

**IN THE NATIONAL COMPANY LAW TRIBUNAL
ALLAHABAD BENCH AT ALLAHABAD**

CP.NO(IB) 77/ALD/2017, IA No. 193/2018

*(under Section 60 (5) (b) & (c) of
Insolvency and Bankruptcy Code,
2016) (r/w Rule 34 of the NCLT Rules)*

IN THE MATTER OF:

**IDBI BANK
VERSUS
JAYPEE INFRA TECH LTD.**

AND

IN THE MATTER OF

M/s Devyani International Limited

(CIN: U15135DL1991PLC046758)

THROUGH MR. VARUN PRABHAKAR

SR. MANAGER (LEGAL)

HAVING REGD. OFFICE AT:

F-2/7, OKHLA INDUSTRIAL AREA, PHASE-I

NEW DELHI-110020

AND

M/s SPINGO FOODS PVT. LTD.

43, PUSHPANJALI BAGH DAYALBAGH,

AGRA (UP)-282005

..... Applicant/ Objector

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JUDGMENT/ORDER DELIVERED ON 18.09.2018

CORAM : **SH. V.P SINGH, MEMBER (J)**
MS. SAROJ RAJWARE, MEMBER (T)

For the Applicant/Objector : **Sh. Amar Khara (Adv)**
For the Resolution Professional: **Sh. Sudeep Harkauli (Adv)**
& Sanjay Bhatt (Adv)

PER SE : **SH. V.P SINGH, MEMBER (J)**

ORDER/JUDGMENT

1. This Interlocutory Application has been filed under Section 60 (5) (b) &(c) of the Insolvency and Bankruptcy Code, 2016 read with Rule 34 of the NCLT Rules, seeking declaration regarding two agreements of LHS and RHS entered into by the RP/ Corporate Debtor with Spingo Foods Pvt. Ltd for running/opening of similar restaurants on Yamuna Express Way, within 55 Km and 110 Km of Express Way stretch ,as null and void and has no legal effect. Further, declaration has been sought against RP/ Corporate debtor in awarding to similar restaurants on Yamuna Expressway within 55 Kilometre and 110 Kilometre of Expressway stretch, **without offering the first right to applicant/ objector, is illegal and is of no legal value.** Petitioner has also sought further direction to give/extend the first right of offer/ refusal of these two additional/similar LHS and RHS Yamuna Expressway Restaurants.
2. Petitioner has stated that the corporate debtor admittedly had entered into with the applicant/ objector two sublease agreements, both dated 4th April, 2014 (i) in respect of sub lease ,piece of a land admeasuring 741.5 square meter, in terms of built up area located at kilometre 107 (near Mathura)on LHS across the Yamuna Expressway from Greater Noida to Agra (hereinafter being referred to as “LHS Agreement”) and (ii) in respect of sub-lease of a piece of land admeasuring 741.5 Sqm in terms of built-up area

located at Km 100.80 (near Mathura) on Right Hand Side across the Yamuna Expressway from Greater Noida to Agra (hereinafter being referred to as “RHS” Agreement”), authorizing, enabling and entitling the Applicant / objector to setting up, running and managing the operations of Restaurants for the commuters, users, public at large driving on and using the expressway (on both sides, i.e. LHS and the RHS).

3. It is further stated that the said sub-lease agreements LHS and RHS were granted for an initial period of 20 years with an option to renew the same for another term of 20 years, subject to terms and conditions as mutually agreed, as per clause no. 2.1 thereof.
4. Applicant has stated that he has the capacity, standing, goodwill and reputation of running F& B outlets and, thus, the Agreement were entered into with the objective of maximizing, optimizing and augmenting the business revenues of both Devyani International Limited and both the agreements are legally valid, subsisting and fully enforceable and both the parties are duty bound to lawfully and strictly enforce and implement the terms and conditions governing the same.
5. Applicant has stated that Clause 5.13 of both these Agreements, which have been breached consciously, with ulterior motives, collusively by the Corporate Debtor and the RP, Mr. Anuj Jain.
6. Applicant has stated that during the pendency of Insolvency Resolution Process and violating the terms scope of the moratorium passed in the order dated 9th August, 2018 in Insolvency Petition in utter disregard of the express terms of LHS and RHS agreements explicitly Clause 5.13 of the agreement within 55 Kilometer to 110 stretch of expressway has been allotted virtually on a sub-lease basis to the said newly incorporated entity M/s Spingo Foods Pvt. Ltd without giving any notice or offer of first refusal to the Applicant/

Objector which acts of their has caused severe prejudice to the rights/ interest business of the Applicant/ Objector.

7. It is further stated in the application that prior to the filing of the present application the applicant/ objector has taken to the issue with RP/ Corporate Debtor in writing through e-mail dated 25th April, 2018 and 22nd May, 2018 addressed to Mr. C M Tickoo of M/s JIL (the Corporate Debtor) followed by a notice dated 22nd May, 2018 addressed to the RP Mr. Anuj Jain. While, there has been no response from the Corporate Debtor to the emails transmitted, a grossly vague, evasive, manipulative, factually incorrect and manipulatively fabricated response dated 30th July, 2018 has been received from the IRP extending wholly baseless, perverse & materially incorrect pleas.
8. In the circumstances petitioner has filed this intervening application under Section 60 (5) (a &b) IB Code for declaration of the two agreements of LHS and RHS entered by the RP/ Corporate Debtor with Spingo Food Private Limited for running and maintaining the similar restaurants on Yamuna expressway, within the 55 km and 110 km of the Expressway stretch, as null and void and of no legal effect enforcement and consequences.
9. During the argument, applicant has laid emphasis on the representation given to resolution professional, which shows that the applicant has given representation dated 22nd May, 2018 to the resolution professional wherein he has stated that the alleged agreement is in breach of DIL's right of first refusal in both of aforementioned agreements have occurred and being initiated during the Corporate Insolvency Resolution Process. In view of the same as management of JIL vests with IRP therefore request was made to do away with the wrongs and misdeeds as highlighted by them.

10. Learned counsel for the applicant has also emphasis on the reply received by JAYPEE Infratech Corporate debtor. It is stated in the reply that “We have gone through your letter as well as the terms of Sub Lease Agreement dated April 4, 2014 as covered under various clauses of the said Agreement. In particular, we have also reviewed the Clause 5.13 which is referred to in your above referred letter. For clarity sake and for your ready reference, clause 5.13 of the aid agreement is reproduced below-
- Clause 5.13: “JIL (the Corporate Debtor) does not provide exclusive right to DIL (the Applicant/ Objector) for setting up and operate Restaurant as per terms of Sub-Lease Agreement and DIL shall have no objection if similar business of Restaurant/ Catering is opened in the vicinity of Demised Premises, if it is felt by JIL that the existing arrangement with DIL is insufficient or needs additional facility in the interest of the public. **DIL shall, however, *always* be given the Rights of First refusal, if such additional and similar business of branded Restaurant/ branded Catering is envisaged and offered by JIL in 55 KM to 110 KM** stretch of expressway, as marked in the Location Plan and Map enclosed as Annexure –A.
11. It is further stated in the reply that JIL has not provided exclusive right to DIL for setting up and operate restaurants. This reply has given by the Mr. Ajit Kumar authorised signatory of the Corporate Debtor JAYPEE Infratech. This does not contain resolution professional petitioner has also attached the copy of email.
12. Corporate debtor has filed its reply through IRP wherein it is stated that applicant’s IA is not maintainable. It is further stated that the applicant has sought relief against Spingo Foods Private Limited but Spingo Foods Pvt Ltd is not a party in the case. The Corporate debtor has further stated that the

relief has been sought against the JAYPEE Infratech, which is under-going Corporate Insolvency Resolution Professional (CIRP) under the provisions of Insolvency and Bankruptcy code, 2016 in terms of the orders passed by this Tribunal. It is stated that moratorium order under Section 14 of the IBC is in effect from 9th August, 2017, therefore, no suit or proceedings for a relief other than permissible under IBC can be instituted against the Jaypee Infratech.

13. The Application is not maintainable on the ground and reason that the reliefs sought herein are not arising out of or in relation to insolvency resolution proceedings of the Corporate Debtor under the IBC, and therefore is not maintainable under Section 60 (5) of the IBC.
14. That it is further stated in the reply that JIL has entered into two agreements dated 21.04.2018 with Spingo Foods Pvt. Ltd. ,well within its legal right, and DIL is not legally entitled and authorized to challenge the same. M/s Spingo Foods Private Limited has already started its business on the aforesaid spots and will suffer irreparably in case any ex-parte relief as claimed by DIL in application under reply is granted. The balance of convenience is to protect a facility created for public purposes which includes all the basic amenities meant for expressway user.
15. On the basis of above; IRP has made a request for rejecting the I.A. no. 193 of 2018.
16. Written objection has been filed by the applicant against the objection of the IRP, wherein contents of interim application has been reiterated.
17. Heard the argument of the learned counsel of the applicant and counsel representing the Interim Resolution Professional and perused the record. On perusal of the record it is clear that the applicant has filed this IA under Section 60 (5) (b)&(c) of IBC seeking declaration against the two agreements

of LHS and RHS entered into by Corporate Debtor with Spingo Foods Private Limited, who are running and maintaining two similar restaurants on Yamuna expressway ,within the 55 kilometer to 110 Km expressway stretch ,as null and void and of no legal effect ,enforcement and consequences.

18. Reply of the Corporate Debtor is mainly based on the Clause 5.13 of the Sub lease agreement which provides that” **JIL does not provide exclusive right to DIL for setting up and operate Restaurant. As per Sub-lease agreement and DIL was have no objection if similar business of restaurant/ catering is open in the vicinity of the Demised Premises, if it is filed by the JIL that the existing arrangement with DIL is insufficient or needs additional facility in the interest of public.**”
19. It is also stated in the Clause 5.13 also provide that; **DIL shall, however, always be given the Right of First Refusal, if such additional and similar business of branded Restaurant/ branded catering is envisaged and offered by JIL in 55 Km. to 110 Km stretch of expressway.**
20. It is pertinent to mention here that **Corporate Debtor or Resolution Professional as nowhere stated that Right of First Refusal was given to DIL i.e. applicant before executing the lease agreement with Spingo Foods Private Ltd. It is important to point out that moratorium order under Section 14 of the Insolvency Petition against the Corporate Debtor company Jaypee Infratech ltd was admitted on 9th August, 2017 and moratorium order under Section 14 of the IBC was passed on that date.** Hon’ble Supreme Court by order dated 9th August, 2018 has granted 180 further period for completion of CIRP in this case w.e.f. 9th August, 2018. Prior to this original moratorium order was effective.
21. It is important to point out that under Section **14 (1) (b) of Insolvency and Bankruptcy Code, 2016 specifically prohibits transferring, encumbering,**

alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein during the moratorium period. The question arises as to how fresh lease in favour of Spingo Foods Private Limited was executed in violation of the provision of Section 14 (1) (b) of the Code. During the moratorium period learned counsel for the resolution professional has stated that it is the duty of the Insolvency Professional to keep concern going on during CIRP. It is specified that Section 14 (2) provides that during the moratorium period the supply of essential goods or services to the Corporate Debtor, as may be specified was not be terminated or suspended during moratorium period. **Sub-Section 3 of Section 14 provides that provision of Section 1 therein apply to such transactions as may be notified by the Central Government in consultation with any financial Sector Regulator.** This is not the case where the alleged lease transaction is covered under Sub-Section 3 of Section 14 ,where Central Government has issued notification in consultation with the Financial Sector Regulator. Execution of fresh lease is complete in violation of Section 14 (1) (b) of the Insolvency and Bankruptcy Code, 2016 because the alleged agreement cannot be treated as an agreement done for maintaining supply of the essential goods or service to the Corporate Debtor .We are of the considered view that transferring, encumbering or alienating or disposing of any property of the Corporate Debtor or assets or any legal right or beneficial interest therein was prohibited during moratorium period. However, lease has been executed by the Corporate Debtor, in violation of the Moratorium order, therefore we hereby direct the Insolvency Resolution Professional to examine the complete details about the alleged transaction, and file report as to how in contravention of the moratorium order, the Corporate debtor has alienated the property.

22. Resolution Professional is directed to submit the detail reports about the alleged transaction, with the copy of the agreements containing specific details within 15 days from the date of order. Details of parawise reply by way of the counter affidavit should be filed within 15 days. Thereafter, rejoinder, if any, may be filed within 7 days.

List on 18th October, 2018 for disposal of Company Application.

Dated: 18.09.2018

**SAROJ RAJWARE,
MEMBER (T)**

**V.P. SINGH,
MEMBER (J)**

Typed by:
Vidit Kumar Pandey
(P.S)