

Through Videoconference

IN THE NATIONAL COMPANY LAW TRIBUNAL

MUMBAI BENCH, COURT No. - I

*** *** ***

IA No. 20 of 2021

in

C.P. (IB) No. 1397/MB/2017

An Application under Section 60(5) read with Section 33(5) & Section 35 of the Insolvency and Bankruptcy Code, 2016 read with Rule 11 of National Company Law Tribunal, Rules, 2016.

Atul Rajwadkar,

Liquidator for Gupta Infrastructure (India) Private Limited,

Reg. No: IBBI/IPA-001/IP-P00152/2017-18/10321,

Resident of 47, Hindustan Colony, Wardha Road,

Nagpur – 440 015.

... *Applicant*

V/s

Ranjan Agarwal,

Having office at

508, Crystal Centre, Raheja Vihar,

Mumbai, Maharashtra.

&

Chhattisgarh City Centre Mall,

Pandri, Devendra Nagar,

Raipur, Chhattisgarh.

... *Respondent*

In the matter of

Bank of India,

Star House, C – 5, “G” Block,

Bandra Kurla Complex, Bandra (East),

Mumbai, Maharashtra – 400 051.

... Financial Creditor

V/s

Gupta Infrastructure (India) Private Limited,

4th Floor, Gupta Tower, Temple Road,

Civil Lines, Nagpur,

Nagpur, Maharashtra – 440 001.

... Corporate Debtor

Date of Order: 10.06.2021

CORAM:

Janab Mohammed Ajmal, Hon'ble Member (Judicial)

Shri V. Nallasenapathy, Hon'ble Member (Technical)

Appearance:

For the Applicant: Mr Sandeep Bajaj with Mr Anuj Jhaveri,
Ms Aakanksha Nehra and Mr Parag Rai,
Advocates.

For the Respondent: Himself.

Per: Janab Mohammed Ajmal, Member (Judicial)

ORDER

This is an Application by the Liquidator of the Corporate Debtor seeking direction to the Respondent to handover the vacant possession of a unit of the Corporate Debtor. Alternatively, to permit the Applicant to take available recourse by filing a suit.

2. The facts giving rise to the Application are as follows.
 - a. Bank of India, the Financial Creditor, filed the captioned Company Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 (the Code) against Gupta Infrastructure (India) Private Limited (hereinafter referred to as the Corporate Debtor) seeking Corporate Insolvency Resolution Process (CIRP). This Tribunal by order dated 01.02.2018 admitted the Company Petition. The CIRP however could not succeed and this Tribunal by order dated 02.01.2019 directed

liquidation of the Corporate Debtor and appointed the Applicant as the Liquidator.

- b. The Corporate Debtor was the owner of a Mall namely Chhattisgarh City Centre Mall-cum-Multiplex, Pandri, Raipur (hereinafter referred to as the Mall) in the State of Chhattisgarh. The Respondent was the licensee in respect of a shop unit bearing No. 201 on the 2nd Floor of the Mall under Leave and License agreement dated 03.10.2012 on a monthly rent of ₹. 24,000/- revisable at 15% every three years and other necessary charges.
- c. The Agreement was due to expire on 02.10.2021. The Respondent didn't pay the rent regularly and as on November, 2020 the amount of ₹. 3,95,822/- was outstanding against him. The Notice dated 13.11.2020 of the Applicant went unheeded and as on the date of filing of the Application on 07.01.2021, an amount of ₹. 4,72,230/- remained outstanding.
- d. Due to nationwide lockdown in the wake of Covid-19 pandemic, the mall remained closed from 20.03.2020 to 25.06.2020, 22.07.2020 to 06.08.2020 and from 21.09.2020 to 28.09.2020. Because of the lockdown, the Applicant had allowed waiver of 90% of license fees / rent for the months of April, May and June, 2020.
- e. The Respondent not only refused to make the payment but by e-mail dated 13.07.2020, claimed to terminate the agreement by invoking the *force majeure* clause in the agreement. The Respondent claimed adjustment of security deposit of ₹. 72,000 for the license fees in the month of March, 2020 and refund the balance.

- f. The *force majeure* clause of the agreement would not be applicable in the present case and the Respondent could not escape the liability of paying the outstanding dues. Besides the Respondent has failed to serve the mandatory three months' notice. Since the Respondent had terminated the lease under his e-mail dated 13.07.2020, the Applicant treated the same as the three months' notice and the lease stood terminated on 12.10.2020.
- g. The Applicant has been running the Corporate Debtor as a going concern and has been receiving leave and license dues from other commercial units located in the Mall. The Respondent by his e-mail dated 26.10.2020 reiterated the invocation of *force majeure* clause and indicated that the clause overrode all other clauses of the agreement. The Applicant attempted to resolve the dispute but to no avail.
- h. Since the notice dated 13.11.2020 went unheeded, the Applicant came up with the present Application seeking the following reliefs.
- a) Direct the Respondent to handover the vacant and peaceful possession of the said Unit to the Corporate Debtor, upon payment of pending dues as mentioned in paragraph 20 of the present Application; and*
 - b) In an alternative, permit the Applicant to take available legal recourse against the Respondent on behalf of the Corporate Debtor by filing a civil suit; and*
 - c) Such further and other reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.*
3. The Respondent in his reply objected the prayers made in the present Application. It is submitted therein that,

- a) The Respondent on 01.07.2020, learned about the opening of the Mall from 26.06.2020. He under his termination letter dated 13.07.2020, expressed his intent to handover the vacant possession of the shop. Later in early November, 2020 he sent an e-mail to the Mall management, seeking permission to remove his materials from the shop and deliver vacant possession thereof to the Management. His e-mail was not responded to.
- b) In mid November, 2020, the Respondent mobilised transport and labour to remove goods from the shop but the Mall management prevented the same. Thereby the Respondent sustained a loss of ₹.20.000/- towards mobilization and transportation. The goods lying in the shop were valued at ₹. 4,00,000/- and are deteriorating by the day.
- c) It is further submitted that the leave and license agreement dated 03.10.2012 was not registered. The *force majeure* clause did not envisage pandemic. Therefore, the provisions of Contract Act, 1872, would be applicable. The *force majeure* clause arising out of a pandemic is invoked worldwide and the same would be a valid ground to invoke the clause. Seeking the rent till 30.10.2020 under e-mail dated 23.10.2020 itself goes to show that the termination notice per *force majeure* was accepted.
- d) After coming to know about the reopening of the Mall, the Respondent got in touch with the Mall Management for a viable solution regarding rent etc., in view of the pandemic. The offer by the Mall Management was quite low and the business by the Respondent was no longer economically viable.

- e) The Respondent accordingly invoked the *force majeure* clause and issued e-mail dated 13.07.2020. He owes rent of ₹. 39,769/- till 18.03.2020. Adjusted against the advance of ₹. 72,000/-, the Respondent is entitled to a refund of ₹. 32,231/-. Besides the Mall has retained the Respondent's goods at the shop illegally and it is liable to compensate the Respondent for the loss sustained thereby as well as the cost incurred by the Respondent for mobilisation of transport and labour for their removal. The Mall is accordingly liable to pay ₹. 4,52,231/- to the Respondent. The Application accordingly deserves to be rejected.
4. We have heard the learned counsel appearing for the Applicant and also the Respondent himself. It is not in dispute that the Respondent has been a tenant in respect of the shop room in the Mall. The Respondent himself had terminated the lease under his email dated 13.07.2020. However, he continued to occupy the premises on the ground that he was not allowed to remove his belongings from the shop room. It is alleged by the Respondent that the terms and conditions of the leave and license agreement dated 03.10.2012 have also been violated by the Mall management and by the Applicant.
5. In our considered opinion the detailed appraisal of the terms and conditions of the lease and their ramifications including application of the *force majeure* clause would require an incisive judicial enquiry. It would not be possible for this Authority to go there into by in a summary proceeding as the present one. Since the Corporate Debtor is under CIRP, it would also be not appropriate for the Respondent to continue in the lease premises. His continuance in the shop would thwart the resolution process and would frustrate the object of the Code. It would accordingly be appropriate to direct

the Respondent to handover the vacant possession of the shop room to the Applicant.

6. The Applicant may approach the appropriate judicial forum for realisation of the outstanding rent. We further feel that the realisation of the rent for the period of lockdown imposed in the area would be prejudicial. It would however be open to the appropriate judicial authority to consider the matter in the light of the effect of the pandemic on business establishments. Moreover when the Respondent did not do any business during the period. Hence ordered.

ORDER

The Application be and the same is allowed in part on contest. The Respondent is directed to handover vacant possession of the shop room to the Applicant (or his successor in office) and to remove his belongings therefrom forthwith. The Applicant (or his successor in office) may approach the appropriate judicial authority for realisation of the outstanding rent / dues, if any, from the Respondent. The Respondent shall be at liberty to raise all such contentions, if so advised, in defence in such proceedings. There would however be no order as to costs.

Sd/-
V. Nallasenapathy
Member (Technical)

Sd/-
Janab Mohammed Ajmal
Member (Judicial)