

**THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH-IV**

I.A. 3438 OF 2022

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016 r/w Rule 11 of
NCLT Rules, 2016

Mr. Satish Kumar Gupta

Resolution Professional/

...Applicant

Vs.

Maharashtra Industrial Development
Corporation

...Respondent

I.A. 3864 OF 2022

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016 r/w Rule 11 of
NCLT Rules, 2016

Mr. Satish Kumar Gupta

Resolution Professional/

...Applicant

Vs.

Maharashtra Industrial Development
Corporation

...Respondent

I.A. 638 OF 2023

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016 r/w Rule 11 of
NCLT Rules, 2016

Maharashtra Industrial Development
Corporation

...Applicant

Vs.

Mr. Satish Kumar Gupta

Resolution Professional/

...Respondent

IVN.P. 11 OF 2023

Under Section 60(5) of Insolvency &
Bankruptcy Code, 2016 r/w Rule 11 of
NCLT Rules, 2016

M/s Auro Laboratories Limited

...Applicant

Vs.

Mr. Satish Kumar Gupta

Resolution Professional/

...Respondent

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT IV

I.A. 3438/2022
I.A. 3864/2022
I.A. 638/2023
INVP 11/2023
IN
CP (IB) 1443/C-IV/MB/2020

In the matter of

C.P.(IB) No. 1443/MB/2020

Vikash Parasampuria

Financial Creditor

Vs.

Bombay Rayon Fashions Limited

Corporate Debtor

Order delivered on: 16.05.2023

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances (via videoconferencing):

For the Applicant/RP : Mr. Gaurav Joshi, Sr. Advocate a/w Mr. Siddharth Ranade, Ms. Nishi Bhankaria, Mr. Kanika Sharma & Ms. Kaazvin Kapadia i/b Trilegal

For the MIDC : Mr. Chetan Kapadia a/w Mr. Rajmani Varma, Mr. Rohan Agrawal, Ms. Poonam Sheth i/b M/s Navdeep Vora and Associates

For the Intervenor : Mr. Shyam Kapadia i/b Mr. Ravitej Chilumuri, Ms.

Aafreen Noor and Ms. Neha
Thirani

ORDER

Per: Prabhat Kumar, Member (Technical)

1. IA 3438/2022:

This is an Application filed by Mr. Satish Kumar Gupta (“*RP/Resolution Professional*”) of Bombay Rayon Fashions Ltd. (“*Corporate Debtor*”) in C.P. (IB)/1443(MB)2020 seeking directions restraining Maharashtra Industrial Development Corporation (“*MIDC*”) from taking possession of the Corporate Debtor’s factory premises located at Plot No. F-9, situated at Tarapur Industrial area, Kolvade, Thane (“*factory premises*”) during the pendency of the corporate insolvency resolution process (“*CIRP*”) in the case of the Corporate Debtor.

2. 3864/2022

This is an Application filed by Mr. Satish Kumar Gupta (“*RP/Resolution Professional*”) of Bombay Rayon Fashions Ltd. (“*Corporate Debtor*”) in C.P. (IB)/1443(MB)2020 seeking directions to restore the possession of the Corporate Debtor’s factory premises located at Plot No. F-9, situated at Tarapur Industrial area, Kolvade, Thane (“*factory premises*”) taken over by Maharashtra Industrial

Development Corporation (“*MIDC*”) during the pendency of the corporate insolvency resolution process (“*CIRP*”) in the case of the Corporate Debtor.

3. IA 638/2023:

This is an Application filed by Maharashtra Industrial Development Corporation (“*MIDC*”) seeking directions restraining Mr. Satish Kumar Gupta (“*Applicant/Resolution Professional*”) of Bombay Rayon Fashions Ltd. (“*Corporate Debtor*”) from including Plot No. F-9, situated at Tarapur Industrial area, Kolvade, Thane (“*factory premises*”) in the assets of the Corporate Debtor for its corporate insolvency resolution.

4. IVN.P (IBC)/11(MB) 2023:

This is an Intervention Application filed by M/s. Auro Laboratories Ltd., allottee of Plot No. F-9, situated at Tarapur Industrial area, Kolvade, Thane (“*factory premises*”) seeking to intervene in the proceedings in IA 3438/2022 and 638/2023; and declaration that the factory premises is not part of the assets of the Corporate Debtor for its corporate insolvency resolution.

5. Since all of three applications have common subject matter i.e. the factory premises, this order disposes of all three applications by common order.

6. The RP submits that the Corporate Debtor is the lessee of Factory Premises situated at Plot No. F-9, admeasuring 19,720 square meters, situated at Tarapur Industrial area, Kolvade, Thane, of which the MIDC is the lessor. Since 2010, the Corporate Debtor has been legally utilising the Plot F-9 Premises for its usual course of business and presently has substantial amounts of material stored at the Factory Premises. Additionally, several workers and employees of the Corporate Debtor are engaged at the location, including some workers of the Corporate Debtor who are residing in the Factory Premises.

6.1. However, the utilization of the Factory Premises is the subject matter of an ongoing dispute between the Corporate Debtor and the MIDC, which is pending vide Misc. Appeal No. 108 of 2015 before the Hon'ble District Court, Palghar. In spite of the pendency of the dispute, the MIDC vide notice dated 2 June 2022 and without any basis stated that employees/workers of the Corporate Debtor are illegally occupying the Factory Premises and sought removal of the employees/workers of the Corporate Debtor from the Factory Premises.

6.2. After commencement of the Corporate Insolvency Resolution Process of the Corporate Debtor, on 30th September 2022 the MIDC officials along with the local police visited the Factory

Premises and attempted to take illegal possession of the same by use of undue influence and coercion. Despite the Applicant informing the MIDC that the Corporate Debtor was undergoing CIRP under the provisions of the Insolvency and Bankruptcy Code, 2016, and the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 was in effect, the MIDC attempted to change the locks on the Factory Premises and forcefully re-gain possession.

7. MIDC submits that due to breaches committed by the Corporate Debtor, it terminated the said Lease vide its notice dated 15.06.2015. Subsequent to the termination of Lease Deed, on 29.06.2015, it took possession of the said plot after doing panchnama. Accordingly, since 29.06.2015, plot is in possession of / in the custody of MIDC.

7.1. In view of the Termination of the Lease as aforesaid, pursuant to a meeting MIDC's Land Allotment Committee held sometime in February 2022, the said Plot has been sanctioned to be allotted on M/s. Auro Laboratories Limited.

7.2. By the letter dated 30.09.2022, the Resolution Professional informed the MIDC that this Hon'ble Tribunal vide its order dated 07.06.2022 has inter alia directed the initiation of a corporate insolvency resolution process against the Corporate Debtor under the provisions of the Insolvency and Bankruptcy

Code,2016 (“Code”) and that he was appointed as the Interim Resolution Professional.

7.3. By a letter dated 15.12.2022, the Resolution Professional erroneously contended that Corporate Debtor is in possession of said plot and thereby has sought the MIDC to restrain from taking any action, step in pursuance of the said termination and possession.

8. The Intervenor submits that it is a bona fide third party allottee of Plot F-9 admeasuring 19720 Sq. Mtrs. Situated in the Tarapur Industrial Area allotted to the it by MIDC for manufacturing of APIs through an Offer Letter dated 28 February 2022. It has also made a payment of Rs. 2,14,25,000/- (Rupees Two Crore Fourteen Lakhs Twenty-five thousand only) towards Earnest Money Deposit.

8.1. On 23 June 2022, MIDC sanctioned the allotment of Plot F-9 in favour of the Applicant vide an Allotment Order date 23 June 2022.

8.2. The Plot is now being sought to be made an asset/property of the Corporate Debtor by Resolution Professional through the Applications filed by him against MIDC, inter alia, alleging that taking possession of the same is against the CIRP of the Corporate Debtor and the Code.

9. This Bench heard the Counsel(s) and perused the material available on record.

9.1. The CIRP in the case of Corporate Debtor, stated to be lessee of Factory Premises leased out to it by MIDC, commenced on 7th June, 2022 on an application filed on 16th December, 2020. It is the case of the Resolution Professional that the Corporate Debtor was in possession of this factory premises as on date of commencement of CIRP; and he can not be dispossessed from the possession of said factory premises after imposition of moratorium u/s 14 of the Code; the Panchnama dated 29.06.2015 is a Paper Panchnama drawn at back of the Corporate Debtor; the Corporate Debtor had paid lease rent for the period from 2011 to 2020 on 1.10.2020 and the same was accepted by MIDC; the Refund Order dated 16.03.2023 refunding the deposit of said lease rent is an after thought; the order dated 28.02.2023 passed by District Court, Palghar directs the Corporate Debtor to return the possession of the Factory Premises to MIDC by 21.04.2023, thus implying that the Corporate Debtor is in possession of the said Factory Premises; and any prospective Resolution Applicant in the case of Corporate Debtor would inherit same rights as the Corporate Debtor possess, hence no prejudice will be caused to MIDC if the Factory Premises is included in the assets of Corporate Debtor for the purpose of its resolution.

9.2. Per Contra, it is the case of MIDC that it had taken symbolic possession of the factory premises vide Panchnama dated 29.06.2015, hence, it cannot be said that the Corporate Debtor was in possession of the Factory Premises on the date of commencement of CIRP in its case; first show cause notice dated 27.04.2015 records the fact that the corporate debtor had “closed production activities” at factory premises and MIDC was entitled to cancel the lease, re-enter and re-possess the said property; this fact of closure is further confirmed from surveyor report dated 29.04.2015 wherein it was stated that the factory premises is in dilapidated condition and had been closed for many years; it issued termination notice dated 15.06.2015 after consideration of reply of the corporate debtor to show cause notice dated 27.04.2015 & 27.05.2015; a public notice was issued in the year 2015 informing the fact of cancellation of lease and cessation of rights/titles in the property of Corporate Debtor; it received lease payment under mistake and when it was discovered, the same was refunded as no such lease rent was payable by the Corporate debtor; the Factory Premises was allotted to Intervenor in February, 2022, who has already paid a sum of Rs. 2,14,25,000/- as Earnest Money out of total premium of Rs. 8,45,00,200/- on 11.03.2022; Notice dated 2.6.2022 was issued to vacate the Factory Premises to illegal occupants (employees and workmen of other company) and was not addressed to the Corporate

Debtor; the factory premises has been finally allotted to Intervenor on 23.06.2022; and MIDC took actual possession of factory premises on 30.09.2022 through Police Intervention and photographs placed on record suggest that no activity was being carried out thereat.

9.3. Upon consideration of facts of the case and the rival arguments, this Bench feels that the issue, in present case, whether the Corporate Debtor was in possession of Factory Premises on the day of commencement of CIRP in the case of Corporate Debtor, as the issue of determination of ownership is irrelevant at this stage in view of section 18(1)(f)(vi) of the Code, which mandates the Resolution Professional to take control and custody of *assets subject to the determination of ownership by a court or authority*, and also considering the fact that the order dated 28.02.2023 passed by district court Palghar affirming the cancellation of the lease by MIDC is liable to be challenge. by the Resolution Professional before the competent jurisdiction and has not attained finality.

9.4. The Ld. Counsel for Resolution Professional has placed reliance on following judicial decisions on the proposition that recovery of the corporate debtor's property by the landlord/lessor during CIRP is in violation of the moratorium u/s 14(1)(d) –

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- (i) *Rajendera Bhutta v. Maharashtra Housing and Area Development Authority [(2020) 13 SCC 208];*
- (ii) *Maharashtra Industrial Development Corporation v. Shantanu T. Ray, Resolution Professional and Anr. [2022 SCC Online NCLAT 180]; and*
- (iii) *Navbharat Castings v. Moser Baer [2018 SCC Online NCLAT 931]*

9.4.1. This bench feels that the issue in present case does not pertain to interpretation of section 14(1)(d) of the Code, and the authorities relied upon by the Ld. Counsel are not disputed. However, the issue pertains to the fact whether MIDC took physical possession or symbolic possession prior to commencement of moratorium.

9.5. The Ld. Counsel for Resolution Professional has placed reliance on decisions in the case of *Manilal Damodar Joshi V. State of Gujarat and Ors.* [MANU/GJ/0903/2018] on the proposition that procedural/paper panchanamas are not sufficient for the government authorities to claim possession over land if steps have not been taken to take physical possession.

9.6. Per contra, MIDC submitted that the Corporate Debtor admitted in its letter dated 11.05.2015 that it was unable to start production activities due to a recession in the textiles market and requested

MIDC to states hands from terminating the lease. Since the explanation afforded by the Corporate Debtor was considered to be unsatisfactorily, MIDC vide its letter dated 15.06.2015 terminated lease and took possession on 29.06.2015 which is evident in the panchnama drawn up at the time of taking over of the possession.

- 9.6.1. It was further submitted that mere acceptance of lease rent does not amount to waiver of termination/notice to quit by MIDC and place reliance on the decision of Hon'ble Allahabad High Court in the matter of *Union of India v. Sudarshan Lal Talwar* [2002 SCC Online ALL 202].
- 9.6.2. It was also argued that National Company Law Tribunal lack jurisdiction to try and entertain disputes pertaining to contractual rights between parties which fall outside the realm of the insolvency and bankruptcy code, 2016 relying on decision of Hon'ble Supreme Court in the matter of *Gujarat Urja Vikas Nigam* [2021 7 SCC 209]; in the matter of *Tata Consultancy Services* [2022 2 SCC 583]; and *Municipal Corpn. Of Greater Mumbai v. Abhilash Lal* [2020 13 SCC 234].
- 9.6.3. MIDC submitted that took physical possession on 29.06.2015 in consequence to termination of lease on 15.06.2015. the said termination has attained finality vide judgment dated 28.02.2023 passed by additional District Court at Palghar. As regards claim of the Resolution

Professional that the Corporate Debtor was in physical possession on 07.06.2022, it was submitted that certain persons who claim to be associated with the Corporate Debtor have a illegally and unauthorizedly encroached upon a small portion in a corner of factory premises and relied upon the decision of Hon'ble Supreme Court in case of *Tamilnadu Housing Board v. A Viswam* [1996 8 SCC 259] wherein it held that “*It is settled law by series of judgment of this court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or panchnama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not cooperate in taking possession of the land*”. On perusal of Panchnama dated 29.06.2015, this bench finds that said panchnama records that the building in vacant and no work of plot holder is going on it; that Mr. Birbal B Kate area manager took possession of the said plot; and the said panchnama is witness by two witnesses.

9.7. The Ld. Counsel for intervenor has placed reliance on decisions in the matter of *Ram Ratan Modi v. Sammelan Tea and beverages Private Limited* (I.A.IB.1111/KB/2021) in CP(IB)No.184/KB/2018);

and Ram Ratan Modi V. Merico Agro Industries Private Limited (IA 1256/KB/2020) in CP(IB) No.184/KB/2018 to support the proposition that the disputed properties do not form part of assets of Corporate Debtor after the lease with the Corporate Debtor is terminated.

9.7.1. The Ld. Counsel for intervenor has placed reliance on decisions in the matter of *Banda Development Authority v. Moti Lal Agarwal*, (2011) 5 SCC 394; *Sita Ram Bhandar Society V. Gov. (NCT of Delhi)*, (2009) 10 SCC 501; and *Balmokand Khatri Educational and Industrial Trust V. State of Panjab* (1996) 4 SCC 212 to support the proposition that the possession through panchnama is sufficient.

9.7.2. The Ld. Counsel for intervenor has placed reliance on decisions in the matter of *K Selvaraj v. Inspector of Police* (1988 SCC Online Mad 351); *Prem Singh v. Krishna Parashar* (2013 SCC Online P & H 26255); *Wajedkhan Usmankhan Pathan V Nissar Sattar (Civil Revision Application No. 132 of 2007)*; and *Subhas Anand Kaldoke and Anr. V. Arun Madhukar Kulkarni and Ors. (SLP (c) No.4400/2022)* to support the proposition that the electricity bills are not proof of possession in the case of.

9.7.3. The Ld. Counsel for intervenor has placed reliance on decision in the matter of *Shila Roy Choudhury and Ors Vs. Nimai Charan Rakshit [2006 SCC Online Cal 365]* to support the proposition that acceptance of rent cannot be regarded as evidence of new tenancy.

9.8. This bench finds that vide order dated 28.02.2023 District Judge-1, Palghar has dismissed the appeal of the Corporate Debtor against the order dated 27.05.2015 terminating the lease in respect of factory premises and directed the appellant to vacate the premise and hand over the possession of factory premise. The Ld. Counsel for MIDC drew our attention para 7 of the affidavit in reply to the application for injunction filed by Corporate Debtor before District Judge-1, Palghar, and submitted that the MIDC affirmed in that matter to have taken over the possession of plot after fallen due process of law and has pleaded that the order of vacation is consequential to the cancellation of lease without adverting upon the submissions in para 7 before District Judge-1, Palghar. Hence, the said order cannot lead to and inference that the Corporate Debtor was in possession of the factory premise. It has further submitted the copies of photographs of the said factory premises vide submission dated 06.04.2023 as Annexure 5 which clearly shows that the premises is lying vacant and there are growth of trees and bushes around the area.

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- 9.9. The Resolution Professional as well as MIDC has claimed that they have reputed security guards looking after the factory premise and pleaded their possession.
10. We have considered the judicial decisions as well as the facts and find that MIDC took over physical possession of the factory premise on 29.06.2015 which is evidence from the panchnama. The said panchnama having been signed by two witnesses cannot be said to be a paper panchnama. Further, the payment lease rent does not fortify the claim of possession of the Corporate Debtor, which is the only relevant aspect now. During hearing, this bench asked MIDC why it had not refunded the money belonging to the Corporate Debtor consequent to cancellation of lease. The MIDC vide additional note dated 24.04.2023 clarified that MIDC had processed the amount refundable after cancellation, however, it was found that no money becomes refundable to the Corporate Debtor. Instead, the Corporate Debtor was liable to pay a sum of Rs. 2,37,92,523/- to MIDC and filed detailed working to that effect.
11. In view of the forging, this bench is of the considered view that the Corporate Debtor had no physical possession on the date of commencement of CIRP, hence the claim of Resolution Professional seeking retention of possession of factory premises in terms of Section 14 (1)(d) of the Code, as the question of retention arises only in case

where the Corporate Debtor can be said to have control or possession of the plot. Since, the cancellation of lease by MIDC and later affirmed by District Judge-1 Palghar is sub-judice as per contention of the Resolution Professional that the said order is appealable and shall be challenged before appropriate forum, this bench feels it appropriate to direct the Resolution Professional to include the said factory premise as a contingent assets in the information memorandum after giving full disclosure of the facts relating to such assets. It is clarified that such a statement in the information memorandum shall not prejudice the rights of MIDC in relation to factory premise after the order dated 28.02.2023 passed by District Judge-1 Palghar attains finality.

12. IA-3438/2022, IA-3864/2022, IA-638/2023 and IVN.P (IBC)/11(MB) 2023 are **disposed of** with aforesaid directions.

Sd/-
Prabhat Kumar
Member (Technical)

Sd/-
Kishore Vemulapalli
Member (Judicial)