IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT III

I.A. 957 OF 2022

In

C.P. No. 126 of 2019

Under Section 60 (5) of Insolvency & Bankruptcy Code, 2016 Read with Rule 11 Of the National Company Law Tribunal Rules, 2016

Filed by

Karnataka Industrial Areas Development Board

Having its Zonal Office at Plot No. -7/B-3, B.K. Kangrali Industrial Area, Poona-Bangalore Road Belgaum - 590010.

...Applicant

1. **Shri. Nandkishor Vishnupant Deshpande Resolution Professional,**
   Etco Denim Pvt. Ltd.
   Address: Headway Resolution and Insolvency Services Pvt Ltd,
   No: 708, Raheja Centre, 7th Floor, Nariman Point, Mumbai- 400 021.

...Respondent No. 1

2. **Committee of Creditor**
   Etco Denim Pvt. Ltd.

...Respondent No. 2

Order Reserved on: 28.07.2022

Order delivered on: 27.09.2022

Coram:

Hon'ble Shri H.V. Subba Rao, Member (Judicial)

Hon'ble Smt. Anuradha Sanjay Bhatia, Member (Technical)

Appearance:

For the Applicant: Mr. Deep Roy, Advocate

For the Respondent: Mr. Shyam Kapadia, Advocate a/w Mr. Ayush J. Rajani, PCA

Per: Shri H.V. Subba Rao, Member (Judicial)

ORDER

1. The above Interlocutory Application is filed by Applicant, *Karnataka Industrial Areas Development Board,* (hereinafter referred as Applicant) Under Section (5) of Insolvency & Bankruptcy Code, 2016 Read with Rule 11 Of the National Company Law Tribunal Rules, 2016 praying for following reliefs:

   i. *Declare that the Lease Property is not an asset of the Corporate Debtor and shall not form part of the resolution plan;*
   ii. *Declare that any transfer of the Lease Property or continuation of the lease arrangement in relation to the Lease Property shall be subject to strict compliance with the Agreement and the express approval of the Applicant herein; and*
   iii. *Direct Respondent No. 1 and Respondent No. 2 to refrain from taking any action in relation to the Lease Property;*
   iv. *Pass any other orders/directions that this Hon'ble Tribunal may deem fit in the facts and circumstances of the matter.*

The submissions of the Applicant are herein below:

2. That, on August 12, 2010, a lease cum sale agreement (**"Agreement"**) was entered into between the Applicant herein and the Corporate Debtor wherein the Corporate Debtor was allotted Survey No. 225 (P), 226(P), 229(P), 237(P), 238(P) and 239(P) of Allyabad Blcok-II, Industrial Area of Allyabad village, Allyabad

Hobli, Bijapur Taluk, Bijapur District admeasuring 100 acres (**"Lease Property"**) by the Applicant on the lease for the setting up of an industrial project. The lease period stipulated under the Agreement was 10 years expiring on August 11, 2020.

3. That under the terms of the Agreement, the Corporate Debtor herein was required to implement the project and utilize the allotted land within the stipulated time under clause 10 therein, which reads as-

   "Clause 10 (2)- The lessee shall utilise not less than 50% of the schedule property and in accordance with the proposal furnished by the lessee to the lessor in the application for the allotment of land and project report submitted to SHLCC/ SLSWCC/ DLSWCC/ Allotment Committee."

4. That, on December 09, 2014, Karnataka State Pollution Control Board granted consent for discharge of effluents under Section 25 of the Water (Prevention and Control of Pollution) Act, 1974 and emission under Section 21 of Air (Prevention and Control of Pollution) Act, 1982 in favour of the Corporate Debtor authorising it to operate its industrial plant at the Lease Property. The said consent was applicable for the period from July 10, 2014 to June 30, 2015.

5. That, on October 18, 2016, the Corporate Debtor herein sought to execute an absolute sale deed for the allotted Lease Property from the Applicant herein which was subsequently refused by the Applicant vide its letter dated December 20, 2016 stating that it has not yet fixed the final price to the said industrial area.

6. That, on February 14, 2020, an order was passed by this Hon'ble Tribunal admitting Mahakali Fuel Pvt. Ltd's application bearing

CP (IB) No.126/MB/2019 under Section 8 and 9 of the IB Code thereby initiating the CIRP against the Corporate Debtor and appointed Mr. Swapnil Mukund Agrawal as the IRP.

7. That, on date of Admission, moratorium under Section 14 of the Code was imposed prohibiting the institution of suits or continuation of suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority; transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein; 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 Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; the recovery of any property by an owner or lessor where such property is occupied by or in possession of the corporate debtor.

8. That, it must be noted that the present Applicant was neither a party to the said proceedings before this Hon'ble Tribunal, nor was it informed of any such proceedings till the time of admission of Corporate Debtor into CIRP as per the provisions of the IB Code.

9. That, on May 09, 2020, the COC in the 2nd meeting approved the appointment of Respondent No. 1 herein as the resolution professional. Thereafter, an order was passed by this Hon'ble Tribunal in an application filed by the COC under Section 22 (3) of the Code approving the same.

10. That, on September 16, 2021 thereafter, the Applicant herein issued a notice under Section 34B of the KIAD Act read with clause 14 of the Agreement to the Respondent No. 1 directing the

Corporate Debtor to remedy the breaches caused by it in relation to the Agreement within 120 days from the receipt of said notice.

11. In the said notice, it was stated by the Applicant herein that the Corporate Debtor had failed to implement the project and utilize the land fully for the purpose for which it was leased under the terms of agreement after a lapse of more than 11 year from the date of handling over the possession of land.

12. That, on October 08, 2021, in response to the Applicant's notice dated September 16, 2021, the Respondent No. 1 sent an email to the Applicant stating that the Applicant has missed out certain areas of land in calculating total land use and not considered the mandatory land use requirement under various other laws. In the said email, it was informed to the Applicant by the Respondent No. 1 that it has appointed one local architect to prepare a land utilization report and based on the said report the Respondent No. 1 will be able to make submissions before the Applicant herein. In light of the same, the Respondent No. 1 has requested the Applicant herein for additional time to make its submissions in relation to this dispute.

13. That, the Applicant had served a notice dated October 30, 2021, directing the Respondent No. 1 to appear before the chief executive officer of the Applicant for a personal hearing on November 10, 2021.

14. The personal hearing was conducted on November 10, 2021, wherein representatives of the Corporate Debtor made their submissions. On the same date, an order was passed by the Applicant whereby a joint inspection was required to be conducted on November 19, 2021 in the presence of the representatives of

the Corporate Debtor in relation to the implementation/utilization of the Lease Property.

15. The joint inspection was conducted on November 19, 2021 and the joint survey report was prepared which clearly exhibited that after taking the entire land use into consideration, only 30.91% of the land was used and that the units have been closed for 3 years.

16. **The Respondent No. 1/Resolution Professional filed a detailed reply opposing the above application the important paras of the reply filed by the Respondent No. 1 are extracted herein under:**

Para. 12. The respondent is the owner of land which has been allotted to the Corporate Debtor for the past decade under a lease-cum-sale agreement, has now issued a show-cause notice dated 16 September 2021 during the ongoing and pendency of the Corporate insolvency and resolution process in violation of the provisions of section 14 r.w.s. 18, 25 and 238 of the Code. The Respondent would also like to place on record letters dated 05 June 2021, 15 July 2021 and 16 September 2021 sent by the respondent to the Applicant, for the sake of completeness. It is pertinent to note that the lessee during its tenure since 2010 has abided by each of the condition as contained in clause no. 5 of the Agreement and have completed the construction as required. The lessor had called for a joint survey on 18th October 2016 for approval of revised building plans and even at that time the lessor had not raised any contention regarding underutilisation of the area of the land as alleged in the notice. Even otherwise the notice dated 16th September 2021 is an attempt to somehow

wiggle out from its obligation to execute the sale deed. The same is contrary to the intent of the "The Karnataka Industrial Areas Development Act, 1966" and in the intent of the lease cum sale agreement.

Para. 13. It is also important to note that vide letter dated 16 September 2021, Applicant gave 120 days to the Corporate Debtor to rectify and remedy the alleged breach which itself is bad in law. Nevertheless, it is evident that the Respondent is still beating around the bush and avoiding the quintessential question and the main issue revolving around the sale price which they ought to fix and then convey the title of the subject land upon payment by the Corporate Debtor. It is this issue which is a bottleneck in the present corporate insolvency and resolution process while the Respondent is now seeking an investment certificate for the project which has been there for over a period 10 years. This is nothing else but a mere attempt to waste precious time in this corporate insolvency and resolution process. It is relevant to point out that way back in 2016, the erstwhile management/directors had also written a letters dated 18th October 2016 and 28th November 2016 asking the Applicant to inform them about the selling price fixed by the applicant so that the then management could proceed with the agreement to sale the transfer the requisite selling price. In fact in response the Applicant merely stated that it has not yet fixed any selling price and hence the then management were to wait till such decision is taken. It is critical to note that at no point in time even in the said response letter of the Applicant did it ever allege any sorts of breach of the lease agreement or the fact that the

utilisation of the subject land is less than the requisite requirement. Hence it is clear that the entire intent of the Applicant is merely to put a spoke in the wheel of the present resolution plan approval process and stall the proceedings which is not the intent of the Code. Hence the present Application deserves to be dismissed.

Para. 15. The Respondent has disregarded the requirements and applicable laws under regulations of the Pollution Control Board while are to be mandatorily adhered to by the Corporate Debtor and warrants the Corporate Debtor to leave open space. For instance, some of the regulations requires the Corporate Debtor to undertake water harvesting covering an area as much as approx. 35 acres. This is a mandatory requirement and the Corporate Debtor cannot be expected to build structures thereon to satisfy the whims and fancies of the Applicant. Moreover, such a requirement to leave open space cannot be negated by the Applicant under the garb of "under-utilisation" of land and issue illegal default notices as is being done in the present case.

Para. 16. It is also relevant to refer to the fact that even before the Corporate Debtor could commence its operations it was required to file a detailed report before the Karnataka State Pollution Control Board (*hereinafter referred to as* ***"KSPCB"***) referred to as "Environmental Management Plan". It is only after submission of the said plan did the KSPCB vide its letter dated 13 April 2012 specifically directed the Corporate Debtor to establish a State-of-the-Art Sewage treatment plant to produce tertiary treated water that will be reused for greenbelt/landscaping as required under clause 1.7 of

the Environmental Management Plan which itself consumes an area of appro. 20 acres on the subject land even before commission the plant for operation as per clause 10 of the said approval letter inter-alia amongst other requirements to leave open space in view of air pollution and water pollution control requirements. The said mandatory requirement on the part of the Corporate Debtor to leave space for water harvesting and water effluent treatment has been conveniently ignored by the Applicant while considering the total land utilised by the Corporate Debtor. The Corporate Debtor is also required to:

Para. 16.1 In terms of clause 1.7 “Environment management during Operation” requires Corporate Debtor to “develop green belt” i.e. maintain open space, garden area etc. with specific species to reduce SPM levels. The same has been explained in detail under para 1.8 “Greenbelt Development” of the said Environmental Management Plan.

Para. 16.2 In terms of clause 1.5 of the Environment Management Plan submitted to KSPCB, the Corporate Debtor is required to leave open space for vehicle maintenance area to be designed to prevent contamination of ground water by accidental spillage of oil.

Para.16.3 In terms of clause 14.1 of the of the Environmental Management Plan submitted to KSPCB, the Corporate Debtor is also required to maintain an “assembly point for the employees in the open space near the Plant”.

All the above-mentioned area which are required to be utilised in terms of the Environment Management Plan

and no structure can be constructed on the designated land area which itself comprises of approx. 19 acres and the same though acknowledged by the Applicant itself in its report has not considered by the Applicant while computing the total area utilised by the Corporate Debtor for reasons best known to the Applicant. This clearly is done purely with an intent to serve its own purpose without appreciating the order statutory requirements which the Corporate Debtor is required to comply with and the same cannot be on the whims and fancies of the Applicant.

Para. 17. The Respondents No. 1 submits that as far as paragraph nos. 17 and 18 are concerned, the Applicant is referring to series of communication between the Applicant's management team and the Respondent with regard to the subject matter. It is important to highlight that the Applicant has deliberately concealed the fact that it was the Respondent who has been time and again attempting to reach out to the Applicant so that there is clarity on the subject matter which would enable the respondent to provide a clear picture to the COC member and the prospective Resolution Applicants. It is important to refer to the minutes of the said personal meeting between the Respondent and authorised representative of the Applicant whereby it was also agreed to have a joint inspection which was required to be conducted on 19 November 2021 and a follow-up meeting was fixed for 24 November 2021 at 11 am as has also been duly recorded in the said minutes. Even thereafter, the Respondent has been repeatedly sending the Applicant emails seeking time for a personal discussion. However, for reasons best known to the

Applicant, the said meeting was never called for and the Applicant thereafter has also refrained from communicating with the Respondent Resolution Professional and rather has chosen to move the present Application before this Hon'ble Adjudicating Authority which is merely with an intent to waste judicial time. I reserve the right to rely on such other documents and correspondences in case necessary during the course of the proceedings.

Para. 18 The respondent No. 1 as far as paragraph no. 19 is concerned, the contents are denied in toto and are clearly contrary to the facts as is evident from record. Without prejudice, it is submitted that as per the available records of the Corporate Debtor, a detailed report shows utilisation of land to the extent of 86.68 acres out of the 100 acres of land and also bears the pictures of site. Even if one were to consider the report forming part of the Application itself, it is evident that in spite of their architect computing the area such as Garden 1, Garden 2, Garden 3, Tree Plantation park and buffer zone which works out to 19.17 acres, the Applicant has deliberately not considered the said area and thereafter alleges that the Corporate Debtor has underutilised the land and the utilisation is only to the extent of 30.91% which ought to have been a minimum of 50% as per the Applicant. Applicant has clearly ignored the applicable laws and regulations under of the pollution control Board which warrants the Corporate Debtor to leave open space which works out to 19.17 acres as per Applicant's own calculations. This itself takes the utilisation of land to 50.28% (*without prejudice to the fact that the entire land has been occupied to the*

extent of 86.68 acres i.e. 86.68%) and hence, based on the contents of the Application itself the so called alleged claim of under-utilisation and issuing a notice upon the Corporate Debtor falls flat and evidences that the present application itself is infructuous by conduct of the Applicant itself. Furthermore it is also important to note that any are open space reserved as am "assembly point", garden, open storage space, Parking area for vehicles and trucks, utility area etc. are always to be treated as part of "utilisation of land" and cannot be ignored since these spaces are intrinsically linked with its usage from the purpose of operations of the Corporate Debtor. I reserve the right to rely on such other documents and correspondences in case necessary during the course of the proceedings. Be that as it may, it is important and relevant to bring on record the extract of a report as available in the records of the Corporate Debtor which shows that there are detailed calculations of entire manufacturing site whereby the total utilisation is shows as 86.68 acres i.e. 86.68% of the 100 acres of subject land allotted to the Corporate Debtor which is much more than the threshold requirement of 50% utilisation.

Para. 19. It is also not out of place to bring on record the letter of allotment dated 08 July 2010 issued by the Applicant to the Corporate Debtor whereby the land utilisation requirement is merely 30%. Hence it is clear and evidence that even on this count the entire Application is baseless and devoid of any merits and ought to be quashed with exemplary costs for wasting judicial time at a time critical moment of approval of resolution plan which has been filed before this Hon'ble Adjudicating

Authority much prior to the Applicant's present application.

Para. 20. The Respondent No. 1 submits that, as far as paragraph no. 20A is concerned, the contents are entire baseless and misconceived. The conduct of the Applicant only goes to show that their sole intent is to mislead this Hon'ble Adjudicating Authority and derail the resolution plan process.

Para. 21. The Respondent No. 1 submits that, as far as paragraph No. 20 B is concerned, the contents only goes to reinforce the contention of the Respondent that the sole intent of the Applicant is to derail the resolution plan process and thereby jeopardise not only the interest of stakeholders but especially creates a threat on the employment of over 300 workmen who would lose their livelihood if the resolution plan approval process fails. It is also relevant to note that the subject land is at a far-fetched rural area and the workmen have no other alternative options for securing their jobs. Hence while there is claim or dispute that the Applicant is the owner of the subject land, it is clear that the Applicant wants to derail the process as it is neither extending the lease period nor has come forward with an estimated sale amount so as to enable the prospective Resolution Applicant to consider the same and ensure that the Corporate Debtor is revived. The Applicant is also in violation of the terms of the allotment itself which gave the right to the lessee i.e. the Corporate Debtor in the present case to buy out the subject land from the Applicant upon completion of two years of commencement of business operations. It is now after a

decade the Applicant is challenging the utilisation of the said land with sole intent to extort money from the prospective Resolution Applicant. It is clear that if the Applicant continues with its current conduct, the Resolution Plan would fail as nothing remains in the Corporate Debtor and would trigger loss of livelihood of 300 workmen which would impact approx./ 2000 people including their family members, while the secured lenders may not even be in the position to recover 5% of their admitted claims if it goes under liquidation. With regard to the contention of the Applicant that merely 30.91% of the land has been utilised by the Corporate Debtor, the same has been dealt in detail hereinabove detailing as to how such contention of the Applicant is incorrect and false and is clear that the Applicant has approached this Hon'ble Adjudicating Authority with unclean hands.

FINDINGS

17. In the light of the above rival contentions of both parties, the issues that needs to be decided in the above Interlocutory Application are as follows:
    i. *Whether the reliefs sought by the Applicant/KIADB are capable of being granted by this Tribunal?*
    ii. *Whether the subject matter of property can be treated as the asset of the Corporate Debtor?*

    Before deciding the above issues, it is important to briefly mention the undisputed facts in this case.

18. It is an admitted fact between the parties that the Applicant/KIADB has allotted to the Corporate Debtor landed property of 100 acres situated in Survey Nos. 225(P), 226(P), 229(P), 237(P), 238(P) & 239(P) of Allyabad Block-II, Industrial

Area of Allyabad Village, Allyabad Hobli, Bijapur Taluk, Bijapur District, under registered Lease-Cum-Sale-Agreement dated 12.08.2010 for a period of 10 years commencing from 12.08.2010 to 11.08.2020. It is also an admitted fact that the lease was neither extended nor terminated by the KIADB due to moratorium kicked in from the date of admission of the Company Petition on 14.02.2020.

19. Therefore, the Applicant/KIADB filed the above Application for the above reliefs contending that the lease period has been expired and the Lessee/Corporate Debtor i.e. ETCO DENIM PVT. LTD. has committed certain breaches with regard to the complete utilization of the land allotted to them etc. and therefore the above referred property cannot be included as an asset of the Corporate Debtor in the Resolution Plan. The Applicant/KIADB is seeking declaration from this tribunal that the lease property is not an asset of the Corporate Debtor and also to restrain the Resolution Professional and the Corporate Debtor from taking any action in relation to the lease property.

20. In order to decide the above controversy, it is important to carefully examine the following clauses in the terms and conditions of the registered Lease Deed.

"Clause 1(c) - The conveyance of the Schedule Property is on lease for a period of TEN years.

Clause 10(2) - The lessee shall utilize not less than 50% of the schedule property and in accordance with the proposals furnished by the lessee to the lessor in the application for allotment of land and project report submitted to SHLCC/ SLSWCC/ DLSWCC/ Allotment Committee.

Clause 11(3) - In case the lessee/allottee goes into liquidation or winding up proceedings without implementing the project fully, the lease-cum-sale agreement shall stand terminated.

Clause 12(i) - The original applicant/ partners/ promoter directors/ shareholders shall continue to hold a minimum of 51% interest/shareholdings in the lessee's firm/company till the end of the lease period/execution of sale deed, whichever is later.

Clause 14 - The lessor shall be entitled to determine the lease hereby granted and to resume the possession of the whole of the Schedule Property or any part thereof, including existing structures if any thereon, whenever there is breach of any of the covenants and obligations contained herein by the lessee, after due notice to the lessee or after various stages as contemplated in the clause-10 supra are complete.

Clause 16 - Notwithstanding any such default the lessor may at its discretion extend the period of lease at the cost and expense of the lessee on payment of rent mentioned herein before and subject to the same covenants, provisions and stipulations herein contained.

Clause 17 - The lessor may at its discretion consider the request of the lessee for the transfer of leasehold rights of schedule property in favour of a new entrepreneur as identified by the lessee during the currency of lease, imposing such terms and conditions as decided by the lessor from time to time in this regard, provided that such transfer shall be permissible if the Lessee has substantially implemented the project.

Clause 22 - As soon as it may be convenient the lessor will fix the price of the said premises at which it shall be sold to the lessee and communicate it to the lessee and decision of the lessor in this regard will be final and binding on the lessee. The lessee shall pay the balance of value of property. If any, after adjusting the allotment consideration and earnest money deposit excluding rents and interest and penalties and maintenance charges levied and paid by the lessee within one month from the date of receipt of communication by the lessor. On the other hand, if any sum is determined as payable by the lessor to the lessee after adjustment as aforesaid, such sum shall be refunded the lessee before the date of execution of sale deed.

Clause 23 - The lessor shall sell the schedule property to the Lessee during the currency of the lease period or at the end of TEN years referred to in Clause 1(C) or the extended period, if any, if the Lessee has performed all the conditions herein contained and committed no breach thereof. All attendant expenses in connection with the sale, such as stamp duty, registration charges etc., shall be borne by the Lessee."

21. It is very clear from the careful reading of the above clauses in the terms and conditions that the above registered Lease Deed is not a mere Lease Deed and is a registered Lease-Cum-Sale-Agreement under which the Corporate Debtor has already acquired possessory legal rights under the registered document. It is also very clear from the above terms that the Lessee has a right to ask for extension of the lease or for purchasing the above property with absolute rights at the price determined by the Corporation. In fact, the Corporate Debtor has already requested the Applicant/KIADB to fix the price of the land that was allotted to them by means of letter dated 18.10.2016 so as to obtain Sale

Deed by them for which the Applicant/KIADB vide their letter dated 28.11.2016 informed the Corporate Debtor that the board of the Applicant/KIADB has not yet fixed the final price to the said industrial area and hence the Sale Deed cannot be considered at this stage. Of course, the Applicant/KIADB also issued notice under Section 34 B of KIAD Act of 1966 to the Resolution Professional to remedy the alleged breaches said to have been committed by the Corporate Debtor in their notice.

22. Therefore, it is very clear from the above terms and conditions of the Lease Deed as well as the various correspondence relied by them that the Corporate Debtor is in physical possession and enjoyment of the land allotted to them under the above registered Lease Deed and both parties are alleging breach of terms and conditions of the registered Lease-Cum-Sale-Agreement against each other and the Applicant/KIADB could not evict the Corporate Debtor due to kicking of moratorium.

23. It is well settled proposition of law that no person who is in settled possession of any immovable property can be evicted by force except under due process of law. Since the Applicant/KIADB and the Corporate Debtor are alleging commission of breach of terms and conditions of the above registered Lease-Cum-Sale-Agreement against each other, the remedy of the Applicant/KIADB is only to approach a competent Civil Court for the reliefs claimed by them in the present Interlocutory Application as per the law laid down by the Hon'ble Supreme Court in Civil Appeal No. 9170 of 2019 in the matter of M/s Embassy Property Developments Pvt. Ltd. Vs. State of Karnataka & others.

24. Therefore, it is hereby held that whatever legal rights the Corporate Debtor had already acquired under the above registered

Lease-Cum-Sale-Agreement shall continue to vest with the Resolution Applicant and the Resolution Applicant is entitled to continue in possession of the property till the Resolution Applicant is evicted under due process of law. It is needless to mention that the Resolution Applicant is also at liberty to approach the KIADB for either extension of the lease period or for purchasing the property which can be considered by KIADB at their discretion as per their rules.

25. Both the above issues are answered accordingly and the above Interlocutory Application 957/2022 is rejected and disposed of with the above observations and findings.

Sd/-	**Sd/-**
ANURADHA SANJAY BHATIA	**H.V. SUBBA RAO**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**