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NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

Comp. App. (AT) (Ins) No. 1423 of 2023

&

I.A. No. 5101 of 2023

IN THE MATTER OF:

Schreiber Dynamix Dairies Pvt. Ltd. **...Appellant**

Versus

Sumat Gupta
Resolution Professional,
International Mega Food Park Ltd. **...Respondent**

Present:

For Appellants : Mr. Udit Mendiratta, Mr. Shivkrit Rai, Mr. Prithvi Sinha, Adv.

For Respondent : Dr. Rajansh Thukral, Dr. Surekha Thukral & Mr. Sidharth Thukral, Advocates.

J U D G M E N T

Per: Justice Rakesh Kumar Jain:

This appeal is directed against the order dated 28.08.2023 by which an application bearing I.A No. 59 of 2021 filed in CP (IB) No. 174/Chd/Pb/2018 by the Appellant to set aside the decision of the Resolution Professional (RP) dated 23.09.2019 classifying the Appellant as a related party of the Corporate Debtor, namely, International Mega Food Park Limited, has been dismissed.

2. The Appellant is engaged in the business of manufacturing juices and dairy products and is a subsidiary of USA based multinational company Schreiber Foods Inc.. The Corporate Debtor was operating a mega food park under the aegis of the Mega Food Park Scheme of the Govt. of India, situated at Dabwala, Kalan, Fazilka, Punjab (in short 'Food Park').

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3. The CD invited the manufacturers to set up their units at the food park and the manufacturers are promised basic utilities such as power, steam, water, refrigeration, cold storage etc. Thus, the Appellant executed a lease deed dated 06.11.2015 with the CD which was subsequently registered on 09.03.2016, pursuant to which the CD leased a part of its food park constituting an area measuring 65,000 sq. ft. on a long-term lease basis to the Appellant. The lease deed was effective for a period of 20 years with a lock in period of 10 years expiring on 28.02.2026.

4. The Appellant and the CD also entered into a Utility Services and Common Facilities Agreement (Utility Services Agreement) on 08.02.2016. As per this agreement, the CD was to provide uninterrupted and timely provisions of various utilities including but not limited to warehousing, steam, refrigeration, soft water, cold storage etc.

5. It is alleged that the CD was finding it difficult to provide the utilities due to financial difficulties and frequent breakdown of its utilities. This threatened a serious impact upon the Appellant's operations and business at the food part. In this regard, it is alleged that the CD was responsible for ensuring treatment of effluents generated from the food park but on account of CD's failure to install adequate effluent treatment, the consent to operate granted to the CD was revoked by the Punjab Pollution Control Board (PPCB) on 04.07.2017. It is alleged that PPCB also directed the Appellant to stop all of its industrial activities, dismantle and remove all outlets and stop forthwith discharging any wastewater. It is further alleged that the CD also failed to

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supply steam, was not functioning properly and failed to supply raw water on various occasions.

6. As per the case of the Appellant, it agreed to support the CD to enable it to supply utility services to it and other lesses at the food park as well as to the operations of the CD. It also agreed to invest money for modifying the utility assets, pre-operative expenses, working capital and accordingly entered into a Utility Operation and Management Agreement (UOMA) on 08.12.2017 as per which the Appellant got a right to operate and manage some of the utility assets and to appoint a third party for it.

7. It is alleged that the Appellant and the CD agreed to appoint Thermax Limited for operating and maintaining the boilers, refrigeration and compressors. The UOMA also provided for a profit-sharing mechanism, whereby the surplus generated from the utility operations were to be shared with the Appellant and the CD in an agreed ratio. It is further alleged that UOMA had an initial term of one year which was referred to as the pilot phase.

8. The Appellant has alleged that after the completion of the pilot phase (lock in period) of the UOMA, it wrote to the CD on 31.12.2018 for termination of the UOMA alleging that Thermax Limited i.e. the entity appointed under the UOMA for regular operation and maintenance of utilities has been replaced by one Par Techno w.e.f. 15.10.2018. Further the day to day supervision of Par Techno was to be undertaken by the CD and thus, the Appellant had no further role to play under the UOMA w.e.f 15.10.2018 and it was thus agreed that UOMA would stand terminated from 31.01.2019.

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9. The Small Industries Development Bank of India (Financial Creditor) filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'Code') against the Corporate Debtor which was admitted on 28.02.2019 and the Respondent was appointed as the RP.

10. The Respondent made the public announcement on From A and in terms of Regulation 6 of the IBBI (Insolvency Resolution Process for Corporate Person) Regulations, 2016 (in short 'Regulations') calling upon creditors of the CD to submit their claims with proof.

11. It is alleged that the Appellant vide email dated 14.03.2019 filed its claim in Form C with the Respondent and also appended the termination notice dated 31.12.2018.

12. It is alleged that the Respondent, vide its email dated 20.03.2019, asked for some clarification from the Appellant. It is further alleged that on 04.04.2019 the Appellant replied to the email dated 20.03.2019 sent by the Respondent and provided clarification as sought but did not receive any reply though the Appellant sent the reminders as well. In the meantime, it is alleged that the Respondent without admitting the claim of the Appellant, formed the CoC and excluded the Appellant. It is further alleged that on 26.04.2019 the Appellant sent email to the Respondent asking him to admit the claim of the Appellant and include the Appellant as a member of the CoC but it received an email dated 06.05.2019 in which it was alleged that the Appellant is a related party of the CD under Section 5(24)(m)(iv) of the Code, therefore, it is not included in the CoC.

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13. It is further alleged that despite asking the Respondent for the justification for excluding the Appellant from the CoC on the ground that it is a related party, the Respondent did not give any cogent reason, therefore, the Appellant filed CA No. 466 of 2019 challenging the decision of the Respondent, classifying the Appellant as a related party of the CD. The said application was disposed of on 04.09.2019 with the following order:-

> "This application is filed by one of the financial creditors under Section 60(5) of the Code read with Rule 11 of NCL T Rules, 2016 challenging the action of the Resolution Professional in classifying the applicant as a 1 related party vide e-mail dated 12.05.2019. Heard the learned counsel Dr. Rajansh Thukral for the respondent and carefully perused the pleadings and record. Admittedly, the Resolution Professional has taken the decision in declaring the applicant as related party based on the Annexure A-5 Utility Operation and Management Agreement dated 06.12.2017 entered between the applicant and the corporate. debtor. Today the learned counsel for the applicant across the Bar produced a letter dated 31.12.2018 issued by the applicant to the corporate debtor stating that by virtue of the terms of the ' agreement their decision to exit the Utility Operation Agreement and the notice period referred to in clause 12 (b) of the O&M Agreement will be expiring on 31 .01 .2019 and accordingly submits that the Utility Operation Management Agreement based on which the resolution professional classified the applicant as a related party itself came to an end for all purposes on 31.01.2019 and whereas the CIRP of the corporate debtor was commenced on 22.02.2019 when the CP was admitted. Learned counsel further submits that the relevant date for treating the applicant as a related party or otherwise was 22.02.2019 since agreement came to an end on 31 .01 .2019 itself, the RP's decision is illegal and liable to be set aside. On the other hand, the learned counsel appearing for the resolution professional stated that the said letter dated 31.12.2018 produced today was never placed before the resolution professional and if the same is produced, the resolution professional will take appropriate decision thereon.

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> In view of the above referred submissions of both the learned counsels, we dispose of this CA granting opportunity to the applicant to submit any fresh documents including letter dated 31.12.2018 within two weeks from today and on receipt of the same the resolution professional shall consider the same in accordance with the law and Regulations issued thereunder and shall pass an appropriate order within two weeks thereafter.
>
> Accordingly, CA No.466/2019 is disposed of."

14. It is alleged that after the aforesaid order dated 04.09.2019, the Appellant again supplied a copy of the termination notice of the UOMA but in response thereto the Respondent conveyed to the Appellant on 23.09.2019 that the Appellant is a replated party. The Appellant therefore filed I.A No. 59 of 2021 on 05.01.2021 again challenging the action of the Respondent which was contested by the Respondent by filing the reply dated 12.02.2020 but ultimately the application was dismissed by the Tribunal vide impugned order dated 28.08.2023 and hence, the present appeal has been filed.

15. On the other hand, the case of the Respondent is that Mega Food Park of the CD was leased out to the Appellant on long term lease basis for a period of 20 years from 16.04.2016 with 10 years lock in period from the date of possession The lock in period was to culminate on 15.04.2026.

16. It is further the case of the Respondent that subsequent to the execution of lease agreement, a UOMA dated 06.12.2017, was entered into between the parties. As per this agreement, the operation and management of all the utilities were to be vested in the Appellant. The Appellant undertook to carry out modifications and also to make investments in various utilities followed by profit sharing between CD and the Appellant in respect of surplus generated from the operations of the utilities. It further agreed to

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sharing/exchange of essential technical information through the constitution of a project steering committee.

17. It is further alleged that the Respondent, from the perusal of the aforesaid document, observed that the Appellant is a related party of the CD against which CA No. 466 of 2019 was filed by the Appellant to challenge the decision of the RP but during the course of hearing, the Appellant submitted a false and fabricated document purported to be a termination letter dated 31.12.2018 in respect of the UOMA dated 08.12.2017. The Tribunal vide its order dated 04.09.2019 while disposing of CA No. 466 of 2019 allowed the Appellant to submit document within two weeks.

18. It is alleged that even as per purported letter of termination, UOMA could have been terminated only by providing three months written notice whereas letter dated 31.12.2018 terminating UOMA was to take effect from 31.01.2019 i.e after the period of one month which is contrary to the provisions of the said agreement. It is alleged that as per clause XXI miscellaneous subclause (b) it is provided that no amendment or waiver of any of the provisions of the agreement or annexures thereof would be binding unless made in writing and signed by authorised representatives of both the parties and that the Appellant failed to produce any such document whereby the clause relating to notice for termination of the agreement was amended reducing the period from three months to one month. It is alleged that letter of termination was not signed by the authorised person because UOMA was executed on 08.12.2017 through the Managing Director of the CD pursuant to Board Resolution dated 06.12.2017 and on behalf of the Appellant by Mr.

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Amitabha Ray and Mr. Dimitri Humbert whereas the purported notice of termination was signed by a different person Mr. Leon Verdes, Chief Financial Officer of the Appellant Company who was not a signatory to the agreement and did not have power to terminate the said agreement. It is also alleged that representative of the Appellant interacted with the respondent several times on various issues but never informed the respondent at any time about the alleged termination of the said agreement. It is alleged that the letter of termination is a manufactured document on the basis of which it cannot presumed that UOMA was terminated. It is also alleged that the decision of the Respondent dated 23.09.2019 was not challenged by the Appellant for a long time but after delay of about 15 months the Appellant filed I.A No. 59 of 2021 on 05.01.2021.

19. The Tribunal in para 12 of its order has held that :-

> "12. To summarise, the aforementioned extracts underline the following facts:
>
> i. There is a transfer of rights to operate and manage the utility assets from IMFPL to SDDPL during the period in which this agreement was in operation. The SDDPL has ownership as well as joint management of the assets of the corporate debtor.
>
> ii. SDDPL has made a considerable investment in the utility assets which will be supplying the critical inputs to all the units operating in the IMFPL, i.e., corporate debtor.
>
> iii. There is a provision for revenue sharing by the parties and also the reimbursement of costs incurred by the SDDPL. The decisions in running the utilities will be controlled by a committee having equal representation of the members of SDDPL and IMFPL.
>
> iv. There is a provision for the pilot phase and subsequent extensions of the operations based on the mutual consent of the parties.

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v. Each of the parties has access and right to use the confidential information and intellectual property, only for the purpose of this agreement. Thus, the parties have access to each other's data, drawings, designs, past data concepts and ideas, know-how, techniques, scientific data, information pertaining to the training procedures/manual business strategies, business plans, price lists, technology of manufacture, marketing, imports, exports and other operational, managerial of technical information. Each of the parties agrees to use such confidential information of the other party only for the purpose of this agreement."

20. It is further held in para 21 which is reproduced as under:-

"21 . In view of the aforementioned facts and judicial decisions, and the terms and conditions of the Utility 0 & M Agreement dated 08.12.2017 between the parties, we hold that the applicant is a "related party" of the Corporate Debtor .and the termination of the said agreement before the CIRP will not make any material change to the status of the applicant who continues to be a 'related party' of the corporate debtor after the initiation of CIRP also."

21. Counsel for the Appellant has submitted that the Tribunal has not identified the relevant sub-section of Section 5(24) on the basis of which the Appellant has been held to be a related party of the CD. It is further submitted that the impugned order only mentions that the Appellant is the related party of the CD based on the terms and conditions of the UOMA but it failed to refer to any provision of the Code under which an investment in or profit sharing with the CD qualifies the Appellant as a related party.

22. It is argued that UOMA already stood terminated before the commencement of the CIRP because the said notice was given on 31.12.2018 terminating the UOMA w.e.f. 31.01.2019 whereas the CIRP was initiated on 28.02.2019. It is further submitted that the Tribunal has committed an error

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in holding that the termination of the said agreement before the CIRP will not make any material change to the status of the Appellant who continues to be a related party of the CD even after the initiation of CIRP also. Counsel for the Appellant has further submitted that no provision of the agreement creates a joint venture or partnership between the parties or makes a party the agent of the other for any purpose unless otherwise agreed. It is further submitted that the Tribunal has failed to consider the fact as to why UOMA agreement was entered into between the parties because it was only to ensure timely and uninterrupted supply of utility services which the CD had failed to fulfil as per the terms of the lease deed. However, it is submitted that the Appellant took upon itself to operate and manage utilities owing to the CD's failure to fulfil its duties and as result the Appellant's own day to day business operations were seriously impacted. It is further submitted that the Tribunal has seriously erred in holding that the Appellant is a partner of the CD by virtue of UOMA, therefore, Section 5(24)(a) is not attracted. Lastly, it is submitted that the Tribunal has misinterpreted clause XVII of UOMA as there was no agreement between the parties to share technical information.

23. On the other hand, Counsel for the Respondent has vehemently argued that UOMA was in the nature of a partnership agreement/joint venture agreement which has provisions for investments, profit/loss sharing, management and operations, sharing technical information etc. It is argued that the entire case of the Appellant is based upon the termination notice dated 31.12.2018 which was to take effect according to the Appellant from 31.01.2019 and since the CIRP has commenced from 28.02.2019, therefore,

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the Appellant was not a related party at that time. It is submitted that the parties were bound by the terms and conditions of the UOMA in which clause 12 'term and termination' sub clause (b) provides for one year lock in period (pilot phase) and right to exit by giving 3 months' notice during the lock in period of one year is provided and clause (d) provides if the agreement is not terminated during the pilot phase, the agreement shall become co-terminus with the lease agreement and the lease agreement, which was executed on 09.03.2016, having lock in period of 10 years, goes up to 09.03.2026. It is further submitted that clause XXI (b) provides that no amendment or waiver of any of the provisions of the agreement or annexures is binding unless made in writing, therefore, the fabricated document letter dated 31.12.2018 which is alleged to be a notice, to show that the agreement was terminated by giving one month's notice, just to wriggle out of the related party relationship in view of the stringent provisions of the IBC.

24. It is further submitted that clause II of the said agreement provides for transfer of absolute rights in terms of the operation and management of utility assets and clause IV provides for manner of investment in utility assets by the parties. It is submitted that appropriation of surplus income generated from the Utility assets (profit sharing) is an enough indicator that the Appellant was a related party of the CD. Lastly, he has relied upon a decision of the Hon'ble Supreme Court in the case of Phoenix ARC Pvt. Ltd. Vs. Spade Financial Services Limited & Ors. Civil Appeal No. 2842 of 2020 which has also been relied upon by the Tribunal in the impugned order.

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25. We have heard Counsel for the parties and perused the record with their able assistance.

26. The relationship between the parties commenced with the execution of the lease deed dated 06.11.2015 followed by Utility Services and common facilities agreement dated 08.02.2016. The Appellant also execute UOMA dated 08.12.2017. The relevant portion of the said agreement has been reproduced by the Tribunal in the impugned order which is also relevant to be reproduced again in this order for a quick glance:-

> "II. Purpose:
>
> The Parties concur that the purpose of this Agreement Is to enable smooth and steady transfer of the rights to operate and manage the Utility Assets from IMFPL to SDDPL with effect from the Effective Date in order to enable provision of uninterrupted and timely supply of Utility Services for as long as required by SDDPL or till the Lease Deed is in force, whichever is earlier. The transfer of operation and management rights of Utility Assets shall mean the transfer of absolute rights terms of the operation and management of the Utility Assets. . ..
>
> IV. Investment in Utility Assets:
>
> a) SDDPL shall Invest (the "Investment) an amount up to Rs. 25,000,000/- (Rupees Two Crore, Fifty Lac) in modifying the Utility Assets, and an amount up to Rs. 75,000,000 (Rupees Seven Crore Fifty Lac) towards pre-operative expenses, operating deficit and working capital for running day-to-day operations of the Utility Assets. Details of the investment are provided in Annexure "8" appended to this Agreement.
>
> b) SDDPL shall prepare a monthly Investment statement once the above arrangement commences which would be reviewed by the Project Steering Committee.
>
> VII. Appropriation of surplus income generated from the Utility Assets (Profit Sharing}: The Parties agree that any income left after meeting all the expenses incurred for utilizing the Utility Assets for provision and consumption of Utilities. shall be appropriated

based on profit sharing basis. The Profit (surplus Income) Sharing Mechanism shall be as follows:

Revenue from operations (A)

Revenue generated by supplying Utilities to SDDPL, IMFPL, PSPCL, and other Persons, If any as per the terms of this Agreement.

Cost of operations (B)

It is agreed between the Parties that all cost & expenses to run the Utilities operation Including, but not limited to, fuel, repairs, manpower, support services, etc. Incurred by IMFPL and or SDDPL through the designated Bank Account shall be considered as cost of operation of Utilities. Details about the operating cost shall be included in the cost module as specified In Annexure "C".

Surplus generated (C) i.e. (A-B)

The Parties agree to appropriate the surplus generated from the utility operations during the relevant period are as under:

20% of the Surplus from Utility operations will accrue to SDDL as a O&M Fee for the period Its Investment in the Utility Operation IINR 100,000,000 (Rupees ten Crores) or more. Any Increase/decrease in the Investment would Increase/decrease the O&M Fee proportionately.

80% of the Surplus from Utility operations will accrue to IMFPL and IMFPL would retain the balance Surplus on all illy billings after deducting costs Incurred by SDDPL based on the cod! module outlined in Annexure "D" and as amended by the steering committee from time to time.

If total monthly Surplus exceeds 6,000,000 (Rupees Sixty Lace) SDDPL will retain 10%, of total surplus towards repayment of Its Investment In the Utility Operation.

All Utility charges shall be subject to applicable taxes.

VIII. Project Steering Committee:

d. All decisions of the Committee shall be taken to the extent possible by unanimity falling which the matter shall be decided by a simple majority. The Committees shall meet as often as required but at least once every month at the registered office of either Party or such other venue as decided mutually by the Pales. Where personal attendance Is not possible. Members can

participate by tele-conference. Promptly after each meeting of the Committee. the authorized member shall prepare and circulate the minutes of such meetings and after. approval, the approved minutes shall be signed by the members present at the relevant meeting of the Committees. A presence of 2 (two) members from each of the Parties shall constitute proper quorum for the meeting to proceed with the business. Parties shall be free to Invite other required participants to the meetings; however, such invitees shall not be allowed to vote. The members present shall elect the Chairman for every meeting of the Committee.

However, it being agreed between the Parties that in the event the Committee fails to arrive at a decision either unanimously or by simple majority as set out in sub-clause (d) above, the matter shall be referred to the Managing Directors of the respective Parties, for an amicable solution. The said matter shall be referred to the Managing Directors by any member of the Committee, within 15 (fifteen) days of the last meeting date of the Committee In which the said matter was discussed: The Managing Directors shall endeavour to settle the matter referred within a maximum period of 30 (thirty) days from the date of the said written notice. The discussions shall take place at a mutually agreed venue.

XII. Term and Termination:

a) A period of one year from the Transfer Date shall be considered as the Pilot Phase of the operations and management of Utility Assets by SDUPL. This period shall be the Lock-in Period wherein neither Party shall be allowed to transfer back the operations and management of the Utility Assets to the other Party ..

b) Upon the completion of the Lock-in Period SDDR shall have the right to exit the utility operation agreement by providing three month written notice.

i. If SDDPL decides to exit this arrangement, then the purchase value of any Inventory handed over to IMFPL. and the book value of Capex Incurred by SDDPL In the Utility. operation will be converted into a Loan to IMFPL to be recovered from the Rent/Utility Billings over a 3 years' period. Any profit or loss on the date of exit shall be apportionment In the ratio of 80:20 between IMFPL & SDDPL and the balance due from IMPPL will be converted into Loan.

c) Once the Pilot phase is over and both parties decide to Continue the Utility Operation Agreement shall be Co-terminus with the Lease agreement.

d) Once the Investment made by SDDPL is recovered. Parties shall have the right to assign & appoint any third party to manage operations & management of the Utility Asset after mutual discussion. This option shall be exercised jointly by the Parties with the condition that the supply of Uninterrupted Utilities would continue without any Impediment. The notice period and Transition arrangements would also be agreed jointly by both parties in such a situation.

e) In case IMFPL wants to sell its Utility Assets. the first right of refusal shall be given to SDDPL. SDDPL shall have (ho right to decide the same within 60 days from the date of notice. The sale consideration for the Utility Assets shall be at the fair market value or offer price. It is expressly agreed by the Parties that in the event of a sale of the Utility Asset by IMFPL, SDDPL 's right under (his Agreement and its right to receive uninterrupted Utilities shall not be affected in any manner; and that the third party shall also be obligated to provide uninterrupted utilities and assume IMFPL 's roles and duties under this Agreement.

f) IMFPL would have the right to exit the arrangement if there is a significant underachievement of operating and financial KPIs (as outlined in Annexure "D' for more than 6 months at any point of time in the contract. The notice period and transition arrangements in such a scenario would be agreed jointly by both parties in such a situation. If IMFPL exits (ho arrangements In such a scenario then the Inventory taken over by IMFPL from SDDPL on the date of transfer would be converted into a secured loan Inventory handed over to IMFPL and the book value of Capex incurred by SDDPL in the Utility operation will be converted Into a secured loan to IMFPL. to be recovered from the Rent/Utility Billings over a 3-year period.

XVII. Confidential Information and Intellectual Property:

a. 'This Agreement or any other document in relation hereto, Information pertaining to SDDPL products and services, the Intellectual Property (as hereinafter defined), and any information and findings of the respective other Party and Its affiliated companies and their businesses, business plans, past, present, and/or future business activities, processes, techniques,

methods, plans, products, product lines, product designs, services, trade secrets, and other technical knowledge or secret processes, customer lists, client lists vendor details, Financial Information, marketing plans date drawings designs, past data concepts and ideas know how techniques, scientific data Information pertaining to the training procedures/manuals, business strategies, business plans, price lists, technology of manufacture, marketing, imports, exports, and other operational, managerial, or technical information, contract provisions, organizational structure or personnel data, etc. which are not known to the general public (the "Confidential Information") are to be treated as strictly confidential. Each of the parties agree to use such Confidential Information of the other Party only for the purposes of this Agreement, not to disclose them to third parties, protect them against access by third parties, and pose a corresponding obligation upon their Representatives (with IMFPL remaining responsible for any breach by Representatives and/or Contract Staff), but no less than reasonable care, with reference to this Agreement.

b. 'The Parties undertake that they shall not during the subsistence of this Agreement or at any time thereafter (a) divulge, disclose or make accessible any Confidential Information of the other Party to any Person whomsoever, firm, partnership, corporation or other corporate entity; or (b) make any use whatsoever of any Confidential Information of the other Party for its own purpose or for any other purpose other than the generation, provision, and/ or consumption of the utilise hereunder; and shall during the subsistence of this Agreement also use their best endeavors to prevent any other Person from doing so.

c. All documents furnished by disclosing Party to the other receiving Party pursuant to this Agreement which Is specifically marked as confidential or otherwise shall be confidential and form part of the Confidential Information of the disclosing Party and to be subject to the confidentiality obligations as contained herein. unless they are generally known to the public, known to the resolving Party prior to such disclosure or have been or are lawfully disclosed by a third party to the receiving Party whom the receiving Party has no reason to believe that the third party has breached any legal obligations to any Person. Such documents shall be kept carefully and with the same degree of care as receiving Party would have to protect its own confidential

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Information of similar nature and shall be returned to the disclosing Party (Including all copies thereto) upon request or upon expiry or termination of this Agreement and receiving Party shall purge all electronic versions of such documents from Its computer systems at that time.

d. IMFFL acknowledge and agree that SDDPL shall retain all rights, lie, and Interest in and to the Intellectual Property as owned by SDDPL and IMFPL shall not perform any activity, indirectly or directly that is inconsistent with or challenges SSDPL's ownership of rights in the Intellectual Property. For the purposes of this Agreement the expression "Intellectual Property" means all patentable subject matter, patented or patent pending inventions, non-patentable subject matter, copyrightable subject matter, copyrights, patents, trademarks, trade secrets, know-how, Ideas, suggestions, inventions, discoveries, designs, developments, improvements (whether or not patentable or copyrightable), processors, computer programs, works of authorship and/or Improvements that are embodied in or related to the SDDPL Products and/or any materials or information accompanying the SDDPL Products. The provisions of this Clause shall survive the expiry or termination of this Agreement.

e. IMFPL 's confidentiality obligations as contained in this Clause, shall survive the expiration of termination of this Agreement and shall remain In full force and effect for at least two (2) after termination or expiration of this Agreement, and for as long as the Confidential Information and/or Intellectual Property remains a trace secret and/or not known to the general public."

27. The Tribunal summarised the aforesaid terms and conditions of the said agreement in para 12 of the impugned order which has already been noticed in the early part of this order.

28. The entire case of the Appellant hinges upon the termination notice dated 31.12.2018 regarding which C.A No. 466 of 2019 was disposed of by the Tribunal and the order has already been reproduced in the early part of this order.

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29. The Respondent after receiving the letter dated 11.09.2019 regarding the alleged termination replied on 23.09.2019. The said reply is also reproduced as under:-

SUMAT KUMAR GUPTA
Insolvency Resolution Professional
(Reg. No. IBBI/IPA-001/IP-P00167/2017-18/10336)

SPEED POST

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Dated: 23.09.2019

Mr. Jay Prakash Sharma,
Company Secretary,
Schreiber Dynamix Dairies Private Limited,
215, Atrium Building,
C Wing, Unit No.1018, 10th Floor,
Andheri Kurla Road,
Andheri East,
Mumbai-400093

SUBJECT: YOUR LETTER DATED 11.09.2019 REGARDING ALLEGED TERMINATION OF UTILITY OPERATION AND MANAGEMENT AGREEMENT DATED 06.12.2017 W.E.F. 31.01.2019

Dear Sir,

During the resumed hearing of CA No. 466 of 2019 in CP(IB) 174/chd/chd/2018 on 04.09.2019 before Hon'ble National Company Law Tribunal, Chandigarh, suddenly and unexpectedly your lawyer produced a photocopy of letter dated 31.12.2018 purported to be a letter terminating the Utility Operation and Management Agreement dated 06.12.2017 w.e.f. 31.01.2019. It was pointed out to the Hon'ble NCLT that this letter was not a part of the pleadings. Accordingly, the CA was disposed of with directions as contained in the order pursuant to which you have sent a photocopy of the said purported letter to the undersigned. As per the directions of Hon'ble NCLT, I am directed to pass appropriate order.

On perusal of the photocopy of letter provided by you, the undersigned has passed the following order:

That the photocopy of the letter purportedly terminating the Utility operations and management agreement dated 06.12.2017 w.e.f. 31.01.2019 is hereby rejected for the following reasons:

1. That the photocopy of any document is not admissible in evidence and cannot be relied upon and therefore the undersigned insists that SDDPL should have produced the original letter before the Resolution Professional to decide the issue relating to "Related Party".

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2. That the purported letter is contrary to the provisions of the Utility operations and management agreement dated 06.12.2017 in the following manner:

   a. As per clause XII of the agreement "Terms and Termination" the agreement can be terminated only after providing a 3 (three) months written notice;

   b. As per clause XXI "Miscellaneous" subclause (b) it is provided that no amendment or waiver of any of the provisions of this agreement or annexures hereof shall be binding unless made in writing and signed by authorised representatives of both the parties.

   Therefore, it calls for an amendment of the agreement in writing to change the conditions of the agreement with respect to the termination by reducing the period from 3 months to 1 month and the purported letter is thus contrary to the terms and conditions of the agreement and is not supported by any amendment in writing to change the condition of termination from 3 months to 1 month.

3. That the Utility operations and management agreement dated 06.12.2017 is executed by SDDPL through Mr. Amitabha Ray and Mr. Dimitri Humbert and IMFPL through Mr. S. Sukhwinder Singh, Chairman -cum- Managing Director duly authorised in pursuance to Board Resolution dated 06.12.2017. Contrary to this the letter of termination by giving one month's notice is signed by Mr. Leon Verdes, Chief Financial Officer of SDDPL, who is not a signatory to the agreement, and apparently does not have power to amend the Utility operations and management agreement dated 06.12.2017.

4. That the signatory of the purported letter on behalf of IMFPL is on the basis of authorisation in pursuance to Board Resolution dated 26.03.2012 whereas the agreement was executed in pursuance of the Board Resolution dated 06.12.2017 and thus this also smells manipulation/ fabrication.

5. That as per the record of the corporate debtor, there is no such letter in record as has been placed before the Resolution Professional now.

6. That the NCLT, Chandigarh in its order dated 28.02.2019 in para 27 has

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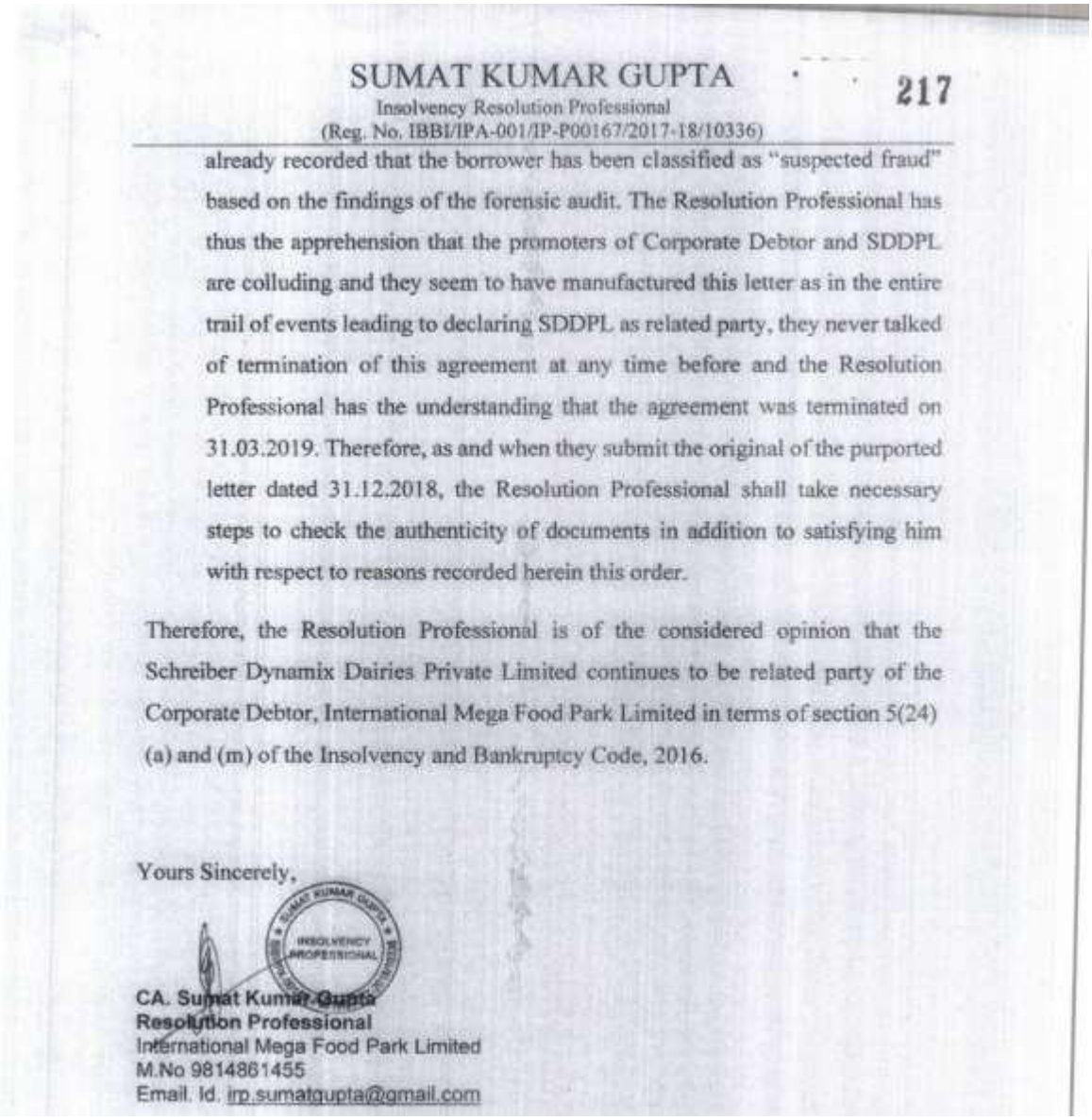

SUMAT KUMAR GUPTA
Insolvency Resolution Professional
(Reg. No. IBBI/IPA-001/IP-P00167/2017-18/10336)

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already recorded that the borrower has been classified as "suspected fraud" based on the findings of the forensic audit. The Resolution Professional has thus the apprehension that the promoters of Corporate Debtor and SDDPL are colluding and they seem to have manufactured this letter as in the entire trail of events leading to declaring SDDPL as related party, they never talked of termination of this agreement at any time before and the Resolution Professional has the understanding that the agreement was terminated on 31.03.2019. Therefore, as and when they submit the original of the purported letter dated 31.12.2018, the Resolution Professional shall take necessary steps to check the authenticity of documents in addition to satisfying him with respect to reasons recorded herein this order.

Therefore, the Resolution Professional is of the considered opinion that the Schreiber Dynamix Dairies Private Limited continues to be related party of the Corporate Debtor, International Mega Food Park Limited in terms of section 5(24) (a) and (m) of the Insolvency and Bankruptcy Code, 2016.

Yours Sincerely,

CA. Sumat Kumar Gupta
Resolution Professional
International Mega Food Park Limited
M.No 9814861455
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30. The Tribunal has concluded in para 16 to 22 of the impugned order that the Appellant is a related party on the basis of the terms and conditions of the UOMA and we do not find any error or infirmity in the said findings.

31. The very fact that the parties were bound by the terms and conditions of the UOMA in which it was categorically provided that for the purpose of terminating the agreement a notice of three months has to be given and the termination of notice dated 31.12.2018 was issued for terminating the said agreement after a period of one month i.e. w.e.f 31.01.2019 instead of three

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months especially when it has been provided in the agreement that the terms and conditions of the agreement cannot be waived or amended without the written consent of the parties, the letter dated 31.12.2018 cannot be relied upon which is the base of the case of the Appellant.

32. Thus, looking from any angle, we do not find any merit in the present appeal for the purpose of interference and hence, the same is hereby dismissed. No costs.

I.As, if any pending, are hereby closed.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Mr. Naresh Salecha]
Member (Technical)

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New Delhi
13th February, 2025

Sheetal