

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

IA/11(AHM)2021 in CP(IB) 279 of 2018

Coram: MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE
AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 26.04.2021

Name of the Company:

Kausar Textile Pvt Ltd

V/s

Brijesh Kumar Mishra RP of Krishna Knitwear
Technology Ltd & Anr

Section:

60(5) of the Insolvency and Bankruptcy Code, 2016

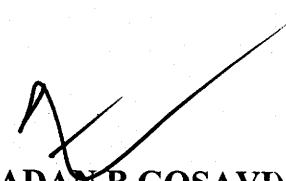
ORDER

Learned Counsel Mr. Ishan Shah appeared for the Applicant.

Speaking to minutes is filed for rectification in order dated 08.04.2021.

Heard Learned Counsel for the Applicant. Speaking to minutes is allowed and stands disposed of. Corrected order be uploaded.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Dated this the 26th day of April, 2021.

BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT 1

IA No. 11 of 2021 in CP (IB) No. 279/7/NCLT/AHM/2018

Coram: MADAN BHALCHANDRA GOSAVI, MEMBER (JUDICIAL)
VIRENDRA KUMAR GUPTA, MEMBER (TECHNICAL)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING THROUGH VIDEO CONFERENCING BEFORE THE
NATIONAL COMPANY LAW TRIBUNAL , AHMEDABAD BENCH ON 08.04.2021

Name of the Company: M/s. Kaushar Textile Pvt. Ltd.
V/s.
Mr. Brijesh Kumar Mishra & Anr.

Section: 60(5)/7 the Insolvency & Bankruptcy Code, 2016

ORDER
(Through video conferencing)

The case is fixed for pronouncement of order.

The Order is pronounced in the open court, vide separate sheet.


(VIRENDRA KUMAR GUPTA)
MEMBER (TECHNICAL)


(MADAN B GOSAVI)
MEMBER (JUDICIAL)

Dated this the 8th day of April, 2021.

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
COURT-1**

I.A. No.11 of 2021

IN

CP (IB) No.279/7/NCLT/AHM/2018

*[An application filed under Section 60(5) of the Insolvency and
Bankruptcy Code, 2016]*

In the matter of:

M/s. Kausar Textile Pvt. Ltd.

Having its registered office at:
27-A, Mezzanine Floor,
Swadeshi Mill Compound,
Opera House, Girgaon,
Mumbai - 400004.

... Applicant


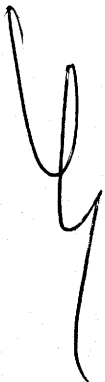
Versus

1. Mr. Brijesh Kumar Mishra,
Resolution Professional (RP) of
M/s. Krishna Knitwear Technology Ltd.
A company under CIRP,
Flat No. 202, Bhoj Bhawan,
Plot No.18-D, Sion-Trombay Road,
Chembur-Mumbai - 400007.

2. Mr. Ajit Kumar,
Resolution Professional (RP) of
M/s. K-Lifestyle & Industries Ltd.
A company under CIRP,
1A, Sanskriti Apartment,
GH-22, Sector-56,
Gurugram - 122001 (Haryana)

... Respondents

**Order Reserved on: 30th March, 2021
Order Pronounced on: 8th April, 2021**



Coram: Madan B. Gosavi, Member (Judicial)
Virendra Kumar Gupta, Member (Technical)

Appearance:

Learned Counsel Ms. Mamta Binani for the Resolution Professional. Learned Counsel Mr. Atul Sharma appeared. Learned Counsel Mr. Ishan Shah appeared for the Applicant. Resolution Professional Mr. Brijendra Kumar Mishra appeared.

ORDER

[Per Bench]

1. This application under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016 has been filed by M/s. Kausar Textiles Private Limited for directions to the Resolution Professional (Respondent No.1) of the Corporate Debtor, M/s. Krishna Knitwear Technology Limited to effectively handover the unit of the Corporate Debtor for carrying business as per the lease agreement dated 29.09.2020 and release of goods belonging to applicant. It is also alternatively prayed that monies paid by the applicant be refunded with interest at the rate of 12%.
2. The relevant facts are that the Applicant was having business relationship with the Corporate Debtor i.e Respondent no.1 since 2017 for production on job work basis as per the agreement between them. This arrangement was further extended between the Applicant and the

Corporate Debtor by MoU dated 02.01.2020 whereby the Applicant assigned the job work to the Corporate Debtor for utilizing the plant and machinery and other infrastructure belonging to the Corporate Debtor for production of goods for applicant. Subsequently, Corporate Debtor was admitted into Corporate Insolvency Resolution Process by the order of this Authority dated 31.01.2020. The Respondent No.1 was appointed as an IRP. Later on, the Committee of Creditors ("CoC") confirmed his appointment as Resolution Professional ("RP"). The Respondent No.1 is in-charge and in control of all the assets of the Corporate Debtor, i.e. M/s. Krishna Knitwear Technology Limited. On 04.08.2020, the Applicant expressed his interest to run the spinning capacity of the plants of the Corporate Debtor situated at samarvani & Piperia pursuant to public invitation issued by the Resolution Professional of the Corporate Debtor. On 10.08.2020, the Resolution Professional required the Applicant to submit final proposal by 12.08.2020. Through this mail, draft lease agreement had also been provided to the Applicant. On 13.08.2020, Resolution Professional again wrote email to the Applicant in response to the Applicant's mail dated 10.08.2020 to submit final proposal alongwith brief profile and financial statements of the three years. On 14.08.2020, the Applicant submitted the final proposal and

also provided the necessary documents. The contents of this letter are reproduced as under:

Dear sir,

This is in reference to your mail dated 13th August 2020 regarding the terms and conditions provided in Lease agreement related to take on lease the facilities of the plants of Corporate Debtor located at samarvani & Piperia (Silvassa).

We are agree with terms and conditions provided in Lease agreement with following clarification.

- 1. The Lease shall pay to the Lessor, Lease rent at the rate of INR 700000 per month from 1st September 2020.*
- 2. The Lease shall be pay insurance cost of raw material, work in process and finished goods.*
- 3. The Lessor / (Corporate Debtor) shall be liable to pay insurance cost of all fixed assets of Corporate Debtor.*

We also attached following documents a per your requirement for evaluate the proposal.

- 1. Brief Profile*
- 2. Financial statements of three previous years, if any deficiency related information please email immediately.*

- 3. On 04.09.2020, the Resolution Professional communicated to the Applicant that his proposal had been approved by CoC in its 4th meeting held on 19.08.2020. The resolution passed in this meeting was also communicated to the applicant. The relevant resolution states that initially lease be given for a*

period of three months subject to further extension, Applicant could carry out business operations as per their mutual understanding for a consideration of Rs. 7,00,000/- per month as lease charges. It was also resolved that such approval was subject to the payment of all dues by the Applicant till 30.08.2020 and also other dues in terms of MoU dated 02.01.2020 entered into between the Applicant and Corporate Debtor. It was also resolved that MoU dated 02.01.2020 shall stand terminated with effect from 31.08.2020. The Resolution Professional of the Corporate Debtor, in view of this resolution, required the Applicant to submit the proof of payment of all outstanding dues as agreed. Such payment had to be made within 7 days from the date of decision of CoC.

4. The Applicant made the some payments and also requested the Resolution Professional to execute lease agreement and provide full access of the location so that the Applicant could carry out the operations. Further payments were made on 12.09.2020. The Resolution Professional wrote an email on 29.09.2020 whereby he acknowledged the receipt of payment and sent signed of the lease agreement return thereof within 3 days after acceptance by applicant and to take possession of the production facilities at Silvassa and

Piperia. On 29.09.2020, the Resolution Professional also wrote a letter that pending receipt of other sums in terms of approval of the CoC in its meeting dated 19.08.2020, the Applicant could take back 80% of the stock belonging to the Applicant which was lying at the plant of the Corporate Debtor at Silvassa and 20% of said stock would be released after receipt of payment of pending dues. On 03.10.2020, there was further correspondence regarding mechanism to be adopted during the course of lease period. On 08.10.2020, the Applicant also wrote letter to the DGM of the Andhra Bank wherein it was stated that although Resolution Professional gave them possession in writing but supervisor of Corporate Debtor Mr. Shah, sitting at the plant had not handed over the possession and there were locks and seals at various places in the plant and because of that Applicant was unable to start the unit. It was also mentioned that some equipments were stolen and representatives of Resolution Professional could not control such thefts.

5. Respondent No.1, in its reply, has admitted the fact that the Resolution Professional i.e Respondent no.1 was informed regarding MoU dated 02.01.2020 between the Corporate Debtor and the Applicant. It is also claimed that during the visit of Respondent no.1 to the plant on 07.11.2020,

Resolution Professional was not provided keys of plant no. 6 make inspection of plant and stocks which were in violation of the agreed terms in lease agreement on 11.11.2020 & 12.11.2020. Resolution Professional wrote email to applicant in this regard. Though, mail on 21.11.2020, the Respondent no.1 (Resolution Professional) requested for payments of outstanding lease rent. On 27.11.2020, Resolution Professional again wrote mail to the Applicant for clearance of lease rent. On 08.12.2020 Respondent no.1 again visited the plant alongwith representative of Bank of India and found that the premises used as store for keeping stock was locked and they could not get access, hence, lock was broken. It was found that stock was available. Respondent no.1 in 6th meeting of CoC held on 21.12.2020 updated these facts to CoC and proposed to terminate the lease agreement with effect from 31.12.2020. In this very meeting of CoC approved the proposal of one M/s Bharti Syntex Ltd. Respondent no.1 accordingly, sent termination letter to the Applicant wherein few allegations regarding failure of Applicant to rectify violations were made. It has also been stated in the reply that due to non-payment of electricity bills and other dues, Respondent no.1 was left with no other option but to terminate the lease agreement. It has also been stated on behalf of Resolution Professional

that even offer was made to take back the goods vide mail dated 29.09.2020 to the extent of 80% of goods and balance 2020 after payment of dues.

6. The Learned Senior Counsel appearing on behalf of the applicant first of all narrated significant facts and submitted that though on paper, possession was given but in reality the possession was not given in the real sense so that applicant could have started manufacturing operations thereafter. Thus, the application should be viewed on the premise that possession has not been given at all. He further submitted that in terms of MoU dated 02.01.2020, there was no liability for the so called dues, but having regard to the goods of the applicant lying in the plant and in the hope of getting a new contract and to recoup such costs and earn forfeit were paid. It was also claimed that during the course of subsistence of MoU dated 02.01.2020 issued advertisement for giving the plant on lease basis was published. The Learned Senior Counsel further pleaded that action of Resolution Professional was not in accordance with the scheme of Code.
7. The learned counsel for the Resolution Professional submitted that the conduct of Resolution Professional was

fair and transparent. Members of CoC were also informed in this regard. status of operations of Corporate Debtor was also apprised from time to time. The dues which were asked by the Resolution Professional to be paid by applicant before execution of lease deed pertained to the period of MoU dated 02.01.2020 and lease agreement was executed with effect from 30.09.2020, hence, payable by the applicant. It was also contended that there was a violation of the terms and conditions of the lease deed which provided for right of Resolution Professional to inspect the plant and when this right was exercised, the Resolution Professional faced critical problems. She further contended that the lease for period of three months and it was terminated on the non-compliance of such provisions and, therefore, nothing adverse could be attributed to Resolution Professionals conduct.

8. Respondent no. 2, being Resolution Professional of another Corporate Debtor has also submitted its reply whereby it has been categorically denied that Respondent no.2 was creating any hindrance/obstruction in the operations of the Applicant. Respondent no.2 has also raised issue of title some of the properties on the basis of some old proceedings which had been leased out by the Corporate Debtor as

belonging to Corporate Debtor of Respondent no.2 which are in the possession of the Corporate Debtor of Respondent no.1. In this regard, Respondent no.2 has asked for handing over of possession of demised property to Respondent no.2 and stock lying therein be removed so that Respondent no. 2 could carry out the Corporate Insolvency Resolution Process in the case of Corporate Debtor viz. M/s. K-Lifestyle & Industries Ltd. The Respondent No. 2 has also claimed that it was requesting the Resolution Professional of this corporate debtor to pay lease rental to the corporate debtor of respondent No. 2 (Resolution Professional). It has also been claimed that the suitable legal process is were adopted for this purpose.

9. We have considered the submission made by the parties and material on record. It is noted that there are two Corporate Debtors which are going under Corporate Insolvency Resolution Process simultaneously. One Corporate Debtor is M/s. Krishna Knitwear Technology Ltd whose Resolution Professional is Mr. Brijendra Kumar Mishra and second Corporate Debtor is M/s. K-Lifestyle & Industries Ltd. whose Resolution Professional is Mr. Ajit Kumar. It also appears that the units which had been given on lease by Resolution Professional of M/s. Krishna Knitwear Technology Ltd. to

the Applicant, there exists some dispute of title of plot(s), where such units are located, between both Corporate Debtors. However, that is separate issue and as such, it has got no bearing on the issue raised before us except that it has been alleged by the applicant that for this reason, free movement was not allowed by Respondent No. 2. In the present case, it is not in dispute that Applicant is having business relationship of the similar nature with the Corporate Debtor since 2017 i.e. production of goods on job work basis. Before initiation of Corporate Insolvency Resolution Process, MoU had also been entered into between the Applicant and Corporate Debtor i.e M/s. Krishna Knitwear Technology Limited on 02.01.2020. It is also not in dispute that during Corporate Insolvency Resolution Process, Applicant and Corporate Debtor through Resolution Professional being Respondent no.1 entered into lease agreement on 29.09.2020 for an initial period of 3 months subject to payment of certain sums. The Applicant has made such payment as insisted by RP for execution of lease agreement. The applicant claims that, in spite of execution of the lease agreement and clearing of agreed dues, the Respondent No. 1 (RP) did not hand over effective possession of the plants to carry out business operations as persons of corporate debtor who were under control of

Resolution Professional created may hassles. Further, Respondent No. 2 also created hurdles.

10. These claims of applicant have been controverted by the RP. According to him, the applicant did not keep the unit open for inspection by Resolution Professional alongwith another Financial Creditor as Resolution Professional could not get the keys of the Plant No. 6 which was ultimately broken to get the access. It is also noted that because of this event, there was a violation of the lease agreement as regard to right of inspection of Respondent no.1. Apart from that, it has also been claimed by Resolution Professional (Respondent no.1) that certain payments were still outstanding. In these circumstances, it is claimed that Resolution Professional have no other option but to terminate the lease agreement.

11. Having regard to these claims/counter claims, we consider it pertinent to look into the background. Admittedly, the applicant is getting it's production done by Corporate Debtor on job work basis since 2017 in terms of MoU dated 02.03.2017 which had a term of 3 years. Another MoU was entered into between the applicant and the Corporate Debtor on 02.01.2020, before Corporate Debtor being admitted into

CIRP. As per the clause 3 of this MoU, the duration of this arrangement was for 3 years with a lock in period of 2 years. In terms of this agreement, as per the averment made in the petition, the applicant brought in the raw material of yarn weighing around Rs.4.42 Lacs Kg worth Rs.4.70 Crores approximately at plants of corporate debtor. Unfortunately, due to pandemic, lockdown was imposed in March, 2020. The applicant requested the Resolution Professional to allow him to remove raw material/finished goods and work-in-progress which was not allowed. Operations were also stopped. The Respondent No. 1 took a stand that removal of goods could be done only after approval of CoC. However, from the minutes of CoC held on 02.06.2020, it is noted that the Resolution Professional informed the CoC that operations of the Corporate Debtor at Silvassa Plant were being carried out at 10 % of operational capacity till March, 2020. Apart from this, there is no discussion on the aspect that how these operations were carried out. Even in the first meeting of CoC held on 29.02.2020, there is no mention as regard to the units were being run for job work of the applicant. These facts show that Resolution Professional did not apprise even CoC in the manner in which he should have. In fact, in the first meeting of CoC, no discussion has taken place on the operational status of the Corporate

Debtor which is one of the crucial aspects of Insolvency Resolution Process because RP is not only mandated to conduct the CIRP but one of its primary duties is to manage the affairs of the corporate debtor as a going concern because if the corporate debtor remains a going concern, the aspect of maximization of value of assets, being one of the prime objects of Insolvency and Bankruptcy Code, 2016 would be achieved.

12. Moving forward to the third meeting of CoC which was held on 07.07.2020, it is noted that due to Covid-19 pandemic situation and lockdown being in place Resolution Professional was dependent on the information supplied by the plant head Mr. Sharma who was also under quarantine. Apart from this, no discussion on the proposal of running the plant of lease basis although public advertisement, in this regard, published in this month only on 31.07.2020 before fourth meeting of CoC which was held on 19.08.2020 wherein for the first time in item No. 7, it has been mentioned that the Resolution Professional along with representatives of some Financial Creditor visited the plant on 17.07.2020. The stock valuation was also done with the help of External Industry experts. However, profiles of so called experts are not on record so that their expertise in

valuation of such items can be assessed. It is stated that the stock at Piparia plant stood at Rs.14.21 Lakhs approximately and stock at Samarvani plant stood at Rs.1.62 Crores approximately. However, we are unable to understand why details of stock lying there and value thereof were not sought from the applicants at first place including supporting documents and why applicant was not informed as regard to such visit so that applicant could also be present there. It is also not known as to on what basis such valuation was arrived at even with the help of experts. For the first time, in the said meeting, the discussion on memorandum of understanding dated 02.01.2020 between the applicant and the erstwhile management of the Corporate Debtor was referred to. The issues of labour dues as well as outstanding electricity dues still June, 2020 were also discussed. In this meeting, however, it was informed that since March 2020, both the plants were totally shut. It was also discussed that minimum monthly charges of electricity were around Rs.6.75 Lakh and cost of officers, staff and security was Rs.10.5 Lakh per month. The cost of insurance was estimated Rs.1.00 Lakh per month. It was also pointed out that mechanism of job work on lease basis was in practice in the textile sector so that fixed cost of the lessor could be recouped and the role of lessor would be



limited to supervising and exercising control over fixed assets and other properties of the Corporate Debtor while ensuring labour related compliances.

13. The CoC was also informed that four parties had expressed interest in running the plant on lease basis and one of them, was applicant before us. The proposal submitted by the applicant was discussed. The aspect whether applicant was a related party of the Corporate Debtor or not was also discussed. In this meeting certain resolutions were proposed for consideration and approval of CoC to execute the lease agreement with the applicant which were ultimately approved.
14. In the fifth meeting of the CoC held on 27.10.2020, in item no. 10 it was informed that the M/s Kausar Textiles Private Limited had made certain payments which included part payment of electricity bill. The amount paid on this account stood at Rs.44,79,472.63/-. It was also informed that there was a further outstanding amount of electricity charges for Samarvani Plant to the tune of Rs.37,28,239/- on September, 2020 which was also to be paid by the Applicant. As regard to the labour dues, it was pointed out that the applicant had paid Rs.17,50,000/- towards payment of such

dues. In this meeting, the issue of some of assets belonging to the other Corporate Debtor i.e. K. Lifestyle & Industrial Limited also cropped up. It was pointed out that ownership Plot No. 65/4 at Samarvani was claimed to be belonging to M/s. K Lifestyle & Industries Limited. However, it was noted that the title deeds of such property owned by M/s. K Lifestyle & Industries Limited were not produced. The Resolution Professional also sought cooperation of CoC members in this regard. The purpose of discussion of this aspect is because the applicant herein has claimed that effective possession was never allowed to him owing to this dispute raised by Respondent No. 2, being the Resolution professional of the M/s K Lifestyle & Industries Limited as he did not allow applicant to function and carry out the job work operations. It may not be out of place to mention that the Resolution Professional (Respondent No. 2) has some connection, whether directly or indirectly with the firm which was appointed by the Resolution Professional, being Respondent No. 1, to carry out transaction audit as regard to transactions under Section 43, 45, 50 and 60 of the Insolvency and Bankruptcy Code, 2016 in respect of Krishna Knitwear Technology Limited, being the Corporate Debtor and also to verify the status of Financial Creditors of said Corporate Debtor being a related party and amount of claim

lodged by them in Form-C. It is also noted that the Respondent No. 2 in spite having some commercial professional relationship with the firm appointed to carry out above mentioned assignment. Resolution Professional of the corporate debtor, being Respondent No. 1 alleged that he was not getting cooperation nor the title issues were sorted out. In this regard Respondent No. 2 also approached the Hon'ble NCLAT against the decision of this Authority vide order dated 05.01.2021 in an application filed by Respondent No.2 in that case under Section 19(2) of Insolvency and Bankruptcy Code, 2016 wherein certain directions were given to suspended management of corporate debtor and the Hon'ble NCLAT directed both Respondent No. 1 and 2 to co-operate with each other to resolve the issue. Thus, it appears to us that due to this situation and non-cooperation of Resolution Professionals personnel at the plants, applicant in spite of making payment of substantial amount to the tune of Rs. 74.00 lacs approximately, could not operate the plants. In addition to this, other factor of theft of two transformers and other parts/items in spite of two persons, being supervisors appointed by Corporate Debtor who could not prevent such thefts also resulted into a situation of plant not being made operational. A letter was written on 08.10.2020 by the

applicant to RP of Corporate Debtor pointing out such situation. A copy of this letter is also marked to such supervisors and concerned financial lender. In this letter, it has been categorically mentioned that plant cannot be started without transformers cost of which was around Rs.1,00,00,000/-. In this letter a request for refund of money was also made along with a request to give authority to remove the goods.

15. Thereafter, sixth meeting of CoC was held on 21.12.2020. In the said meeting, the lease agreement with the applicant has been terminated for the reason that the applicant did not allow inspection to Resolution Professional on 07.11.2020. However, the fact remains that the plant manager of the Corporate Debtor which is Mr. Sharma and its two supervisors were always there. No material has been brought on record to show that such persons had been removed or ceased to be the plant head or supervisors and, in this situation, such allegation of the Resolution Professional does not appear to be logical. Thus, this is just a pretence or excuse which the Resolution Professional was looking for to terminate the lease agreement after receiving an amount of Rs. 73.57 lacs approximately from the applicant, particularly when the letter of applicant dated

08.10.2020 has remained uncontroverted, this view cannot be said to be assumptive. No material has been brought on record to show that corrective measures were taken by Resolution Professional to protect the assets of corporate debtor for which he is under obligation under Section 25 of Insolvency and Bankruptcy Code, 2016. No copy of FIR lodged, if any, has been brought on record. No fact of insurance claim being lodged, if any, has been disclosed. No discussion has taken place on this aspect in CoC meeting. This issue, in our opinion, requires in depth inquiry irrespective of outcome of this application. It is also noted that in the public announcement made on 31.07.2020, the period of lease had been indicated as 6 months which was mutually extendable and in spite of that, the lease agreement was entered into for a period of 3 months only. No material has been brought on record as to why such period was reduced to 3 months only, particularly, when the applicant was familiar with the plant and other facilities of the corporate debtor as it was getting its production activities done job work operations there since 2017.

16. Further, in this meeting, without any advertisement being published, giving said plant(s) to M/s Bharti Syntex Limited on lease basis has been proposed. Surprisingly, resolutions have also been proposed to this effect. CoC has also agreed

to put such proposal for e-voting without bringing any material on record either in the minutes of meeting which have been produced before us or during the course of these proceedings, the facts as regard to the commercial terms and conditions of such proposal and also how such proposal was better than earlier arrangement with the applicant. It is also not known whether the parties who had participated in the earlier process were also given an opportunity or not as no material has been brought on record to this effect and the party with whom fresh lease agreement is proposed is not the one who participated in this process earlier. Even the business profile of the such party has not been brought on record whereas in the case of applicant, such business profile was asked for at the lieu of execution of lease agreement dated 29.09.2020, in spite of fact that applicant was already getting job work done in these plants for last 3 years or more on the earlier occasion. However, it appears to us that such fresh lease proposal has not been executed as yet because on the last date of hearing i.e., 30.03.2021, the learned counsel appearing on behalf of Resolution Professional stated that the Resolution Professional may be permitted to enter into such agreement which was declined by us as present application was pending for disposal. It is also noted that in the said meeting resolution was also

proposed to sale the stock of raw material/finished goods/working progress belonging to the applicant to realize so called outstanding dues. During the course of hearings on different dates, we asked the Resolution Professional and his advocate to show us the clause as to how and on what basis such goods could be retained by Resolution Professional or sold. It is also noted that dues of period prior to execution of lease agreement dated 29.09.2020 have been cleared at the time of execution of such lease agreement or immediately thereafter although applicant was not liable to pay major part of such dues for no operations being carried out during lockdown and as per terms or MoU dated 02.01.2020. On the contrary, for premature termination of this MoU before lock-in-period of two years, corporate debtor is liable to pay a compensation of Rs. 20,00,000/- to the applicant. We asked them to refer the relevant provisions of the lease agreement dated 30.09.2020. Our attention was drawn to clause 4, 5 & 6 of MoU dated 02.01.2020 which has already been terminated and it was stated that as per clause 6 the Resolution Professional had a right to withhold the goods until the dues were clear by the applicant. We, however, noted there is no clause in the lease agreement dated 29.09.2020 to this effect i.e. goods belonging to applicant cannot be retained by Resolution Professional

even for outstanding dues by charges payable under lease agreement. We also find that as per terms and conditions of MoU dated 02.01.2020, situation of force majeure or non-availability of plant due to reasons attributable to Corporate Debtor has also been provided and on the happening of such events, applicant's liability to pay even minimum monthly rent is extinguished. It as an admitted fact that plant has remained closed since March, 2020 due to Covid-19 related lockdowns and restrictions. Even the plant at Samarvani has not been in operation till 07.11.2020 as noted from minutes of meeting of CoC dated 21.12.2020. Main plant is at Samarvani. It has also been mentioned the operations at Samarvani were not started by applicant. This fact lends substantial credence to the claim of theft made by applicant. The value of transformers stolen has been stated at around Rs.1,00,00,000/- which is a significant amount. Coming back to issue of dues, the applicant is liable to pay dues owed under new lease agreement only as per clause 14 thereof and it does not cover dues of past. Hence, for this reason also the action of Resolution Professional of retaining goods belonging to applicant is not justified. CoC is also equally responsible for such actions of Resolution Professional as actions of Resolution Professional have not been questioned at all. There is another dimension as regard

to liability or dues of the applicant under lease agreement, which is, whether Resolution Professional can demand such dues when the Samarvani plant could not be operated due to reasons mentioned elsewhere in this order? Are the terms and conditions of lease agreement dated 29.09.2020 fair and reasonable to both parties? If not, then whether Doctrine of unconscionability of contract is applicable in regard to such agreement? To find answer to this question, we need to look at various clauses of both MoU dated 02.01.2020 and lease agreement dated 30.09.2020.

17. In this regard, we consider it pertinent to reproduce the relevant portions of memorandum of understanding dated 02.01.2020 executed between the applicant and the corporate debtor. Main features of MoU dated 02.01.2020 are as under:

M/s Krishna Knitwear Technology Limited (hereinafter referred as a "KKTL"). The other portions of this MoU is not relevant, hence, not reproduce and M/s Kausar Textile Private Limited (hereinafter referred as "KTPL") not relevant, hence, not reproduce.

And whereas KKTL has been carrying on business of Spinning and Knitting for around 2 decade sat its units located at Krishna Nagar, Samarvani, Silvassa.

And whereas KKTL at the request of KTPL, agreed to perform job work on one of its units, so as to have effective utilization of the plants and machineries, which have been under-utilized due to financial

crunch. And whereas, both the parties, keeping in view the mutual interest, agreed to execute the MoU, covering all the covenants, more specifically described hereunder written.

And whereas KKTL agree to perform the job work of KTPL by utilizing the P&M and other Infrastructure, available at Krishna Nagar-Samarvani Silvassa and Piperia-Silvassa.

And whereas in view of the understanding arrived KKTL, agrees to perform job work of KTPL, at the entire cost and expenses of KTPL, *including purchase of raw materials, expenses for sales, promotions, wage and salary of existing workforce, power, electricity, payable in respect of the said job work taken either on and/or on Open End at Samarvani/Piperia Silvassa on which the job work would be under ken. It is expressly understood that KTPL will borne all such expenses in respect of the job work undertaken by KKTL and that for the period during which the job work is performed on its behalf.*

And whereas the parties hereto are desirous of recording the understanding arrived at by and between them in the manner hereinafter appearing.

Now this MoU witnesseth and it hereby agreed by and between the parties hereto that:

1. *The recitals mentioned hereinabove shall form an integral part of this MoU as if the same have been hereunder:*
2. *KKTL has agreed to take up job work of KTPL on its RF Units & OE Units, for valuable consideration and on the terms and conditions recorded hereunder:*
3. *The understanding would come into effect from 01.01.2020 and will be for a period of 3 years with lock-in-period of 2 years. It is expressly agreed between the parties that the present agreement would be further*

renewed upon successful determination of this agreement, on mutually agreed terms and conditions of a further terms of 3 years. That in case the party of the OTHER PART (KTPL) would be desirous to continue the arrangement, then it shall give notice of its intention at least 3 months before expiry of the present agreement. Both the parties agree that in case KKTL undertakes spinning for its own purpose or perform work of other vendor, then the goods of KTPL will be segregated in the manner that the same can be easily identified. KKTL confirms that as on the date of this understanding no goods i.e. raw material, stock in process and finished goods are lying in its units at Samarvani/ Silvassa and that KTPL can store/bring their material for the proposed job work to be got performed through KKTL. KKTL further declares that all stocks in the plant such as Raw Materials, Stock in Process and Finished Goods brought in by KTPL shall remain to be property of KTPL at all times.

4. It is expressly agreed between the parties that KTPL, inconsideration for getting job work performed shall pay KKTL a sum of Rs. 2.0/- per kg on the actual monthly production of Ring frame yarns and Rs. 1 per kg on OE yarns subject to a minimum sum of Rs. 1,00,000/- (Rupees One lakh only) per month, on or before the 7th of very next month i.e. for the month of January, 2020, KTPL shall pay the amount on or before 7th February, 2020. Both the parties agree that the minimum sum of Rs. 1,00,000/- per month would be paid by KTPL to KKTL, irrespective of the fact that there is any job work to be performed or not, except on account of inability of KKTL to do so or due to force-majeure.
5. It is expressly agreed between the parties that the said sum of Rs. 2.0/kg for RF yarns and Rs.1 per kg for OE yarns or minimum of Rs.1,00,000/- would be over & above all the expenses borne by KTPL, in respect of the said mill, inter alia, expenses towards power/electricity, salary, wages in respect of employees etc. It is also agreed that KTPL, after making

payments towards all such expenses, would provide evidence thereof to KKTL at regular interval.

6. It is expressly agreed that in case KTPL, falls to pay the expenses as mentioned in point no. 5 and/or fails to pay monthly compensation on the production of yarn at agreed rate or Rs.1,00,000/- KKTL will have right to withhold the goods of KTPL, till said expenses are paid or amount of compensation is received by KKTL from KTPL. It is further agreed that in the event of such circumstances, total value of goods withheld would not exceed the amount of pending dues or other expenses to be met by KTPL. It is agreed that for the purpose of valuation of goods to be retained by KKTL, due consideration would be given to the value of raw material/inventory/stock in process/finished goods.
7. It is expressly agreed between the parties that except in the circumstances and to the extent as covered in para 6 of this MoU, the ownership of all the goods i.e. raw material/stock in process or finished/semi-finished goods, lying in the unit(s) of KKTL would be of KTPL and KKTL will not claim any right/interest on all such goods.

Clause 8, 9, 10 & 11 are not relevant, hence, not reproduced.

12. It is agreed that to start the units of KKTL, KTPL will have to incur certain expenditure towards electric supply and upkeep of P&M and infrastructure and therefore a lock in period of 2 years has been stipulated. It is expressly agreed that in case KKTL is unable to continue will the arrangement for minimum period of 2 years due to any reason, save and except that KTPL is not interested to continue, KKTL, shall pay a cost of Rs.20,00,000/- to KTPL, to compensate the cost incurred by KTPL towards expenses on electric lining and start functioning of the units.

18. The relevant clauses of lease agreement dated 30.09.2020 are reproduced as under:

Whereas the first party is a public company, namely, Krishna Knitwear Technology Limited, CIN: U17119DN1982PLC000092 and having its registered office at village Samarvani Krishna Nagar, Silvassa UT, Gujarat, represented by its Resolution Professional (Mr. Brijendra Kumar Mishra)

And whereas the Corporate Insolvency Resolution Process (hereinafter called "The CIRP") of the Corporate Debtor was initiated on 13.02.2020 by the order passed by Hon'ble National Company Law Tribunal, Bench at Ahmedabad (hereinafter called "NCLT")

And whereas the Corporate Debtor owns land, buildings, plant & machineries, fixtures & fittings, office equipment, furniture, utilities and facilities, electrical and water installations etc. (hereinafter referred to as "The manufacturing facilities" or "The facilities) at C.S. No.59/1, 65P of Silvassa, Village Samarvani, Union Territory of Dadra and Nagar Haveli - 396 230 and Plot Nos. 59, 70/1, 70/4, & 70/5 of Dan Udyog Sahakari Sangh Limited, Silvassa, Village - Amlia (Piperia), Union Territory of Dadra & Nagra Haveli - 396 230. For manufacturing, spinning, knitting and processing textile products.

And whereas due to certain financial and other resource constraints it desired to maximize the value of the corporate debtor said facilities be given on lease.

And whereas party to the second part (Kausar Textile Private Limited or Lessee) has shown its interest in the proposal to undertake business activities at the aforesaid facilities and its proposal has been duly approved by the committee of creditors constituted in the Corporate Insolvency Resolution Process of the Corporate Debtor.

Now this lease agreement is hereunto being entered into on the terms and conditions as laid down below:

1. **Lease:** Not relevant, hence, not reproduced.
2. **Period of Lease:** Not relevant, hence, not reproduced.
3. **Consideration:** The Lessee shall pay to the Lessor, Lease rent at the rate of INR. 7,00,000 (Seven lacs) per month and applicable taxes for the entire period of the Lease. Such rent shall be payable by the Lessee to the Lessor's bank account viz following details:

Name of the Bank: Union Bank of India (Erstwhile Andhra Bank)

Branch: Juhu Vile Parle, Mumbai

Account No. 059311100004173

Name of the Account Holder: Krishna Knitwear Technology Limited

Lessee shall ensure payment of monthly rental in advance before 10th of every month. Any delay beyond the 20th day of the month will give the right to the Lessor to cancel this Lease Arrangement forthwith and the Lessee shall peacefully vacate the facilities and handover the possession of all the facilities to the corporate debtor. It is expressly understood by the parties hereto that time shall be the essence of this Lease Arrangement, in so far as it relates to the obligations or commitments of the lessee.

4. **Warranties of the Lessee:** Not relevant, hence, not reproduced.
5. **Title, identification, ownership of equipment:** Not relevant, hence, not reproduced.
6. **Consequence of damages to equipment:**

6.1 Lessee shall, at its own cost take all necessary steps and undertake to keep all the assets of the Facilities viz., land, buildings, plant & machineries, fixtures & fittings, office equipment, furniture, utilities and facilities, electrical and water installations etc.

preserve, protect, keep intact and in good condition and cause no damage to the same.

6.2 Lessee shall not detach or dismantle any of the aforesaid assets of the corporate debtor forming part of the facilities, from its premises at Samarvani and Piperia and shall undertake to repair to keep the entire plant and machinery operational at his own costs and expenses.

6.3 The Lessor undertakes to pay the insurance cost in respect of all the assets of the facilities where ever applicable and to the need thereof, as may be appropriate. The Lessee shall assist and provide all kind of support including identification and physical verification of the assets for taking the necessary insurance cover.

6.4 In the event, any item of facilities is lost, stolen or destroyed or damaged beyond repair for any reason, Lessee shall promptly bear the responsibility of the same and pay the Lessor the instalments of lease rentals then remaining unpaid, if any, plus the price/costs attributable to the lost, stolen or damaged equipment.

7. Indemnity: Lessee agrees to comply with all laws, regulations and orders relating to the possession, operation, and use of the Facilities and assumes all risks and liabilities arising from or pertaining to the possession, operation or use of the Facilities. Lessee does hereby agree to indemnify and keep indemnified and hold safe and harmless the Lessor from and

covenants and undertakes to defend Lessor against any and all claims, costs, expenses, damages and liabilities whether civil or criminal, of any nature whatsoever, arising from or pertaining to the use, possession, operation or transportation of the Equipment. Any fees, taxes or other lawful charges paid by Lessor upon failure of Lessee to make such payments, shall become immediately due from Lessee to make such payments, shall become immediately due from Lessee to Lessor. Lessee further covenants and undertakes to indemnify and keep indemnified the Lessor against loss of any asset to the facilities by seizure by any person other than the Lessor for any reason whatsoever, or resulting from any form of legal process initiated by any person other than the Lessor, provided that such indemnity shall not cover such loss as arises out of any neglect or default on the part of the Lessor. Lessee further agrees to indemnify and keep indemnified the lessor against all risks and liabilities whether civil or criminal, arising from the possession, use, operation or storage of any asset to the facilities and for injuries or deaths of persons or damage to property arising from the above.

8. **Use and Inspection:** Lessee will cause the facilities to be operated in accordance with manufactures' manuals or instructions, if any, and in so far as applicable by competent and duly qualified personnel only and in accordance with applicable Government regulations, if any, and for business purposes only. **Lessor shall have the right from time to time during the normal business hours on any working day to enter in the**

Leased premises with/without prior notice for the purpose of confirming the existence, condition and proper maintenance of the facilities.

9. **Repairs, loss and damage:** During the term of the lease and any renewal thereof, Lessee, at its own cost and expenses will keep all facilities in good repair, condition and working order and shall furnish all parts, mechanisms, devices and servicing required thereof. All such parts, mechanisms and devices shall immediately be deemed part of the facilities for all purposes hereof and shall become the property of the Lessor.

10. **Applicability:** Not relevant, hence, not reproduced.

11. **Termination:**

11.1, 11.2 & 11.3 not relevant, hence, not reproduced.

Clause 11.3 is reproduced as under:

Upon occurrence of any violation of terms and conditions of this Lease Arrangement by either party to this Lease Arrangement.

12. **Waiver:** Any expressed or implied waiver by the lessor of any default shall not constitute a waiver of any other default by lessee or a waiver of any of Lessor's right. All original rights and powers of the Lessor under this Lease Arrangement will remain in full force, notwithstanding any neglect., forbearance or delay in the enforcement thereof, by the Lessee of this Lease Arrangement shall not be deemed as waiver or any continuing or recurring breach by the Lessee of this Lease Arrangement.

13. **Notices:** Not relevant, hence, not reproduced.

14. *This Lease Arrangement and other contracts executed between the parties hereto pursuant to **this Lease Arrangement cannot be cancelled or terminated except as expressly provided herein. Lessee hereby agrees that Lessee's obligations to pay all Lease rentals and any other amounts owing hereunder shall be absolute and unconditional.** This Lease Arrangement cannot be amended except in writing and shall be binding upon and to the benefit of the parties hereto their permitted successors and assigns.*

Clause 15 is not relevant, hence, not reproduced

16. **Arbitration:** *All disputes, differences, claims and questions, whatsoever, which shall arise either during the subsistence of this Lease Arrangement or afterwards between the parties and/or their respective representatives touching these presents or any clause or thing herein, contained or otherwise in any way relating to or arising from these presents shall be referred to the arbitration of two Arbitrators, one to be appointed by each party to the dispute and such arbitration shall be in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or reenactment thereof for the time being in force.*

Clause 17 is not relevant, hence, not reproduced.

18. *Some of the provisions of MoU dated 02.01.2020 has already been discussed, hence, not repeated. From other provisions,*

as reproduced hereinbefore it is apparent that such MoU is having parity as far as right and liabilities of both parties to such MoU are concerned which, do not exist in the lease agreement dated 29.09.2020. Further, on termination of such MoU, no liability of the applicant survives as there is no provision to that effect except clause 6. Such clause 6 is also applicable only when actual production happens as sums/expenses payable as per clause 4 and 5 are applicable in that situation only for the reason that consideration which is to be paid by the applicant is based upon the actual production. It is not in dispute that no production has happened from the month of March, 2020 due to lockdown till September, 2020 and even thereafter. This situation is supported by the quantum of electricity dues claimed by the electricity provider which appear to be based upon the minimum monthly charges post March 2020. In bill dated 05.01.2021 wherein arrears at approximately at Rs.50,00,000/- have been estimated though, no breakup has been given and such arrears are to be assessed as per claim of Resolution Professional in one meeting of CoC wherein minimum monthly charges for this plant have been estimated at Rs.6.75 lacs. The fact of plant not being operational even in the month of October and November is also supported by the letter of the Corporate Debtor dated 08.10.2020 and

even assertion averment made in the letters of Resolution Professional/minutes of CoC meetings. Thus, in fact no liability exists under the terminated MoU also. For this reason, clause 7 of the terminated agreement can also not be invoked as the same is not applicable. Apart from this fact we cannot forget the fact that the goods worth Rs.4,00,00,000/- or more belonging to the applicant were lying in these plants since March, 2020. Those goods were not allowed to be removed by Resolution Professional nor, the plant was utilized for job work operations to be carried on by the Corporate Debtor in terms of provisions of MoU dated 02.01.2020. It is again to be reminded that as per MoU there is a lock-in-period of 2 years and if MoU is rescinded before that the Corporate Debtor is liable to pay a compensation of Rs. 20,00,000/- which has not been paid although the contract has been terminated before expiry of such period. Further, public announcement inviting Expression of Interest for giving plant on lease has been given without before bringing the facts relating to such operational arrangement to CoC and during the subsistence of MoU dated 02.01.2020. Even the term of lease has been reduced from 6 months to 3 months and no reason has been given for that. This action is not justified as this results into distraction from the main purpose i.e. time bound

Insolvency Resolution as after expiry of time of lease, fresh process is to be done. Further, this also adds to CIRP costs.

19. It pains us to point out that in fact, Resolution Professional has forced the applicant to pay the amount pertaining to period of lockdown during which plant was closed and legally also there was no liability of the applicant to pay such dues and such action of the Resolution Professional has been accepted by the applicant. We wondered why this treatment has been accepted. We could find only two reasons for this. 1. That goods worth Crores of rupees belonging to the applicant were lying there. 2. The Resolution Professional made payment of such dues as a pre-condition and the applicant in the hope of recouping the same from further operations accepted. Thus, considering these facts, we have no hesitation in holding that it is an instance of use of coercions or undue influence or abuse of dominant position by Resolution Professional.
20. This is the story till the lease agreement is executed. Now comes the situation after the lease agreement is executed. At one place it is stated that the lease agreement would come into a fact from date of its execution and such date is 29.09.2020, and, in once letter it applicant has been asked

to pay rent for September, 2020 and rent for the month of September, 2020 has also been taken from the applicant. Further, no operations have been carried out by the applicant during the period of lease because transformers had been stolen and were not replaced. Apart from this, Resolution Professionals personnel also created many hurdles and blocked the operations as alleged and such claims have not been controverted by Resolution Professional bring any material on record. Further, Resolution Professional has inspected the plant no.6 after breaking of lock, hence, had there been a case of inspection could not done due to the action of applicant, then cause for termination could be initiated. In addition to this all the terms and conditions of lease agreement dated 29.09.2020 are one sided only in favour of Corporate Debtor as we have mentioned a few clauses in detail and headings of few clauses have been given to substantiate this view.

21. Thus, considering the overall facts and circumstance of the case, we may not be wrong in stating that the conduct of Resolution Professional with the support of CoC is far from satisfactory. In our humble opinion, amount to in the garb of running the affairs of Corporate Debtor as a going concern, which have not materialized as yet, Resolution

Professional has practically exploited the situation to get money from the applicant. In this regard, we also consider it pertinent to mention that even amount paid by the applicant for clearing the electricity dues appears to not have been paid as electricity charge arrears are claimed by the electricity supplier in its bill dated 05.01.2021. As we have not been provided outstanding dues by RP inspite of our direction due to failure of RP to attach the same with their supplementary affidavit, we are unable to give details as regard to period of arrears.

22. We have also no hesitation to state that Resolution Professional of the Corporate Debtor has failed to discharge its functions as provided in Section 17, 18 & 20 which are also applicable to Resolution Professional as Section 5(27) provides that Resolution Professional shall include IRP and as per Section 23(2) of the Code, Resolution Professional is duty bound to exercise powers and performance duties as vested or conferred on IRP. In addition to this, Section 25 also enumerate duties of Resolution Professional, and by not continuing the business operations of the Corporate Debtor as a going concern or in view of the fact that theft of property has also taken place in the plants in spite of two supervisors of Corporate Debtor and one plant being there and who are directing under control of Resolution Professional,

Resolution Professional has also failed to preserve and protect the assets of the Corporate Debtor. Thus, provisions of Section 25(1) have also been violated.

23. Since, in the case of same Corporate Debtor one common order has been pronounced by this Bench in IA 953 of 2020 and IA 13 of 2021 on 05.04.2021, whereby we have replaced the Resolution Professional, hence, we do not wish to make any further observations on the conduct and approach of Resolution Professional. We are also not making any further observations on the approach of the authorized representatives of members of CoC. We are consciously restraining ourselves from this exercise in spite of the fact that some other party is being proposed to run the plant on lease basis and terms and conditions of offered by such parties have also not been brought on record so as to make evaluation whether such terms and conditions were better than the that of applicant.
24. Having discussed the facts of the case and even finding merits in the claims of applicant, now the question which needs our consideration is as to what relief can be granted to the applicant in this situation. Apparently, it is a case of breach of MoU dated 02.01.2020 as compensation for premature termination has not been given and of non-

performance of lease agreement by the Corporate Debtor represented by Resolution Professional and, therefore, question of our jurisdiction arises under which this Authority can decide this issue. It is not in dispute that Corporate Debtor is to be run as a going concern for maximization of value of assets of Corporate Debtor. In the present case, it is not in dispute that Corporate Debtor was a going concern at the time of commencement of CIRP. Hence, it was the obligation on the part of RP to keep it as a going concern subject to difficulties/lockdown being imposed on account of Covid-19 pandemic. It is again reiterated that the MoU dated 02.01.2020 was in operation and had a balance period of almost three years, when the Corporate Debtor was admitted into Corporate Insolvency Resolution Process (CIRP). There was a lock-in-period of two years. The goods worth of Rs. 4.00 Crores and more belonging to the Applicant was also lying at the plants, hence, on the removal of lockdown or lifting of restrictions, the Applicant could start the operations without any difficulties. In this situation, we are not able to appreciate as to what prompted RP to not to continue with this arrangement, particularly when the Applicant was already having such arrangement since 2017 and had all the competency and all the resources to continue with the same

arrangement and MoU dated 02.01.2020 was still valid. Having stated so, if the RP wanted to renew or modify commercial terms and conditions, the same could have been done on mutual basis but that has not been done. On the contrary the Applicant has been forced to pay the dues which he was not liable to pay at all as noted in the earlier part of this order. The purpose of this discussion is to enter into the area whether termination of the MoU dated 02.01.2020 and non-performance of lease agreement dated 29.09.2020, can be said to be in relation to or arisen out of Insolvency Resolution of the Corporate Debtor as per the provisions of Section 60(5) (c). If the question is answered in negative then in that event whether after admission of Corporate Debtor into Corporate Insolvency Resolution Process (CIRP), could reliefs claimed by the Applicant fall under clause 60(5) (b) of the Code and therefore such reliefs could be granted to the applicant.

As regards to the applicability of Section 60(5) (c), It is normal practice that several parties come before this Adjudicating Authority for example non-admission of claim lodged by the Creditors or rights of third parties as regards to property belonging to them being not released by the RP, which was in possession of the Corporate Debtor at the time of commencement of Corporate Insolvency Resolution

Process (CIRP) etc. etc. In those cases, this Authority takes cognizance and dispose of these matters in accordance with the provisions of Code and provisions of any other statute applicable to such issue subject to the condition that other law is not contrary to any provision contained in the Code.

Before proceeding further, reproduce clause 60(5) as under

:
"(5) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Company Law Tribunal shall have jurisdiction to entertain or dispose of— (a) any application or proceeding by or against the corporate debtor or corporate person; (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under this Code".

From the perusal of the main provision of this Sub Section, it is noted that the jurisdiction on NCLT is conferred irrespective of anything contrary contained in any other law. If this provision is taken into consideration, then in our considered view, in regard to claim/matter which fall under clause 60(5) (a), clause 60(5) (b) and 60(5) (c) of the Code, the NCLT will have jurisdiction to entertain and dispose of such issue which may otherwise fall within jurisdiction of the Civil Court under Code of Civil Procedure, 1908. This view can be further substantiated by the provision of Section 9 of the Code of Civil Procedure, 1908 which provides that,

if any statute specifically bars the jurisdiction of a Civil Court, then the dispute even of Civil nature would have to be decided by the judicial forum constituted under that statute.

We further note that in clause 60(5) (b), the term "Claim" has been used. This term has been defined in Section 3(6) of the Code which is reproduced as under:

"3(6) claim" means—

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, un-matured, disputed, undisputed, secured or unsecured;".

There are two clauses in this definition. Clause (a) covers right to receive payment. It is important to note that this right is defined in very wide manner and covers various kinds of rights which may arise out of contract or judgment or even disputed. Thus, if claims of applicant are disputed by the RP still it would fall under the definition of claims. Assuming for a moment that it is claimed that payment of old dues was made by applicant and, there is no provision

for refund of that, either in MoU dated 02.01.2020 or lease agreement dated 30.09.2020, hence, not admissible. Our answer to this possibility is that first of all these dues were no payable by Applicant under both these agreements and, secondly, lease agreement has not been performed, hence, having regard to the term "equitable" used in clause (a), the applicant is entitled to get refund of the same on equitable considerations which squarely apply to the facts of the case. Further, provisions of clause (b) can be applied for payment of compensation for breach of MoU on account of premature termination of such MoU (refer clause 12 of MoU). In addition to this, this clause can also be applied to get suitable remedy for breach of lease agreement even if it is disputed by Corporate Debtor.

25. Having stated so, we also consider necessary to ponder a little on the aspect of nature of Corporate Insolvency Resolution Process (CIRP) proceedings which are conducted by RP. Whether can it be said that such proceedings should necessarily be beneficial or tilted towards the Corporate Debtor or Secured Financial Creditor only in all situations even at the costs of interest or third parties, who enter into contractual arrangement or continue that the contractual arrangement with the Corporate Debtor even though it is admitted into CIRP. The answer is 'NO'. For this view, we

need to look at the preamble to the Code which reads as under:

“An Act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto”.

From the various objects stated in this preamble as reproduced hereinabove, it is evident that apart from maximization of value of assets of Corporate Debtor there are three more objects which are relevant for our purposes and are of equal importance. These objects are (1) to promote entrepreneurship (2) availability of credit and (3) balance the interest of all the stakeholders. If we pose a question to ourselves whether Applicant's claims fall under all the three above objects. Even a layman can answer it so. Having arrived at such conclusion, we also state that preamble of any statute is not only a guiding force to find the legislative intent and policy in enacting a statute but

such preamble is also equivalent to provisions of law which can be resorted to decide issues arising under that statute.

In this regard, following observations of Hon'ble Supreme Court in the case of Committee of Creditors Essar Steel India Ltd., vs. Satishkumar Gupta RP of ESIL as reported in SCC online, are very important, hence, reproduced as under:

" 54. This is the reason why Regulation 38(1A) speaks of a resolution plan including a statement as to how it has dealt with the interests of all stakeholders, including operational creditors of the corporate debtor. Regulation 38(1) also states that the amount due to operational creditors under a resolution plan shall be given priority in payment over financial creditors. If nothing is to be paid to operational creditors, the minimum, being liquidation value - which in most cases would amount to nil after secured creditors have been paid - would certainly not balance the interest of all stakeholders or maximise the value of assets of a corporate debtor if it becomes impossible to continue running its business as a going concern. Thus, it is clear that when the Committee of Creditors exercises its commercial wisdom to arrive at a business decision to revive the corporate debtor, it must necessarily take into account these key features of the Code before it arrives at a commercial decision to pay off the dues of financial and operational creditors. There is no doubt whatsoever that the ultimate discretion of what to pay and how much to pay each class or sub-class of creditors is with the Committee of Creditors, but, the decision of such Committee must reflect the fact that it has taken into account maximising the value of the assets of the corporate debtor and the fact that it has adequately balanced the interests of all stakeholders including operational creditors. This being the case, judicial review of the Adjudicating Authority that the resolution plan as approved by the Committee of Creditors has met the requirements referred to in Section 30(2) would include judicial review that is mentioned in Section 30(2)(e), as the provisions of the Code are also provisions of law for the time being in force. Thus, while the Adjudicating Authority cannot interfere on merits with the commercial decision taken by the Committee of Creditors, the limited judicial review available is to see that the Committee of Creditors has taken into account the fact that the corporate debtor needs to keep going as a going concern during the insolvency resolution

process; that it needs to maximise the value of its assets; and that the interests of all stakeholders including operational creditors has been taken care of. If the Adjudicating Authority finds, on a given set of facts, that the aforesaid parameters have not been kept in view, it may send a resolution plan back to the Committee of Creditors to re-submit such plan after satisfying the aforesaid parameters. The reasons given by the Committee of Creditors while approving a resolution plan may thus be looked at by the Adjudicating Authority only from this point of view, and once it is satisfied that the Committee of Creditors has paid attention to these key features, it must then pass the resolution plan, other things being equal..”

Thus, Hon'ble Supreme Court while determining the scope of jurisdiction of Adjudicating Authority vis-à-vis final authority of CoC while approving the resolution plan considered the factors, being part of the preamble, and held that non-adherence there could result into an occasion for intervention by Adjudicating Authority. Thus, in this sense, preamble is treated not only a guide but also as an enforceable provision of law. Thus, this aspect further strengthens view taken by us relying on the preamble of the Code.

Thus, considering the above position of law in our considered view that this Authority have requisite jurisdiction to entertain and dispose of the claims made by the Applicant for enforceability of the lease agreement or illegal action of termination of MoU or of the lease agreement or both, and allow the RP to continue with the Applicant, if Applicant agrees to get its job done either after taking the plant on lease or in the like arrangement which was

prevalent under MoU dated 02.01.2020. In case, it is not done, we also have authority to direct the RP to return the money (Rs. 7357 Lacs), which has been paid by the Applicant to the RP @ 12% p.a. Also to direct RP to return goods belonging to the Applicant which is lying at the plan of the Corporate Debtor even otherwise there is no bar or limitation on our jurisdiction as regard to direction to the RP to return the goods as this is not a property belonging to the Corporate Debtor nor there is any liability of the Applicant for which it could be retain the same as security particularly. In this regard, the Hon'ble Supreme Court of India, though, in the context of termination of PPA by a Government Agency on account of the insolvency of the Corporate Debtor, held that the Adjudicating Authority can decide the contractual issues between the Corporate Debtor and third party, if such issues were in relation to or arose out of insolvency resolution. The issues raised in this application would not have been arisen if the Corporate debtor was not admitted into CIRP because in that situation RP would not have been there and such situation would not have emerged.

26. Apart from this factor, one cannot ignore the legal position that RP is duty bound to keep and manage the affairs of the Corporate Debtor as a going concern during CIRP period, hence, continuation of pre-CIRP arrangements in this regard

or entering into new arrangements to keep the Corporate Debtor as a going concern amounts to an issue in relation to insolvency resolution of the Corporate Debtor. This situation can be looked from one more angle. The dues are on account of electricity charges, labour wages, salary, insurance etc. Such expenses are of the nature of CIRP costs in terms of Section 5(13) (c) of the Code as these relate to keeping of Corporate Debtor as a going concern. Thus, these expenses are to be paid by all means. Assuming, for a moment Applicant was not there, then also these expenses would have to be paid by the Corporate Debtor through its available resources, if no resources are available from operations of Corporate Debtor or otherwise, then, in that situation interim finance had to be raised to meet such expenses in terms of provisions of Section 5 (13) (c) with section 28(1) (a) which requires prior approval of CoC in certain situations. Further, if viewed from the aspect of ordinary commercial/business prudence where no business entity would like to suffer loss purposely then it can be said that applicant must have calculated the amount of liabilities of this nature and, therefore, quantum of lease charges has been accepted. Thus, lease charges can be said to be net of these liabilities. Therefore, there could be a situation where more amount of lease charges could be fixed and these


charges would have been paid by Corporate Debtor directly. Accordingly, these expenses, being of the nature of CIRP costs, would have been met out of internal accruals in that sense. Now due to non-performance of lease agreement the amount so received from applicant, need to be reimbursed and in that way, it amounts to interim finance raised by RP of the Corporate Debtor. As stated earlier CoC has approved such arrangements, hence, it can be considered as CIRP costs. As per Section 53, CIRP costs are to be paid in full. Thus, considering this legal position, amount claimed to be returned also falls under Section 60(5) (c) of the Code.

Accordingly, it is absolutely clear that the issues raised in this application can be said both as in relation to or arising out of insolvency resolution and a claim against the Corporate Debtor. Therefore, even if some financial obligation becomes payable by the Corporate Debtor, in our view, the same needs to be met by the Corporate Debtor. Further, CoC is involved and such actions have taken place under their knowledge after certain stage i.e. after publication of advertisement dated 31.07.2017 and resolution for termination of MoU as well as for execution of lease agreement has been approved by CoC and thereafter, these problems have happened, hence, in case the Corporate Debtor does not have resources to meet such obligations, in

our view, the members of CoC are liable to pay the same. Thus, considering various aspect of the matter and applicable legal provisions, we hold as under:

- (1) The entire goods belonging to the **Applicant** is to be released immediately on receipt of this order. The CoC is advised to ensure the same.
- (2) The new RP should look into the possibility of running the plant of the Corporate Debtor on lease basis or under any other arrangement with the Applicant who will have first right of refusal. The commercial terms and conditions of such arrangement would be mutually decided. As far as, aspect of approval of CoC is concerned, we leave to RP as, in our opinion no prior approval of CoC is required u/s 28(1) (f) of Code because it is not a transaction with a related party. In case, the Applicant herein refuses for the same, then in that event, the total amount of Rs. 73.57/- lacs shall be refunded to the applicant with interest @ 7% p.a. from the date of receipt till the date of payment. till the period of refund.
- (3) In case of any delay or non- implementation of our directions, the Applicant is at liberty to approach this Authority for the redressal of his grievance.

27. Before we leave, we may also pertinent to consider that this IA belongs to the Corporate Debtor, who is a party in IA No. 953 of 2020 & IA No. 13 of 2021. This IA could not be disposed of with IA No. 953 of 2020 and IA No. 13 of 2021 because the issue involved in this IAs are different from the issue involved in those IAs. However, for the sake of convenience and speedy disposal, we have taken note of CoC minutes of meeting, which were provided to us by the RP in those IAs, wherever it was considered necessary.
- 28. Thus, this application is allowed and stands disposed of in terms indicated above.**
- 29. We also direct the Registry to send copy of this order to the IBBI in the manner similar to our direction to the Registry while disposing of IA No. 953 of 2020 and IA No. 13 of 2021 vide order dated 05.04.2021.**


(Virendra Kumar Gupta)
Member (Technical)


(Madan B. Gosayi)
Member (Judicial)