

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 2468 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:

**The Court Receiver,
High Court, Bombay.**

...Applicant

Versus

**Mr. Vijay Kumar Iyer,
The Resolution Professional of
Future Retail Limited**

...Respondent

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 Pooja Batra a/w Yash Naik.

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 mortgaged immovable property, being the Subject Premises situated in Ahmedabad, Gujarat and to provide the details and data of net sales of the period from April, 2022 to April, 2023 for the Subject Premises to the Applicant so that the Applicant can reckon the outstanding lease rent and file appropriate claim.
2. The averments made by the Applicant in its application and as argued by the Learned Counsel for the Applicant are summarized as under:
 - i. M/s. IDBI Trusteeship Services Ltd had filed a Commercial Suit No. 207 of 2022 and Interim Application (L) No. 18696 of 2022 in the High Court of Judicature at Bombay against M/s. Ojas Tradelease and Mall Management Pvt Ltd & Anr *inter-alia* seeking a money decree amounting to Rs. 401,89,99,179/- (Rupees Four Hundred and One Crores, Eighty-Nine Lakhs, Ninety-Nine Thousand, One Hundred and Seventy-Nine Only) and a declaration that its claim is duly secured by a mortgage over

the Mortgaged Property equivalent to 12,407 sq.mtrs. or thereabouts spread equally over the ground, first and second floor in Block 'C' in the commercial complex known as "The Acropolis" constructed on Non-Agricultural lands bearing Survey Nos. 04, 6/1+2 and 7+7/2 allotted Final Plot No. 5/Part in the T.P. Scheme No. 38 of Village Thaltej, Taluka Daskrol (Old), registration district Ahmedabad, sub-district Ahmedabad-9 (Bopal) ("**Suit Premises**").

- ii. After hearing both the parties, the Hon'ble Bombay High Court passed an interim order dated 12th September, 2022 inter-alia appointing the Applicant as the Court Receiver of the Suit Premises. Thereafter, the Applicant addressed a letter on 27th September, 2022 to the Advocates of Ojas Tradelease and Mall Management Pvt Ltd (hereafter called as 'Ojas' for the sake of brevity) directing them to furnish the particulars of lessees/tenants occupying the shops/tenements in the Suit Premises, the details of licence fee/lease rentals payable by the lessees/tenants, the copies of registered agreements/deeds and the particulars of shops/tenements that are closed/vacant. The Applicant's officers and representatives visited the Suit Premises on 03rd October, 2022 and took symbolic possession of it.
- iii. The Advocates of Ojas submitted a letter dated 03rd October, 2022 on 04th October, 2022 with the Court Receiver (i.e. the Applicant) providing the details of lessees/tenants occupying the shops/tenements in Suit Premises as well as particulars of the licence fee/lease rentals payable by the lessees/tenants. The said letter *inter-alia* revealed that by way of a Retail Operating Agreement dated 18th May, 2015, the Corporate Debtor

was using certain parts of the Suit Premises under the brand name of “Big Bazaar”. The chargeable area for the Corporate Debtor was a total of 42,272 sq.ft. carpet consisting of 8,526 sq.ft. carpet on the upper ground floor and 33,746 sq.ft. carpet on the first floor (being hereinafter referred to as “**the Subject Premises**”). The said letter stated that the term of the aforesaid Retail Operating Agreement was to be 09 years from the commencement date, a license fee of 3.5% of the “Monthly Net Sales” was payable subject to deduction of taxes and 18% interest in case of default in payment of license fees. The said letter also stated that the security deposit was of Rs. 15,00,000/- (Rupees Fifteen Lakhs Only).

- iv. On 17th November 2022, the Applicant had received a letter dated 09th November 2022 from the Respondent confirming that the Subject Premises had been made available to it under the Retail Operating Agreement dated 18th May, 2015 and informing the Applicant that pursuant to the Order dated 20th July 2022, the Corporate Insolvency Resolution Process (‘CIRP’) process had been initiated by this Hon’ble Tribunal against the Corporate Debtor (i.e. Future Retail Limited). The Respondent further informed the Applicant that the Corporate Debtor is under a moratorium in terms of the Code and therefore, no proceedings can be initiated or continued against the Corporate Debtor. The Respondent stated that in light of the same, the Applicant was requested to maintain a status quo in respect of the assets of the Corporate Debtor lying in the Subject Premises.
- v. The Applicant also received a letter dated 16th November 2022 on 17th November 2022 from the Advocates for Ojas that the rent payable by the

Corporate Debtor was not received by Ojas and had, therefore, not been deposited with the Applicant. Despite repeated requests and reminders, the Respondent/Corporate Debtor failed to pay rent, handover possession and give net sales data. The Applicant was also informed at the meeting convened on 19th November, 2022 that the agreement between Ojas and the Corporate Debtor had been terminated on 06th August, 2022. Accordingly, the Court Receiver prepared and submitted the Court Receiver's Report No. 104 of 2023. The Hon'ble Bombay High Court considered the aforementioned Report and directed the Court Receiver vide Order dated 05th April, 2023 to make an application before the NCLT against M/s. Future Retail Limited.

vi. Hence this Application.

3. Reply of the Respondent

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

- i. The Hon'ble Adjudicating Authority has passed CIRP Order dated 20th 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 23rd July, 2022 inviting claims of all creditors against the Corporate Debtor up till the insolvency commencement date i.e., 20th July, 2022. However, no claim for any dues upto the insolvency commencement date has been received from Ojas Tradelease and Mall Management Pvt Ltd till date.

- ii. The Respondent submitted that despite repeated requests and reminders, the erstwhile management of the Corporate Debtor failed to provide the complete information, documents and data of the Corporate Debtor to the Respondent. Therefore, the Respondent had filed two interlocutory applications bearing IA No. 3463 of 2022 and IA No. 420 of 2023 before this Hon'ble Adjudicating Authority u/s 19 r.w. Section 60(5) of the Code seeking directions to the erstwhile management, director, ex-director, certain key managerial personnel and the statutory auditor namely NGS & Co. LLP to provide necessary co-operation and the critical information, documents and data of the Corporate Debtor to the Respondent in order to facilitate smooth running of CIRP. However, the complete information, documents and data of the Corporate Debtor, as sought for by the Respondent, are still not available with the Respondent. It is pertinent to note that qua the submissions of the erstwhile management that all data in their custody has been provided to the Respondent and the rest is in the SAP, whose access has been given to the Respondent, this Hon'ble Tribunal was pleased to dispose off the I.A. No. 3463 of 2022. However, upon checking, the data in data tapes with backup of SAP was found to be corrupt. The Respondent sought the assistance of SAP team and the erstwhile management to recover the data which was found to be corrupt. However, the same yielded no positive result and the Respondent is now in the process of taking requisite steps against the erstwhile management for the same. In the absence of any data or information, as sought by the Applicant, with the Respondent, the Respondent is unable to furnish the net sales data for the period from April, 2022 to April, 2023. Hence, the prayer of the Applicant in this regard should be dismissed.

- iii. Admittedly, the Subject Premises were in the possession of the Corporate Debtor at the time of initiation of CIRP and therefore, the Corporate Debtor cannot be dispossessed of the same during the subsistence of the CIRP by virtue of the effect of the moratorium u/s 14(1)(d) of the Code. Further as regards the submission of the Applicant that the Retail Operating Agreement dated 18th May, 2015 was terminated on August 06, 2022, it is submitted that in the light Section 14(1)(d) of the Code, the said Agreement could not have been terminated during the subsistence of the moratorium under the Code. Hence, the prayer of the Applicant in terms of clause (a.) cannot be granted.
- iv. The Respondent referring to the Letter dated 31st January, 2023 annexed at Exhibit 'K' to the Application at page 165, admitted that since the Future Retail Limited was going through financial stress, the store was in near shut condition and therefore, no to little revenue is generated for all these months from April 2022 onwards. Further, as submitted above, the Respondent has not been provided critical information/data of the Corporate Debtor for the pre-CIRP period, including details of the net sales of the Subject Premises, by the erstwhile management. Further, as regards the period during CIRP, the Subject Premises have been non-operational and the revenue generated from it is almost nil. The Respondent undertakes to submit the requisite information of net sales as and when the same is made available to him.
- v. The Corporate Debtor submits that CIRP is at its final stage and the resolution plan received by the Respondent, post discussions and deliberations between the CoC members, has been put to vote for the approval of CoC members on 19th July, 2023. In light of the same, the CIRP is likely to conclude sometime in August, 2023 and the Respondent

may be in a better position to assess regarding the vacation of the retail stores post the outcome of voting on the approval of the resolution plan for the Corporate Debtor.

- vi. Once a company is admitted to insolvency under the Code, the remedy available with all creditors of such company for their dues pending upto the insolvency commencement date, is to file their claims with the Interim Resolution Professional/Resolution Professional. All such claims of the creditors shall be resolved in accordance with the resolution plan or the proceeds of liquidation, as the case may be. However, no claim has been submitted by the Applicant.
- vii. It is also important to highlight that the Applicant has not obtained any orders from the Hon'ble Bombay High Court authorizing it to dispossess existing tenants/lessees of Ojas. The Corporate Debtor being duly possessed of the Subject Premises shall continue to be authorised to possess the same subject to the protection of the rights of the Applicant to collect any lease rentals as may be applicable, in accordance with the orders passed by the Hon'ble Bombay High Court from time to time.

4. Rejoinder of the Applicant:

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 04th September, 2023 has been placed on record and the submissions made therein on behalf of the Applicant are being briefly stated hereinbelow:

- i. The Applicant states that the claim on behalf of the Applicant could not be filed as the operating rental charges was required to be calculated @ 3.5% of the monthly net sales. However, as the Respondent has failed to

provide the Applicant with the net sales data of the Corporate Debtor for the period from April, 2022 to April, 2023, the claim could not be lodged.

- ii. The moratorium under the Code was imposed w.e.f. 20th July, 2022 i.e., the date of admission of the Corporate Debtor into CIRP. However, prior to the imposition of the said moratorium, Ojas Tradelease and Mall Management Pvt Ltd ('Ojas') had terminated the Retail Operating Agreement vide Letter dated 03rd June, 2022 addressed to the Corporate Debtor and called upon the Corporate Debtor to vacate and handover the possession of the Subject Premises to Ojas on or before 30th June, 2022. The said letter was duly accepted by the Corporate Debtor and the acceptance in fact was communicated by the Corporate Debtor to Ojas vide Letter dated 15th June, 2022 in which the Corporate Debtor had agreed to hand over the possession of the Subject Premises by 01st July, 2022. However, despite such agreement, the Corporate Debtor continues to illegally occupy and retain the possession of the Subject Premises under the garb of moratorium. The Applicant denies that merely because the Corporate Debtor has been in possession of the Corporate Debtor at the time of initiation of CIRP, the Corporate Debtor cannot be dispossessed. It is submitted on behalf of the Applicant that the Corporate Debtor cannot be allowed to take undue advantage of moratorium and cannot be allowed to hold on to the Subject Premises illegally.
- iii. Vacation and handing over of the Subject Premises by the Corporate Debtor to the Applicant is in no way related to the resolution plan received by the Respondent which is yet to be approved by the CoC. Therefore, the plea taken by the Respondent that it would be in a better

position to assess the vacation of retail stores post the outcome of voting on approval of the resolution plan, is entirely baseless. The Respondent is deliberately trying to delay the handing over of the Subject Premises when it is an admitted fact that the Corporate Debtor had agreed to handover the possession by 01st July, 2022.

FINDINGS

5. We have heard the learned Counsels for the Applicant and the Respondent. We have gone through the pleadings, the documents and materials placed on record.

6. Counsel for the Applicant submits that the Applicant is entitled to take possession of the Subject Premises as the agreement in respect of the same was terminated prior to the commencement of CIRP and therefore, embargo of moratorium u/s 14(1)(d) will not apply. In this regard, the Counsel for the Applicant has relied upon the ruling of NCLAT dated 07th December, 2022 in the case of Neesa Leisure Ltd. v/s Rajasthan State Industrial and Investment Corporation [Company Appeal (AT)(Ins.) No. 510 of 2022) to buttress his proposition that where a property owing to the termination of lease ceases to be a property of the Corporate Debtor prior to CIRP, then it cannot be covered u/s 14 much less Section 14(1)(d) of the Code. Counsel for the Applicant further submits that in view of Explanation to Section 18(1)(f) of the Code, the assets owned by a third party which are in possession of the Corporate Debtor, have to be excluded from the scope of CIRP and thus, the moratorium will not apply in the instant case to the Applicant recovering the property.

7. Per contra, the learned Counsel for the Respondent has submitted that the termination of agreement prior to the commencement of CIRP is irrelevant so long as the possession of the premises at the insolvency commencement date is with the Corporate Debtor. Counsel for the Respondent submits that the recovery by owner or lessor of the property in possession or occupation of Corporate Debtor during the CIRP is prohibited by virtue of Section 14(1)(d) of the Code. In this regard, the Counsel for the Respondent has relied upon the ruling of Hon'ble Apex Court in Rajendra K. Bhutta v/s. MHADA, (2020) 13 SCC 208 where section 14(1)(d) of the Code, particularly the use of words "occupied by" and "possession of" have been given a wide import. Counsel for the Respondent further submitted that Neesa Leisure's case relied upon by the Applicant is distinguishable on facts as the corporate debtor therein had lost possessory rights more than three years prior to the initiation of CIRP. Further, the possession of land in question was taken over by RIICO (Respondent therein) prior to the CIRP and the RP in Neesa Leisure's case was attempting to recover the possession of certain assets. In contrast to the facts of Neesa's case, the Corporate Debtor is in possession and remains in occupation of the leased premises.
8. We have carefully examined the above submissions and we have given our thoughtful consideration to them after perusing the records.
9. On perusal of record, we find that the Applicant in his rejoinder has annexed the Notice dated 03rd June, 2022 terminating the Retail Operating Agreement dated 18th May, 2015 ('**Agreement**') executed between Ojas and Future Retail Ltd (i.e. the Corporate Debtor) on the ground of continuous defaults in paying the operating charges. The Applicant has also annexed the Reply of the

Corporate Debtor dated 15th June, 2022 to the Termination Notice dated 03rd June, 2022. The aforesaid Reply states that the Corporate Debtor had acknowledged and accepted the aforesaid Termination Notice and further stated that the possession of the premises shall be with Ojas from 01st July, 2022. It is also pertinent to note that the Respondent herein has not rebutted the Termination Notice dated 03rd June, 2022 and the Reply dated 15th June, 2022. Thus, we see that the Agreement was terminated prior to the insolvency commencement date and as such, the Corporate Debtor ought to have handed over the possession of subject premises to the Applicant before the commencement of CIRP.

10. The matter can be looked at from another angle. The Corporate Debtor was going through financial stress, the store is in near shut down condition and therefore, hardly any revenue is being generated from April, 2022 onwards. The Respondent further admits in his reply that as regards the period during CIRP, the subject premises have been non-operational and the revenue generated from the same is almost nil. Hence, we are constrained to observe that the rights of the Applicant/Ojas are being seriously prejudiced as the Applicant/Ojas have not been paid the rent since the month of April, 2022 and the subject premises in possession of the Corporate Debtor is also not being used to run the retail store to keep the company as a going concern. Denying possession to the Applicant would amount to gross prejudice to the Applicant. On one hand, the Applicant is not being given any rent which is to be calculated on the basis of turnover from the store. Since no business is being transacted, as per the Lease Deed, the Applicant would not be paid any rent. Therefore, depriving the Applicant of possession of the property would be grossly unjust. Even otherwise, retention of possession by the RP/Corporate Debtor is also not

justified as the property is not being utilized to keep it as a going concern and the retention of its possession would not in any way maximize the value of the Corporate Debtor. Rather, it would enhance the financial burden of the Corporate Debtor which is already in acute stress.

11. As regards the prayer of the Applicant to furnish the net sales data for the period of April, 2022 to April, 2023, which the Applicant requires for the purpose of calculating the outstanding rent for the said period to enable him to lodge the claim with the RP, the latter has stated in the reply that the relevant data is not available with him and the SAP data tapes provided by the erstwhile management was found to be corrupt. Since as per the terms of the contract between the parties recorded in the Retail Operating Agreement, the lease rentals are to be calculated and paid at the rate of 3.5% of the net monthly sales of the retail store, non-supply of the data would cause a serious prejudice to the Applicant for no fault on his part. Under the given situation, we are of the considered view that if the RP does not furnish the relevant monthly net sales data within a period of two weeks, the Applicant shall be at liberty to lodge his claim pertaining to the pre-CIRP period in respect of which the rentals have not been paid on the basis of average turnover of the immediately preceding equal number of months. The said claim will be considered and verified by the RP accordingly.

12. Counsel for the Applicant has prayed for directions to the Respondent to disclose all necessary details in respect of the Commercial Suit in the Information Memorandum and also expressly disclose and record the ownership of the Subject Premises lies with Ojas Tradelease and Mall Management Pvt Ltd and to further disclose the orders dated 12th September

2022, 13th October, 2022 and 05th April, 2023 passed by the Hon'ble Bombay High Court. The Ld. Counsel for the Applicant has further prayed for the directions to the Respondent that the Subject Premises be excluded from the assets of the Corporate Debtor. In this regard, we observe that since this Tribunal is directing the Respondent to hand over the possession of the Subject Premises to the Applicant, the directions prayed for by the Applicant, as discussed above, have become redundant and therefore, we are not inclined to give such directions to the RP/Respondent.

13. In view of the foregoing discussions and aforesaid findings, we are of the considered view that this application should be dismissed and hence, we pass the following orders:

ORDER

- a. **I.A. No. 2468 of 2023 is partly allowed;**
- b. The Respondent is hereby directed to handover the Subject Premises to the Applicant within one month from the date of this order;
- c. The Respondent is directed to furnish the monthly net sales data to the Applicant from April, 2022 to June, 2022 within a period of two weeks, failing which the Applicant shall be at liberty to lodge or get lodged the claim of Ojas Tradelease and Mall Management Pvt Ltd pertaining to the pre-CIRP period in respect of which the rentals have not been paid on the basis of average turnover of the immediately preceding equal number of months. The said claim will be considered and verified by the RP accordingly;

IN THE NATIONAL COMPANY LAW TRIBUNAL, COURT-II,
MUMBAI BENCH

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- d. Further, the Respondent is directed to treat the lease rent, if any, accruing during the CIRP period as CIRP costs;
- e. Accordingly, I.A. No. 2468 of 2023 stands disposed of on above terms.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)