment dated 06.03.2008 without any consent and intimation of the Appellant, development rights were transferred to Respondent No.2. Application filed by Respondent No.3 who was a Resolution Applicant and subsidiary of Respondent No.2 was wholly unauthorised. It is submitted that there is no

privity of contract with the Appellant and the Respondent No.3. Application filed by Respondent No.3 is wholly misconceived and deserves to be rejected. The Adjudicating Authority committed error in issuing interim direction to handover the possession to the Resolution Professional. It is the Appellant who is the owner of the premises in question and continues to be the owner of premises in question as per the Development Agreement dated 24.02.2006. The Resolution Professional has no jurisdiction to take over the possession of assets which was owned by the Appellant under Section 18 of the IBC. Neither the Respondent Nos.2 and 3 can claim any right in the premises nor the Adjudicating Authority could have directed to handover possession to the Resolution Professional by the Appellant. The order passed by the Adjudicating Authority setting aside the termination agreement is without jurisdiction and beyond the jurisdiction of the Adjudicating Authority. Order dated 17.01.2022 terminating the Development Agreement does not arise out of insolvency process of the Corporate Debtor and could not be made subject matter of any dispute before the Adjudicating Authority. The order passed by the Adjudicating Authority is wholly without jurisdiction and deserves to be set aside in this Appeal. Development Agreement executed in favour of the Respondent No.1 was terminated lawfully by the Kolkata Municipal Corporation which could not have been interfered with by the Adjudicating Authority. Termination was in accordance with the Development Agreement dated 24.02.2006 and could not have been quashed. Termination was also not affected by Section 14 of the IBC. The Corporate Debtor had no interest in the premises and premises were owned by Appellant. When the premises were owned by the Appellant,

the Moratorium was not applicable. Corporate Debtor entered into unlawful possession of the premises on the basis of illegal and unauthorised assignment by the Respondent No.1 without consent of the Appellant.

5. Learned Counsel appearing for the Respondent Nos.1 to 3 supporting the order impugned submits that under the Development Agreement and Supplemental Agreement, the Respondent No.1 was fully entitled to part with its development rights and assignment in favour by Respondent No.1 was not illegal. Respondent No.2 having assigned the development rights, Respondent No.2 was proceeded to carry out the process. It is submitted that under the Agreement between the Appellant and the Respondent No.1, 70% of the constructed shops were to be allotted to Respondent No.1 and only 30% were to be given to the Appellant. Shops constructed to the extent of 30% has already been allotted to the Appellant. It is submitted that the Corporate Debtor being in possession of the premises, the Appellant even if the owner of the premises could not recover the possession from the Corporate Debtor by virtue of Section 14 of the IBC. It is submitted that the premises were the only assets of the Corporate Debtor which are relevant for the Resolution Plan, hence, Respondent No.3 was entitled to file its application before the Adjudicating Authority to protect its right.

6. Learned Counsel for the Resolution Professional submits that under clause 7(c) of the Development Agreement, Respondent No.1 was entitled to appoint, engage and employ according to law such consultants, marketers, contractors, sub-contractors, engineers, labourers, caretakers etc. Respondent No.1 sub-contracted the Corporate Debtor vide Arrangement

Agreement dated 06.03.2008 for development of the project. On application filed by 'Asset Reconstruction Company', CIRP of the Corporate Debtor commenced on 09.08.2019 and Moratorium was imposed due to which possession of the premises could not have been taken by the Appellant. Corporate Debtor had been in the possession of the said property. Resolution Professional in discharge of its duty has taken steps to protect the premises. Appellant who had opportunity to file a claim with the Resolution Professional has not filed any claim.

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

8. The Development Agreement was entered between the Appellant and the Respondent No.1 on 24.02.2006 which was basic document for Respondent No.1 to develop the College Street Market premises. Agreement also confers certain rights to Respondent No.1 contained under the heading 'Bengal Shelter's Rights' under which the Bengal Shelter shall hold the possession of College Street Market Premises. Clauses (a) and (d) of 'Bengal Shelter's Rights' are as follows: -

"7. BENGAL SEHLTER'S RIGHTS:

(a) Bengal shelter shall hold the possession of College Street Market Premises, as the Developer having the right under this Agreement to construct Comprehensive Market Complex by construction of buildings in accordance with the Scheme and plan approved by KMC.

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(d) Bengal Shelter shall be entitled to do all lawful works required for implementation of Comprehensive Market Complex either by itself and/or by other contractors appointed by it and/or in any other manner it considered fit and proper. None of the Contractors and/or the persons engaged in connection therewith shall have any claim of any nature whatsoever against KMC and Bengal Shelter shall be solely responsible for payment of all amounts, including compensation for injuries to such workman and/or other persons engaged by them and/or due for anything done by Bengal Shelter in pursuance hereof."

9. Agreement in clause 9 (c) of the Development Agreement further provides that on completion of the project, it is KMC who shall execute lease deed(s). Clause 9(c) is as follows: -

"9. BENGAL SHELTER AND KMC BOTH HEREBY AGREE UNDERTAKE AND DECLARE AS FOLLOWS:-

c) On completion of the Project and at the request of Bengal Shelter KMC shall execute lease Deed(s) in favour of the end-users of stalls, spaces and/or units to be allotted-retained, as the case may be, out of the Bengal Shelter's Allocation and such Leases shall be for a period of 30 years with an option for period or periods, as any by agreed between KMC and Bengal Shelter provided however the and were will be the Lessee under KMC and shall be liable to pay lease rent and maintenance charges to KMC provided further however Bengal Shelter shall be entitled to receive from the end-users such amount or amount as and by way of premises/cost/price as it may determine and KMC shall not have any right and/or claim whatsoever in respect of the same."

10. Clause 9(g) of the Development Agreement which has been relied by the Appellant for issuing show-cause notice to the Respondent No.1 is as follows: -

"9. BENGAL SHELTER AND KMC BOTH HEREBY AGREE UNDERTAKE AND DECLARE AS FOLLOWS:-

(g) In the event of there being any breach on the part of any of the parties hereto to perform and observe its obligations and/or duties, as contained in this agreement, including payment of any amount or amounts on due date(s) by Bengal Shelter to KMC, as stated above, the aggrieved party will give to the other party a notice in writing calling upon the other party to remedy such breaches and remove default within a period of one month or so, from the date of service of such notice, on the other party and in the event of the other party failing to remedy the breaches or remove the defaults the other party shall be entitled to take such steps, as may be available to it under the law for the time being in force."

11. It is further relevant to notice clause (h) of the Development Agreement which provides that KMC shall always remain the owner of the premises and the structure after its completion by Bengal Shelter. Clause 9 (h) is as follows:-

"9. BENGAL SHELTER AND KMC BOTH HEREBY AGREE UNDERTAKE AND DECLARE AS FOLLOWS:-

(h) It is specially agreed by and between the parties hereto that save and except the rights conferred on Bengal Shelter, under these presents, KMC shall always remain the owner of the premises and the structure after its completion by Bengal Shelter at its cost and the new structures created -- also automatically vest in KMC absolutely without any claim, charge or lien by any parties.”

12. Under Clause 13, there was prohibition against both the parties that none of the parties shall seeing or part with any of its rights and obligations under the agreement to any third party without the prior approval in writing of the other party. Clause 13(b) is as follows:-

“13. MISCELLANEOUS:-

(b) Neither party shall seeing or part with any of its rights and obligations under this agreement to any third party without the prior approval in writing of the other party.”

13. Supplemental Agreement contains certain modifications of the Development Agreement. Clause 3(ii) of the Supplemental Agreement is as follows:-

“3. In further modification of Bengal Shelter's Rights under the Principal Development Agreement:-

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(ii) Bengal Shelter shall be entitled to Aise necessary finance for construction of Comprehensive Market Complex including finance from the authorised financial institu- tions, Banke, Corporate houses or

such other bodies for development of the land by construction of the Comprehensive Market Complex as per the terms of the Development Agreement and for that purpose, to create mortgage or any other lien over College Street Market Complex or any part thereof, gave and except the area to be allotted to KMC or its nominee or nominees, in favour of the Banks, financial institutions or other bodies without however creating any financial liability for the KMC or affecting its right, title, interest in the said College Street Market Premises and for that purpose Bengal Shelter shall at all times keep the KMC indemnified and harmless against all actions, claims, suits, proceedings, losses, damages and/or costs, charges, and expenses that the MKC may have to face in relation to or arising of such mortgage.”

14. The Application which was filed by the Respondent No.3 before the Adjudicating Authority being IA No.138 of 2022 was for setting aside the order dated 17.01.2022. The Kolkata Municipality Corporation, owner of the premises, having by agreement dated 24.02.2006 appointed Respondent No.1 as developer to develop the College Street Market premises and it issues notice to the Respondent No.1 on 14.07.2020. Clause 9(g) of the Development Agreement intimating that the developer had committed breach and even after more than 13 years the project is not complete. In reply to the notice (notice is at Page No.251 of the Appeal) was given on 12.08.2020 by Respondent No.1 where several causes was sought to be explained for not able to complete the project. On 12.11.2021, another notice was given by the Appellant to the Kolkata Municipal Corporation. The

notice requires the Appellant to show cause. Last portion of the notice is as follows:-

“NOW, THEREFORE, you are called upon hereby to show cause as to why, in view of the breach on your part to perform and discharge your obligations and/or duties as contained in the said agreement(s), the contract between KMC and Bengal Shelter Housing Development Limited in respect of development of the College Street Market by dint of the aforesaid Development and Supplemental Agreements will not be terminated and the Project premises / site along with all buildings / structures/fixtures / appurtenances, etc. attached to Project Premises will be taken over by the Kolkata Municipal Corporation forthwith.

Your reply must reach the undersigned within 7 (seven) days, failing which the KMC will take necessary steps and proceed in this regard as per Law without any further notice.”

15. After issuance of show-cause notice dated 12.11.2021, it was replied by Respondent No.1 vide his letter dated 19.11.2021. After considering the reply, the Development Agreement was cancelled. From paragraph 2 to the end of the notice is as follows:-

“2. That the delay in completion of the Project is injurious to your interest only since the allocation of KMC has been completed.

- *As has already been elaborated above, the allocation of KMC is yet to be completed.*
- *Moreover, owner of the space under your allocation i.e. 70% of the built up space is also KMC. In fact, KMC is supposed to lease out the said space and to receive lease rent against the same. Delay in completion of the Project has meant that KMC is losing out on revenue from such lease rent.*

3. That the KMC has accepted the enormity of delays in pertinent issues on its part.

- *However, the KMC has only stated that even if certain delays are taken to be reasonable, these could have caused a delay of around three years or so and cannot in any way explain the tremendous delay of eleven years.*

4. That several issues were notified to the KMC through numerous letters but the KMC either miserably failed or preferred to be deaf and blind even against encroachment of principal pathways etc.

- *However, such claims made by you are vague and trivial. Encroachment of passages is not in any way linked to the delay in construction of the Project.*

5. That reluctance of KMC to perform its part of the Agreement led to the delay and such delay beyond your control caused stress with bankers, financiers, suppliers and investors. Some of sub-contractors, your financiers and creditors moved to the jurisprudence

including NCLT. One RP was appointed under whom your allocation is now governed and monitored by order of the said NCLT Court. A resolution plan has been submitted being duly accepted by majority of the members of the Committee of Creditors before the Hon'ble Judge of NCLT Court which is pending for final order.

- *It is denied that the reluctance of KMC to perform its part of the Agreement led to the delay and that such delay was beyond your control.*
- *The act on your part to procure loan from financial institutions and on the part of the financial institutions to grant such loan by creating mortgage or lien on any part of the College Street Market without seeking express permission or consent from the owner viz. KMC but simply on the basis of the Agreement were absolutely illegal, contrary to and inconsistent with the provisions of the Agreement and also against the law of the land.*
- *You also kept the KMC totally in the dark about the proceedings before the NCLT, appointment of RP and submission of so-called resolution plan even though KMC is the owner of the entire building and Project. Your such act is detrimental to the rights of the KMC in the Project.*

Therefore, in view of the default and violation on your part of the terms of the agreements and unsatisfactory reply to the Show Cause Notice, the Kolkata Municipal

Corporation hereby cancels and terminates the Development Agreement entered with you on 24th February 2006 and Supplemental Agreement dated 12th June 2006 and also revokes and cancels the power given by the KMC by dint of the Power of Attorney vide Annexure-A of the Supplemental Agreement. You are hereby asked not to act any further on the basis of the said Power of Attorney.”

16. It was the termination order dated 17.01.2022 which was challenged in IA No. 138 by the Respondent No.3. It is relevant to note that the termination of Development Agreement issued by the Appellant terminating the agreement of Respondent No.1 was not challenged by the Respondent No.1 who was to develop the project. Termination was directed after issuance of show-cause notice in accordance with the relevant clauses of Development Agreement. The Development Agreement executed by the Appellant in favour of the Respondent No.1 also contained a provision as noticed above that no party shall assign any of its rights or obligations to the third party without obtaining prior consent of other party. Here the case of the Respondent No.2 is that the Respondent No.2 has received an assignment from the Respondent No.1 dated 06.03.2008 and it was the Corporate Debtor came into possession of the premises by virtue of assignment dated 06.03.2008. Assignment in favour of Respondent No.2 i.e. Corporate Debtor by the Appellant was clearly contrary to the Development Agreement where there was clear prohibition without approval of the other party. No consent or permission was obtained from Kolkata Municipal Corporation by Respondent No.1 for assignment the development right in

favour of the Respondent No.2. We are of the view that on the basis of assignment dated 06.03.2008 as claimed by Respondent No.3, no right could flow in the Respondent No.2 regarding the premises neither any developmental rights nor any ownership rights. It was Respondent No.1 who has unlawfully gave the possession of the premises to Respondent No.2 and Respondent No.2 was clearly in unlawful possession of the premises.

17. From the materials on record, it is clear that the Appellant who was owner of the premises and only right for development of the premises was given to Respondent No.1. Respondent No.1 having failed to carry out the development as per the terms and conditions, Kolkata Municipal Corporation has every jurisdiction to cancel the agreement. The cancellation of the agreement being outside the insolvency process, Respondent No.3 could not have brought issue of cancellation of the agreement before the Adjudicating Authority by filing the application IA No.138 of 2022. Respondent No.1 whose Development Agreement was cancelled was free to take such legal proceeding against the Appellant as may be permissible. It is relevant to notice that no proceedings were initiated by Respondent No.1 questioning the termination of agreement dated 17.01.2022. When the Respondent No.1 having not questioned the termination of agreement before any Competent Authority or Court, it is not for the Adjudicating Authority to adjudicate the issue of validity of termination order dated 17.01.2022. The submission which is pressed by Learned Counsel for the Respondent is that since Moratorium was issued after admission of the CIRP, Section 7 proceedings against the Corporate Debtor Appellant could not have recover

the possession from the Corporate Debtor. Section 14(1) on which reliance is placed is as follows:-

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

- (a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or

any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]”

18. From the facts as noticed above, it is clear that the Kolkata Municipal Corporation who is owner of the premises by Development Agreement gave right of development of the premises to the Respondent No.1 and Respondent No.1 has unauthorisedly without prior approval of the Appellant as alleged Assignment Agreement dated 06.03.2008 has given to the Corporate Debtor. The possession of the premises has to be of Respondent No.1 who was given possession by the Appellant. In event, the Respondent No.1 illegally transferred the possession to Respondent No.2 contrary to the Development Agreement for protection of such possession, Section 14(1)(d) cannot be relied on.

19. Learned Counsel for the Respondent has also relied a judgment of the Hon’ble Supreme Court in support of their submissions- **“Rajendra K. Bhutta vs. Maharashtra Housing and Area Development Authority and Anr.- (2020) 13 SCC 208”**. In the above case, the Hon’ble Supreme Court had occasion to consider the provisions of Section 14 of the IBC. The judgment of the Hon’ble Supreme Court in ‘Rajendra K. Bhutta’ may not render any assistance to the Respondent since in the said case Corporate Debtor was in lawful physical possession of property whereas in the present

case, the possession has to be deemed to be of Respondent No.1 who was given development rights. There was no privity of contract between the Appellant and the Corporate Debtor nor Section 14(1)(d) can be relied by the Corporate Debtor for protecting his possession. Another judgment which has been relied by the Counsel for the Respondent is **“Victory Iron Works Ltd. VS. Jitendra Lohia and Anr- (2023) SCC OnLine SC 260”**. In ‘Victory Iron Works Ltd.’, developmental rights belong to the Corporate Debtor whereas in the present case, developmental rights belong to Respondent No.1 not to the Corporate Debtor. Thus, the judgment relied by the Counsel for the Respondent in ‘Victory Iron Works Ltd.’ also does not render any assistance to the Corporate Debtor. Section 18 of the IBC provides, that while enumerating duties of the IRP, the IRP shall 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. Section 18(1)(f) is as follows:-

“18. Duties of interim resolution professional. -

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

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(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;"*

20. In the present case, assets i.e. premises are owned by the Appellant and there was no contractual arrangement between the Appellant and the Corporate Debtor with regard to premises in question. The assets clearly were not the assets of the Corporate Debtor on which IRP can take possession. It is only the assets on which IRP can take possession on which the Moratorium under Section 14(1)(d) shall be applicable. Moratorium cannot be applicable with regard to assets which are not the assets of the Corporate Debtor.

21. The Adjudicating Authority in its impugned order had held the assignment agreement dated 06.03.2008 as lawful and valid. The Assignment Agreement dated 06.03.2008 is on the record which assignment was not made by the Respondent No.1 after obtaining consent of the Appellant and it was clearly in breach of clause 13(b) of the Development Agreement which prohibits both the parties from parting with any of its rights and obligations under the agreement to any third party without the prior approval in writing of the other party.

22. We are of the view that the Adjudicating Authority has come to a wrong conclusion that the Assignment Agreement dated 06.03.2008 is lawful and valid without looking to the terms and conditions of the Development Agreement which was made by the Kolkata Municipal Corporation in favour of the Respondent No.1 dated 24.02.2006. No valid right could flow to Respondent No.2 in pursuance of the Arrangement Agreement dated 06.03.2008, hence, no right or interest created by Corporate Debtor by virtue of Arrangement Agreement dated 06.03.2008 which was neither obtained with the consent of the Appellant nor the said Arrangement Agreement even communicated to the Appellant by Respondent No.1. The Corporate Debtor had no right to be in possession of the premises nor its possession was lawful.

23. In view of the foregoing discussions, we are of the view that the Adjudicating Authority committed error in setting aside the termination order dated 17.01.2022 passed by the Appellant terminating the Development Agreement executed in favour of the Respondent No.1, as observed above. The Respondent No.1 whose Development Agreement was challenged had not taken any proceeding before any Competent Authority or Court questioning the termination of the Development Agreement. Development Agreement having been terminated, no better or further right can be claimed by Respondent No.2 whose alleged Arrangement Agreement dated 06.03.2008 on the basis of Development Agreement which was given by the Appellant in favour of the Respondent No.1. Adjudicating Authority ought to have desisted from entering into the validity of termination order

dated 17.01.2022 issued by the Kolkata Municipal Corporation terminating the agreement.

24. We have already noticed the show-cause notice dated 12.11.2021 issued by the Appellant to the Respondent No.1 and on finding that there is breach committed by the Respondent No.1 to the terms and conditions of the Development Agreement dated 24.02.2006. Agreement was terminated on 17.01.2022 which order we have already extracted above.

25. From the facts of the present case, it is clear that the Respondent No.1 has brought its 100% subsidiary, Respondent No.2 without there being any consent or permission of the Appellant and in the CIRP of the Respondent No.2, the assets are sought to be included whereas the assets premises are not the assets of the Corporate Debtor. Even the development rights do not belong to the Corporate Debtor which was given by the Kolkata Municipal Corporation in favour of the Respondent No.1 which could not have been assigned to any entity without prior approval of the Kolkata Municipal Corporation. No right and interest with regard to premises have been created in favour of the Respondent No.2. The premises, in question, cannot be subject matter of the CIRP of the Corporate Debtor. Adjudicating Authority committed error in directing the Appellant to handover the possession of the premises to the Resolution Professional. The order passed by the Adjudicating Authority setting aside the order dated 17.01.2022 terminating Development Agreement, Supplemental Agreement and Power of Attorney cannot be sustained.

26. In view of the foregoing discussions and our conclusions, we allow this Appeal, set aside the order dated 17.11.2022 passed by the Adjudicating Authority and reject IA filed by the Respondent No.3. Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

New Delhi
Anjali