

IN THE NATIONAL COMPANY LAW TRIBUNAL,  
COURT II, MUMBAI BENCH  
INTERLOCUTORY APPLICATION NO. 2357 OF 2023

IN  
CP(IB) NO. 527(MB)/2022

*Application u/s 60(5) of the Insolvency and  
Bankruptcy Code, 2016*

In the matter of:

**Kothapally Krishna Reddy**

**...Applicant**

Versus

1. **Mr. Vijay Kumar Iyer,**

The Resolution Professional of  
Future Retail Limited

2. **Future Retail Limited**

**...Respondents**

In the matter of

**Bank of India**

**...Financial Creditor**

v/s.

**Future Retail Limited ...Corporate Debtor**

**Order pronounced on 15.01. 2024.**

**Coram:**

**Shri. Kuldip Kumar Kareer : Member Judicial.**

**Shri. Anil Raj Chellan : Member Technical.**

**Appearances (in physical mode)**

For the Applicant: Counsel Mr. Sankalp Anantwar.

For the Respondent: Counsel Rishabh Jaisani.

**ORDER**

***Per: Coram***

1. This is an application under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “the Code”) filed by the Applicant seeking, inter-alia, directions to the Respondent, who is the Resolution Professional of the Corporate Debtor, to hand over the vacant and peaceful possession of the land leased to the Corporate Debtor and pay outstanding monthly rent together with taxes, interest, penalties and other charges as per the registered Lease Deed dated 19<sup>th</sup> March, 2015.
2. Facts of the case pleaded by the Applicant in his application are briefly stated below:
  - i. Applicant is the sole and absolute owner and in possession of a piece of land measuring 3 acres in Survey No. 61/A situated in Peerazadiguda Village, Ghatkesar Mandal, Rangareddy District, Telangana.
  - ii. In the year 2015, representatives of Future Retail Limited (formerly known as Bharti Retail Limited), the Corporate Debtor abovenamed, had approached the Applicant to take a portion of the said Land on lease for business purpose of the Corporate Debtor.
  - iii. Pursuant to discussions and deliberations between the Applicant and the representatives of the Corporate Debtor, the Applicant carved out a piece

of land measuring 1 acre (being hereinafter referred to as the “**leased land**”) and agreed to lease out the same to the Corporate Debtor for a period of 27 years and 4 months for construction of building (“**premises in question**” or “**Building Appurtenant thereto**”) on the leased land by the Corporate Debtor to be used for sale and merchandise. The aforesaid terms and conditions were reduced to a Lease Deed dated 19<sup>th</sup> March 2015 executed between the Applicant and the Corporate Debtor and registered with the Joint Sub-Registrar, Uppal. The Corporate Debtor deposited an interest free security deposit of INR 49,50,000/- with the Applicant as per clause 4.3 of the Lease Deed

- iv. The Corporate Debtor abruptly stopped depositing the lease amounts from the month of February, 2022 in complete breach of the terms and conditions of the Lease Deed. The Applicant, through their advocates, issued a Legal Notice dated 20<sup>th</sup> May, 2022 terminating the Lease Deed as per clause 13 B (ii) of the Lease Deed and calling upon the Corporate Debtor to clear the outstanding rent due of Rs. 51,49,820/- payable to the Applicant along with peaceful and vacant possession of the leased land within 45 days from the date of receipt of the above legal notice. However, the Corporate Debtor failed to respond to the said notice.
- v. Thereafter, the Applicant learnt that the Corporate Debtor is in Corporate Insolvency Resolution Process (‘CIRP’) and the above-captioned Petition came to be admitted by this Hon’ble Tribunal vide Order dated 20<sup>th</sup> July 2022 and the Respondent herein was appointed as Interim Resolution Professional (‘IRP’). Therefore, the Applicant immediately filed his claim before the Respondent on 01<sup>st</sup> August 2022 and revised his claim on 24<sup>th</sup> November, 2022.

- vi. The premises built by the Corporate Debtor on the leased land of the Applicant is decaying as it is not being properly taken care of. The electricity company has disconnected the power supply for non-payment of bills. Incidents of pilferage and vandalism have taken place in the premises which is a subject matter of FIR. As a result, the Applicant is suffering unwarranted losses for the reasons stated hereinbefore. The Applicant is entitled to outstanding rent and possession as the Lease Deed was terminated before CIRP. However, since the Respondent/Corporate Debtor has neither vacated the leased land nor paid the outstanding rent, the Applicant herein is constrained to file this application.

### **3. Reply of the Respondent No.01**

The Respondent has filed his Preliminary Reply vide Affidavit dated 27<sup>th</sup> July, 2023. The pleadings and submissions of the Respondent are briefly covered hereunder:

- i. The Hon'ble Adjudicating Authority has passed CIRP Order dated 20<sup>th</sup> July, 2022 by virtue of which the moratorium has been declared on the Corporate Debtor during the CIRP period in terms of Section 14 of the Code. Public Announcement was made by the Respondent in his capacity as Interim Resolution Professional on 23<sup>rd</sup> July, 2022 inviting claims of all creditors against the Corporate Debtor up till the insolvency commencement date i.e., 20<sup>th</sup> July, 2022.
- ii. By virtue of CIRP Order, this Hon'ble Tribunal has declared a moratorium on the Corporate Debtor, which inter-alia prohibits recovery of any property by an owner or lessor where such property is occupied by

or in the possession of the Corporate Debtor. Therefore, the present application of the Applicant is not maintainable in law.

- iii. The Applicant has admittedly submitted a claim form in Form 'B' dated 01<sup>st</sup> August, 2022 claiming an amount of Rs. 1,05,19,307/- which was revised to Rs. 92,31,853/- on 24.11.2022. The Respondent No. 01 has verified the claim form and admitted the claim amount to the extent of Rs. 42,81,859/-. The Respondent proposed that the rental dues in respect of the leased land up till the insolvency commencement date claimed by way of claim form in Form 'B' will be dealt with as per the Code and as for the land lease rental dues for the CIRP, the same shall be endeavoured to be paid from the cash flows of retail store of the Corporate Debtor in the building constructed upon the leased land upon its resumption. However, the Applicant declined to accept the aforesaid proposal. In any case, the Respondent states that the claim of the Applicant will be dealt with as per the provisions of the Code.
- iv. The Corporate Debtor has incurred substantial costs in constructing a building on the leased land and, therefore, the leased land cannot be returned until the Corporate Debtor is compensated for the constructed building. The Respondent No.01 denies that the condition of the premises is deteriorating. The Respondent No.01 states that he has taken all possible steps to safeguard the leased land.
- v. The CIRP is at its final stages and the Respondent is actively negotiating a resolution plan. The building constructed by the Corporate Debtor on the leased land is owned by the Corporate Debtor and thus, it forms part of the assets of the Corporate Debtor, which is useful for negotiating on

resolution plans received from the prospective resolution applicants. Any order for vacating the possession of the leased land or the building appurtenant thereto would impede the process of CIRP of the Corporate Debtor. The Respondent has thus prayed for the dismissal of the instant application.

**4. Submissions of the Applicant in Rejoinder:**

In response to the Affidavit in Reply filed by the Respondent, the Applicant was granted liberty to file rejoinder and accordingly, the Rejoinder Affidavit on behalf of the Applicant dated 01<sup>st</sup> August, 2023 has been placed on record and the submissions made therein on behalf of the Applicant are being briefly stated hereinbelow:

- i. The Respondent is required by the provisions of the Code to run the entity of the Corporate Debtor as a going concern. If the entity of the Corporate Debtor was to be run as a going concern, then the Respondent is required to pay the lease rents and clear all the arrears of the same. The Respondent under the garb of CIRP and moratorium under the Code cannot occupy the leased land without payment of lease rent.
- ii. The Lease Deed in clear and unambiguous terms in Clauses 13 and 14 provide for termination wherein the physical possession of the leased land shall be returned on "As Is Where Is Basis" to the Lessor (i.e. the Applicant). As the building on leased land cannot be severed or separated, the meaning "As Is Where Is Basis" will have to be construed as returning the physical possession of land with building built on it collectively. Further, it is settled position of law that upon determination of lease, the lessee/Corporate Debtor has no right, title or interest in the

leased land and therefore, the building cannot be treated as part of the assets of the Corporate Debtor.

**5. Submissions of the Applicant:**

- a. The Applicant is entitled to take possession of the leased land from the Respondent since the Lease Deed was terminated prior to the commencement of CIRP of the Corporate Debtor and, therefore, the Corporate Debtor was under a bounden duty to return the possession of the leased land to the Applicant prior to the commencement of CIRP.
- b. The building constructed on the leased land also belongs to the Applicant since after determination of lease, the Corporate Debtor has no right, title and interest over the property and the leased land has to be returned on “As Is Where Is Basis”, which means that the building too has to be returned along with the land as the same cannot be separated or severed from the leased land.
- c. Assets owned by a third party in possession of the Corporate Debtor have been excluded from the scope of CIRP and moratorium in view of Explanation (a) to Section 18 of the Code. As the Applicant is a third party and admittedly the leased land is owned by him, therefore, the leased land including the building is outside the scope of CIRP and consequently, the moratorium. In this regard, the Counsel for the Applicant has relied upon the following precedents:
  - i. Neesa Leisure Limited v/s. Rajasthan State Industrial and Investment Corporation- Company Appeal (AT) No. 510 of 2022.
  - ii. Intervention Application filed by Orbit Lifesciences Pvt Ltd in Weather Makers Pvt Ltd. v/s. Parabolic Drugs Ltd.- C.A. No. 171/2019 in CP(IB) No. 102/Chd/CHD/2018.
  - iii. K.A. Dhiaryawan v/s J.R. Thakur, Civil Appeal Nos. 192/1954.

**6. Submissions of the Respondent:**

- a. In terms of Lease Deed, the demised premises only refer to the land and does not include the building constructed by the Corporate Debtor. The Lease Deed does not contain a provision for the return of building to the Applicant. Corporate Debtor who has constructed the building cannot be expected to vacate the demised premises/leased land without being adequately compensated for the building.
- b. In view of the subsistence of moratorium, the recovery of possession of the leased land by the Applicant is barred by Section 14(1)(d) of the Code. Though the Applicant has claimed termination of lease prior to the commencement of CIRP, however, that contention is not relevant since the property is undisputedly in occupation of the Corporate Debtor at the time of commencement of CIRP. The word “occupation” has wider import u/s 14 of the Code. In this regard, the Counsel for the Respondent has placed reliance upon the judgment of Hon’ble Apex Court in Rajendra K. Bhutta v/s. MHADA, (2020) 13 SCC 208.

**FINDINGS**

7. We have heard the counsels representing the Applicant and the Respondent, and we have duly considered the opposing submissions presented before this tribunal. Our careful examination encompasses thorough scrutiny of the pleadings, documents, and materials submitted as part of the official record.
8. The present application is filed under section 60(5) of the Code by the Applicant, seeking various reliefs, notably the repossession of land leased to the Corporate Debtor and the claim for rent accruing from the date of default until the handing over the possession of the leased land.

9. Counsel for the Applicant contends that the land leased to the Corporate Debtor does not fall under the defined scope of "assets" as stipulated in the Explanation to Section 18 of the Code. It is asserted that the moratorium provision should not obstruct the Applicant's pursuit of repossessing the land leased, particularly since the lease had been terminated before the commencement of the Corporate Insolvency Resolution Process (CIRP). Moreover, the Applicant asserts that the Corporate Debtor's operation as a going concern imposes an obligation for the payment of lease rents.
10. Conversely, the Counsel for the Respondent asserts that the Applicant's attempt to reclaim the property during the moratorium, as outlined in section 14(1)(d) of the Code, is legally impermissible. It is highlighted that the Applicant has already submitted a claim to the Respondent for the period leading up to the initiation of insolvency proceedings, which will be addressed in accordance with the provisions of the Code. Furthermore, it is argued that the lease rents during the CIRP period shall be treated as part of the CIRP costs, and therefore, the present application shall be deemed to have become redundant.
11. The submissions presented have been meticulously weighed and examined by this tribunal.
12. The CIRP of the Corporate Debtor commenced on 20<sup>th</sup> July, 2022. The Applicant herein had lodged his claim before the Respondent No.01 on 01<sup>st</sup> August, 2022 and then revised his claim on 24<sup>th</sup> November, 2022 for Rs. 92,31,853/- in respect of the lease rent outstanding for the period from February, 2022 to July, 2022. The Respondent No.01 admitted the Applicant's claim to the tune of Rs. 42,81,859/- and now, the same will be dealt with in

accordance with the law. It is pertinent to note that the Applicant here has not impugned the partial rejection of his claim by the Respondent No.01, but instead, the Applicant herein is seeking directions to the Respondents for payment of lease rent notwithstanding the CIRP of the Corporate Debtor. In this regard, we observe that the Applicant's claims in respect of lease rental pertaining to pre-CIRP period will be appropriately treated in the resolution plan, if any or under section 53 of the Code in the event of liquidation, as the case may be. At this stage, we cannot direct the Resolution Professional of the Corporate Debtor to make payment of lease rent for the period in respect of which the claim form has been filed by the Applicant.

13. The Applicant's claim concerning lease rent during the CIRP period is to be treated as CIRP costs, as mandated by the Code. From a plain reading of the definition u/s 5(13)(c), it is crystal clear that during the period of moratorium the Resolution Professional who carries on the business of the Corporate Debtor and in carrying on the business and to keep the Corporate Debtor as a going concern, the costs so incurred by the Resolution Professional shall have to be treated as CIRP costs. In view of the above provisions of law, the dues namely lease rents due to the Applicant for the period after the insolvency commencement date until handing over the possession of the property need to be treated as CIRP Costs.
14. So far as the relief sought by the Applicant with regards to the possession of the property is concerned, in our considered view, the RP is not justified in retaining the possession on account of the following circumstances:
  - i. The CIRP of the Corporate Debtor commenced vide Order dated 20<sup>th</sup> July, 2022 and the lease was terminated prior to the CIRP vide Legal

Notice dated 20<sup>th</sup> May, 2022 on the ground of non-payment of rent. Since the lease was terminated prior to CIRP, the Corporate Debtor should have handed over the possession of the leased land along with the Building appurtenant thereto as per the aforesaid notice prior to the insolvency commencement date.

- ii. Undisputedly, no rentals have been paid from February 2022 to 20<sup>th</sup> July 2022 i.e. upto the insolvency commencement date, though a claim in respect thereof has been admitted by the RP.
- iii. No rentals have been paid to the Applicant during the CIRP period at any point of time even though a period of more than two years has already passed. It cannot be disputed that the rentals during the CIRP period is required to be mandatorily treated and paid as CIRP cost.
- iv. Admittedly, no business is being transacted in the premises in question nor the Corporate Debtor is being run as a going concern. Therefore, the RP cannot be allowed to retain the possession merely on the ground that it will further bring down the value of the Corporate Debtor.
- v. Even though the building in question was raised by the Corporate Debtor but as per the terms and conditions of the Lease Deed executed between the Applicant and the Corporate Debtor, upon termination of lease the Corporate Debtor was required to give back the property on "As Is Where Is" basis which would imply that apparently the Corporate Debtor is not entitled to claim any compensation on account of the fact that the building on the leased land was raised by it.
- vi. The Applicant cannot be put to a double jeopardy, as on one hand no rent is being admittedly paid to him since February, 2022 which includes pre and post CIRP periods nor the possession is being handed over to him which is resulting in a continuing loss to him and such type of status quo

cannot be allowed to be maintained endlessly causing severe prejudice to the Applicants and his rights as a lessor.

- vii. No meaningful purpose is being served by retaining the possession of the property by the Corporate Debtor as it would unnecessarily increase the financial burden of the Corporate Debtor which is already under acute stress.

15. Regarding the security and protection of the land and the building currently under the possession of the Corporate Debtor, it is incumbent upon the Respondent to ensure the safeguarding of assets held by the Corporate Debtor. Exhibit to the Affidavit-in-Reply, the invoices from the security agency, presented by Respondent No. 01, substantiate the measures taken to safeguard the leased land and its associated building. Hence, at this juncture, we find no compelling reason to issue any directives pertaining to the security measures concerning the leased land or its related building.

16. No other contentions have been raised on behalf of the Applicant.

17. Thus, in view of the facts and circumstances of the case and in view of the foregoing discussions and analysis, we are of the considered view that this application deserves to be partly allowed and hence, we pass the following orders:

- a. **I.A. No. 2357 of 2023 is partly allowed;**
- b. The Respondents are hereby directed to handover the possession over the leased land along with the Building appurtenant thereto to the Applicant within one month from the date of this order. In case any inventory is lying

in the premises in question and the RP is not having sufficient funds to remove the inventory, the Applicant will be at liberty to bear the costs of removal as well as warehousing of the inventories lying at the premises in question, if any, which will be subsequently treated and paid as CIRP costs at the appropriate stage;

- c. The Respondent No.01 is further directed to treat the lease rent pertaining to the CIRP period till the handing over the physical possession of the leased land along with the Building appurtenant thereto as CIRP costs.
- d. All other relief(s) prayed for are rejected;
- e. This I.A. accordingly stands disposed of.

**Sd/-**

**ANIL RAJ CHELLAN**  
**(MEMBER TECHNICAL)**

**Sd/-**

**KULDIP KUMAR KAREER**  
**(MEMBER JUDICIAL)**