

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 170 of 2020

(Arising out of Impugned Order dated 31.07.2020 passed by the Adjudicating Authority/National Company Law Tribunal, Delhi Bench in Company Petition No. 81/241-242/ND/2020)

IN THE MATTER OF:

MBev Spirits Pvt. Ltd.

Having its registered office at:

**F-28/5, Okhla Industrial Area,
Phase-II, New Delhi-110020.**

...Appellant

Versus

- 1. Mam Chand Goyal
S/o Late Shri J.B. Goyal,
R/o 169, Sukhdev Vihar,
New Delhi-110025** Respondent No.1
- 2. M/s Windsor Buildwell Pvt. Ltd.
169, Sukhdev Vihar,
New Delhi-110025** Respondent No.2
- 3. Uttar Development Private Limited
F-28/5, Okhla Industrial Area,
Phase-II, New Delhi-110020.** Respondent No.3
- 4. Anil Kejriwal,
R/o Flat No. 1004A, DLF Aralias,
Sector 42, Gurugram-122009.** Respondent No.4
- 5. Ritwik Kejriwal,
R/o 71, Friends Colony, West
New Delhi-110065** Respondent No.5
- 6. Harshvardhan Parwal,
R/o M-31, Friends Colony, West
New Delhi-110065** Respondent No. 6

Company Appeal (AT) No. 170 of 2020

**7. Ms. Rama Yadav,
R/o B-2, Pocket – 9A,
DDA HIF Flat, Jasola Vihar,**

Jamia Nagar, New Delhi-110025 Respondent No. 7

**8. M/s PDA International Pvt. Ltd,
R/o B-2, Pocket – 9A,
DDA HIG Flat, Jasola Vihar,**

Jamia Nagar, New Delhi-110025 Respondent No. 8

**For Appellant: Shri Krishnendu Datta and Shri Gursat
Singh Vachher, Advocates.**

**For Respondents: Shri Virender Ganda, Sr. Advocate (R-1
& 2) Shri Anand Sengar, Advocate,
Shri Prashant Mehta and Shri Aaryav
Mehra, Caveators (R-1 & 2)**

**Shri Siddarth Bhatli and Shri Abhishek
Chaudhary, Advocates (R-5,6,7 & 8).**

JUDGEMENT

(Through virtual mode)

(Date: 17.3.2021)

{Per Dr. Alok Srivastava, Member (T)}

1. This appeal has been filed under Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter called the “IBC”) by the Appellant who is aggrieved by the order dated 31.07.2020 (hereinafter referred to as the ‘Impugned Order’) the National Company

Company Appeal (AT) No. 170 of 2020

Law Tribunal, New Delhi, Bench-V (hereinafter referred as the “NCLT”) in CP No.81/241-242/ND/2020. The Appellant MBev Spirits Pvt. Ltd. is a private limited company registered under the provisions of the Companies Act, 2013 and is engaged in the business of distillation, brewery, bottling, manufacturing etc. Mam Chand Goyal and M/s. Windsor Buildwell Pvt. Ltd, are arrayed as Respondents No. 1 & 2 in this appeal, and M/s Uttar Development Pvt. Ltd., Anil Kejriwal, Ritwik Kejriwal, Harshvardhan Parwal, Ms. Rama Yadav and M/s. PDA International Private Limited have also been included as respondents in the appeal.

2. The operative part of Impugned Order which is the bone of contention reads as under:-

“ 48. But the manner in which the respondent no. 2 to 7 acted and got the lease deed executed and registered for 29 years whereas the unregistered lease deed was for five years that compelled us to form an opinion that act of respondents no. 2 to 7 are prejudicial to the interest of R-1 company and in order to protect the interest of R-1 Company, it is necessary to pass the following order that on the basis of the unregistered lease deed dt 03/12/2019 and Registered lease deed dt 29/06/2020 no construction work shall be done and no new

thing shall be installed over the land in question by the R-5 or by any other persons on or their behalf and the possession shall remain with the Respondent no. 1 company during the pendency of this application and neither respondent no. 2 to 7 nor the petitioners shall interfere with the possession of the R-1 company.”

3. The brief facts of the case as presented and argued by the parties are as hereunder:-

- (i) Mam Chand Goyal (Respondent No.1), M/s. Windsor Buildwell Pvt. Ltd. (Respondent No.2), Anil Kejriwal (Respondent No.4), Ms. Rama Yadav (Respondent No.7) and M/s. PDA International Private Limited (Respondent No.8) are shareholders of Uttar Development Pvt. Ltd. which is Respondent No. 3 in the present appeal. Ritwik Kejriwal (Respondent No.5), Harshvardhan Parwal (Respondent No. 6) are directors in MBev Spirits Pvt. Ltd. and also directors in the Respondent No. 3 company Uttar Development Pvt. Ltd.
- (ii) Respondent No. 3 Company is owner of the land situated in Village Mahuakhera Ganj, Tehsil-Kashipur, District Udhham Singh Nagar, admeasuring 26.76 hectares approximately.

The said land was purchased and acquired by Respondent no. 3 Company mainly in the year 2007 and includes some land purchased sometime later. This Company entered into a Lease Agreement dated 03.12.2019 with the Appellant for leasing total land area of 26.76 hectares for a period of five years beginning from 1.12.2019, which was extendable up to thirty years, in pursuance of a resolution dated 3.12.2019 passed by the Board of the Company. The Board Resolution authorized Sanjay Singh, s/o Late Shri Ganga Prasad Singh as Authorized Representative to execute the lease agreement on behalf of Respondent no. 3.

- (iii) With the objective of setting up a distillery and brewery plant on the said land the Appellant made an application to the District Excise Officer, Rudrapur, Distt. Udham Singh Nagar to obtain license for the plant. The Respondent No.1 filed false and frivolous complaints with police authorities and the District Administration, Kashipur threatening the Appellant to hand over the land under question to him. After failing in his efforts to get hold of the said land, Respondent no. 1 has filed a company petition to pressurize the Appellant

and succeeded in obtaining a restraining order from the NCLT.

- (iv) The Learned Counsel for the Appellant has submitted that the Appellant Company has given the Respondent No.3 Company a sum of Rupees 3 crores as Interest Free Security Deposit as consideration for the said lease deed. Consequent to the first lease agreement dated 03.12.2019, the Appellant and Respondent No.3 Company executed a second lease deed on 25.6.2020 (which was registered on 29.06.2020) for a lease period of 29 years. He has claimed that Appellant made preparations by procuring raw material, machinery etc. for the said project and also obtained in-principle approval from the Uttarakhand State Government for the project and all this was in the interest of the Appellant company. He has pleaded that while the NCLT, Delhi, Bench-V, in the Impugned Order arrived at a finding that no prima-face case for relief was made out, it still went ahead to give a restraining order for any construction work or installation of machinery on the leased land and kept the possession with Respondent No. 3 Company during the pendency of Company Petition No.81 of 2020 in the NCLT. The

Appellant's Learned Counsel has argued that the lease deed in question was executed on 03.12.2019 whereas the Company Petition was filed on 23.06.2020 and therefore the Company Petition is barred under Section 242(2)(g) of the Companies Act, 2013, as has been held in **K. Santhakumari vs. K.J. Trading Co. Pvt. Ltd. [R.F.A. No 160 of 2004 (D)]** by the Hon'ble Kerala High Court. He has also cited the following judgments in favor of the Appellant's case-

(1) V.J. Thomas Vettom and Ors. Vs. Kuttanad Rubber Co. Ltd. & Ors. ILR 1938(1) Kerala 501.

(2) Amritsar Swadeshi Woollen Mills Pvt Ltd vs. Vinod Krishan Khanna and Ors. [2019] 214 Comp Case 8.

(3) Sangramsinh P. Gaekwad & Ors. Vs. Shantadevi P. Gaekwad (Dead) thr. LRs. & Ors. AIR 2005 SC 809

- (v) The Learned Counsel for Respondent-1 and Respondent-2 has argued that that the Board Resolution of Respondent-3 Company dated 03.12.2019 is fabricated because no notice was sent for the said meeting to Respondent-1 and Respondent-2 and the minutes of this purported Board meeting was never prepared and circulated. He has also submitted that

the Appellant is a related party of Respondents nos. 4, 5, 6, 7 and 8 and Respondent-4 is a common Director in Appellant company and Respondent-3 company. Respondent-4 and Respondent-5 (who is the son of Respondent-4), each hold 50% shares in the Appellant Company. He has also stated that consent of the Board of Respondent-3 Company for executing the lease deed since it was a Related Party transaction was not obtained which is breach of Section 188(1) (d) of the Companies Act, 2013 nor any ratification of the Board Resolution was done by its Board members and shareholders. He has claimed that the non-disclosure of interest by Respondent-4 in Appellant Company tantamount to harming interest of shareholders of the Respondent-3 Company and is in contravention of Section 188(1)(c) of the Companies Act, 2013.

- (vi) The Learned Counsel for Respondents Nos. 1 & 2 has also pointed out that the lease period in the lease deed dated 03.12.2019 is 5 years and that the lease deed was not registered, which is in contravention to Section 17(1)(d) of the Registration Act, 1908. Therefore, the Lease Deed is *non est* in view of Hon'ble Supreme Court Judgment in **Anthony**

vs. K.C Ittoop and Sons and Others (2000) 6 SCC 394.

The lease deed is also in violation of Shareholder's Agreement dated 23.7.2007 of the Respondent – 3 Company and it erodes the substratum of Respondent-3 Company.

- (vii) The Ld. Counsel for Respondents 1 & 2 has also raised the issue of discrepancy in the area of the leased property as included in pages 42-43 of Appeal and page 15 of Appeal. He has argued that the Appellant had stated that the payment of Rupees 3 crores to Respondent-3 Company as Interest Free Security Deposit as consideration for the lease deed dated 25.6.2020 (even though the lease deed dated 25.6.2020 does not show any such contemplated payment) is an eyewash in reality, as the said amounts were received in an unauthorised bank account of Respondent-3. These amounts have been siphoned off through cheque payments to M/s PDA International Pvt. Ltd. (Respondent no. 8), which is clearly discernible from the bank statements attached at Annex-4 (pg 60-63 of the Appeal). The Account No. 251141087889 in IndusInd Bank was opened behind the back of Respondents No. 1 and 2 to carry out such fraudulent transactions by keeping them in the dark, as no such bank account was

maintained by Respondent-3 Company with IndusInd Bank prior to the present dispute. He has reiterated that Respondent-4, in his capacity of Director of Respondent-3 Company, in collusion with Respondent no. 5 to Respondent no-8, acted fraudulently and passed Board Resolution dated 03.12.2019 for executing lease deed when the quorum of the Board was incomplete and all the directors were not given notice of the meeting.

(viii) The Ld. Counsel for Respondents nos. 4 to 8 has broadly supported the contentions made by the Ld. Counsel for the Appellant.

4. It may be mentioned that the Company Petition No. 81/241-242/ND/2020 which has been filed by the Respondents 1 and 2 (as petitioners) under Sections 241 and 242 of the Companies Act, 2013 is still under consideration of the NCLT, New Delhi Bench – V. There are issues in this company petition which are still to be adjudicated upon by NCLT. We are restricting ourselves to examining, in the present appeal, the Impugned Order dated 31.07.2020.

5. It is not disputed that Respondents No.1, 2, 4, 5, 7 and 8 are shareholders in the Respondent No 3 Company. Anil Kejriwal (R-4) and his son Ritwik Kejriwal (R-5) are shareholders in both the companies. Anil Kejriwal (R-4) holds directorship in both Uttar Development Pvt. Ltd. (R-3) and MBev Spirits Pvt. Ltd. (Appellant) companies.

6. The legality of the Board Meeting dated 03.12.2019 of Respondent no. 3 Company if it was held in accordance with legal provisions or there was any collusion or fraudulent action in holding the Board Meeting is an issue, as alleged by the Respondents no. 1 & 2. We have perused the notice and minutes of this Board Meeting. It may be mentioned that execution of the lease deed dated 03.12.2019 was done pursuant to a resolution passed in the Board meeting dated 03.12.2019 of the Respondent- 3 Company.

7. The Appellant has claimed that under the provision of Section 167 (1)(b) of the Companies Act, 2013, Mam Chand Goyal was no longer a director of the R-3 Company as he had been failing to attend the board meetings in the last 12 months without seeking leave of absence of the Board. Hence it is claimed there was no requirement to send him notice for the Board Meeting dated

Company Appeal (AT) No. 170 of 2020

03.12.2019. Now before this Tribunal the Appellant has mentioned that “Respondents have not been regular with the board meetings despite the service of notice numerous times due to which notice about the Meeting dated 03.12.2019 was provided but the meeting was not attended by the Respondents no. 1 and 2”. Respondents no. 1 and 2 have stated in their reply (para 9, page 5 of Reply of Respondents no. 1 and 2) that no notice was sent to Respondents No. 1 and 2 for the Board Meeting. Further no documents have been presented by the Appellant to show that such notice was served upon the Respondent No. 1. The issue is thus open for decision in the petition pending. The Ld. Counsel for Respondents no. 1 & 2 have cited the judgment in **Parmeshwari Prasad Gupta v. Union of India AIR 1973 SC 2389** wherein the of Hon’ble Supreme Court held the following:

“notice to all the directors of a meeting of the board of directors is essential for the validity of any resolution passed at the meeting. Where no notice is given to one of the directors of the company, the resolution passed at the meeting of the board was invalid”.

8. The other issue is whether leasing and alleged transfer of possession of the land in question was done by following the

Company Appeal (AT) No. 170 of 2020

applicable laws and regulations. Anil Kejriwal is a director in both the companies – Uttar Development Pvt. Ltd. and MBev Spirits Pvt. Ltd. Hence he is a related party. Moreover, he and his son Ritwik Kejriwal (Respondent no. 5) are the only two shareholders in Appellant Company, each holding 50% of total shares. Compliance of Section 188(1)(d) of the Companies Act, 2013 is seriously in dispute. The net gainer from such an act of Respondent No. 4 Anil Kejriwal is the Appellant company which is owned jointly by him and his son Ritwik Kejriwal. Another fact is that Appellant Company was incorporated just on 4.11.2019 (See page 188 of Appeal), hardly 30 days before the execution of Lease Deed dated 3.12.2019.

9. The lease deed executed on 03.12.2019 fixes annual rent and mentions that the lease will be of 5 years. It has not been registered. This non-registration is in contravention of Section 17(1)(d) of the Registration Act, 1908. Also, the lease deed should have been executed on stamp paper of adequate value in accordance with Schedule IA, Entry 35(ii) read with Rule 15 of the Delhi Stamp (Prevention of Under Valuation of Instruments) Rules, 2007 whereas it has been executed on stamp paper of Rupees 100 value. Moreover, it has been pointed out by the Respondents no. 1

and 2, the stamp paper was purchased on 02.12.2019 whereas the purported Board Resolution was passed on 03.12.2019. The Ld. Counsel of Respondents no. 1 and 2 has relied on the judgment of Hon'ble Supreme Court in **Anthony vs K C Ittoop And Sons and Ors. on 21 July, 2000** wherein the Hon'ble Apex Court looked at the question whether a lease could be made by an unregistered instrument when such deed is compulsorily registerable and held that such a lease deed would be null and void. This ratio in this judgment supports the argument of the Respondents no. 1 & 2.

10. The claim of Appellant is that the possession of the said land was taken on the same date when the resolution was passed and lease deed signed, which is 03.12.2019. The related parties, unseemly haste in holding the board meeting, signing the lease deed and alleged taking of possession of the said land indicates more an effort for completing paper work, than real bonafide transaction. This does provide a pointer to the reason why Respondents 1 and 2 were kept out of the picture in this process. The claim of the Appellant that the land lease is for the benefit of the Respondent No. 3 Company keeping the interest of the shareholders is suspect.

11. We now turn our attention to another point raised by the Respondents No. 1 & 2 that while the original lease deed (though unregistered and executed on a lower value stamp paper) was for entire land admeasuring 26.76 hectares for a period of 5 years starting from 1st December 2019 (pp. 52-55 of the Appeal, para 1 and Schedule of the property) the lease deed executed (after filing of Company Petition dated 23.06.2020) on 25.06.2020 (see pp 64-95 of the Appeal) shows the leased land area as 5.659 hectares and the period of lease as 29 years. These changes could have held good had there been a fresh Board Resolution to that effect. On this point no document has been put forward by the Appellant to show any such action by Respondent No. 3 Company, and hence these discrepancies further reinforce question about the legitimacy of the lease deed. It is surprising to see that the Applicant is relying on one Board Resolution which claims even the draft of lease deed to be approved, two lease deeds were created with so much disparity, especially regarding term.

12. Another point raised by the Appellant relates to the debarment that would operate under Section 242(2)(g) of the Companies Act, 2013 since the issue of the legality of the lease deed was raised after a lapse of more than three months after the

execution of the lease deed on 03.12.2019. The ratios in **K. Santhakumari vs. K.J. Trading Co. Pvt. Ltd. [R.F.A. No 160 of 2004 (D)]** and other related judgments which have been cited, reiterate the legal position enumerated in Section 242(2)(g) *ibid* - that the issue should be raised within a period of three months for any relief. The question of *lis pendens* will need consideration as facts indicate hurried execution and registration of lease deed after Company Petition was filed. We have prima facie found many gaps in the compliance of various legal requirements in the execution of the lease deeds. We are of the prima facie opinion that in the facts of the matter, Section 242(2)(g) would not come to the rescue of the Appellant.

13. The Appellant's argument that the Interest Free Security Deposit was given to the Respondent No. 3 Company does not appear to be done with clean and *bonafide* intention. The amounts are seen to have been deposited in an account in IndusInd Bank which was opened without any proper authorization of the Company's Board and behind the back of other directors. This further provides strength to the doubt that the lease deed of the said land and transfer to Appellant was done with malafide intentions and with unseemly haste.

14. The contention of Ld. Counsel of Respondents No. 1 & 2 is that Section 180 of the Companies Act, 2013 was contravened. Section 180, which is regarding the requirement of a special resolution since the land to be leased and transferred was 100% of the land owned by the Company has also not been complied with. The validity of the Resolution dated 3.12.2019 is also under issue in context of agreement dated 23.7.2007 which required presence of Respondent No. 1 in the Board Meeting dated 3.12.2019 as per clause 5 and clause 7.

15. Various acts of commission and omission in the holding of Board Meeting dated 3.12.2019, execution of the two lease deeds by the Appellant, the lack of proper compliance of various legal requirements, non-disclosure of interest by Anil Kejriwal, the common director in both the companies are sufficient reasons to cast a strong doubt on the lease deeds entered into by the Respondent No. 3 Company and the Appellant.

16. The purpose of looking at various issues connected with the signing of the lease deeds dated 03.12.2019 and 25.06.2020 and the connected circumstances has been a limited one- i.e. the interest of the company itself. The act of creating document after document of lease deed in doubtful circumstances with common director hobnobbing on both sides and declaring possession taken, and facts and documents as discussed above, are sufficient for NCLT to step in to protect property of the company from forces within, in the interest of the Company and its shareholders. Transfer of possession would require animus and also corpus. Common Directors - Respondent No. 4, with or without his son present on land of the Company would not be sufficient to show animus. Further evidence would be required. Here it appears to be instant paper possession. Fault cannot be found if NCLT did not accept the claim of possession of Appellant and passed orders as mentioned *supra*. We find that the Appellant has not been able to provide convincing answers. The transfer of entire substratum of Company would adversely affect the interests of its shareholders. We, therefore, find the order passed by the NCLT, Delhi Bench V in interest of the Company and consequently dismiss the appeal. There is no order as to costs.

17. Observations made by us in this Judgment are prima facie and will not affect the Company Petition which is yet to be decided.

(Justice A.I.S. Cheema)
Member (Judicial)

(Dr. Alok Srivastava)
Member(Technical)

New Delhi
17th March, 2021

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