

IN THE NATIONAL COMPANY LAW TRIBUNAL,
COURT II, MUMBAI BENCH
INTERLOCUTORY APPLICATION NO. 4638 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:

1. Mr. Radha Kishan Mehta
2. Mrs. Savitri Devi Mehta
3. Mr. Rahul Mehta

All of the above residing at:

House No. 263, Near Valmiki Chowk,
F-Block, Sirsa, Haryana-125055.

...Applicants

Versus

1. Mr. Vijaykumar V. Iyer,
The Resolution Professional for
Future Retail Limited

...Respondents

In the matter of

Bank of India ...Financial Creditor

v/s.

Future Retail Limited ...Corporate Debtor

Order pronounced on 16.07. 2024.

Coram:

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

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

Appearances (in Virtual mode):

For the Applicant: Adv. Nishi Agrawal.

For the Respondent: Adv. 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") read with Rule 11 of the N.C.L.T. Rules, 2011 filed by the Applicant seeking following reliefs against the Respondent:
 - a. Direct the Respondent to carry out inspection and take inventory of the assets lying inside the property bearing No. B-15/474, Khasra No. 587/174/3, Near Woodland store, Dabwali Road, Sangwan Chowk, Sirsa, Haryana-125055 ("Leased Property").
 - b. Direct the Respondent to handover the peaceful vacant possession of the Leased Property to Applicant No. 1 on behalf of Applicant Nos. 1 to 3 after removal of assets of the Corporate Debtor lying inside the Leased Property.
 - c. Direct the Respondent to make payment of the CIRP Cost comprising of monthly rent along with electricity bills, water & sewerage charges towards Leased Property payable from the CIRP commencement date till the Handover Date, to Applicant Nos. 1 to 3 in equal proportion as per Lease Deed in three different bank accounts nos.- (i) 14070 I 000003278 held at Indian Overseas Bank belonging to Applicant No. I; (ii) 14070 I 000002955 held at Indian Overseas Bank belonging to Applicant No.2 and; (iii) 140701000003536 held at Indian Overseas Bank belonging to Applicant No. 3.

2. Facts of the case pleaded by the Applicant in his application are briefly stated below:

- i. The Applicant Nos. 1 to 3 are joint owners of the Leased Property, who vide a registered Lease Deed dated November 11, 2011 ("Lease Deed") gave the Leased Property on Lease for 15 years to Bharti Retail Limited for exclusive use of retail store operations. The lease was subjected to a monthly rent of Rs. 1,10,200/- with enhancement by 15% after every five years and a one-time interest-free refundable security deposit of INR 3,30,600/-.
- ii. Pursuant to the Composite Scheme of Arrangement, the name was changed to its present name viz, Future Retail Limited ("Corporate Debtor). The Applicants are Operational Creditors of the Corporate Debtor by virtue of being the owners and Lessors of Easyday Store Code No. 3586.
- iii. The Respondent is the Resolution Professional who was appointed as the interim resolution professional for corporate insolvency resolution process ("CIRP") of the Corporate Debtor by the Adjudicating Authority vide its Order dated July 20, 2022 passed in the above-captioned Company Petition filed by the Petitioner under Section 7 of the Code and was subsequently appointed as the Resolution Professional by committee of creditors ("CoC") of the Corporate Debtor.
- iv. The Applicants submitted their claims on August 03, 2022 in Form 'B' for an amount of INR 9,45,000/- vide e-mail dated 03.08.2022 with the Respondent. The Applicants sent an email dated 30.08.2022 to the Respondent for updating their claim from INR 9,45,000/- to INR 11,65,920/-. Upon checking the website of the Corporate Debtor, it came to the knowledge of the Applicants that their claims have been partially

admitted for an amount of INR 8,35,320/- out of the total claim of INR 11,65,920/-.

- v. The Lease Rentals remain outstanding from December 2021 onwards till date. Due to the Corporate Debtor's non-payment of monthly rent and utility bills since December 2021, Applicant No.03 vide e-mail dated September 03, 2022 issued an eviction notice to the Respondent thereby requesting the Respondent to pay outstanding rent failing which the lease would come to an end as per Clause 26.1 of the Lease Deed read with Section 111 of the Transfer of Property Act, 1882 and that the Corporate Debtor is liable to be evicted forthwith.
- vi. The Applicants state that neither they have received rents from December 2021 nor they have been given with possession of the Leased Property. The Applicants are not desirous of giving Leased Property on further lease to the Corporate Debtor but the assets belonging to the Corporate Debtor which are lying in the Leased Property and have made the said property unusable and thereby causing problems to the Applicants in further leasing out the same to any other party. Applicant Nos. 1 and 2 are senior citizens and their only source of income is through monthly rent received from the Leased Property.
- vii. Hence this application.

3. Reply of the Respondent No.01

The Respondent has filed his Preliminary Reply vide Affidavit dated 14th February, 2024. The pleadings and submissions of the Respondent are briefly covered hereunder:

- i. The above-captioned application was listed for hearing on December 06, 2023 wherein this Tribunal directed the Respondent to vacate the premises. The said Order is reproduced below:

*“Adv. Jyoti A. Singh a/w Sakil Ansari appeared for the Applicant. Adv. Harit Lakhani appeared for the Resolution Professional. It has been pointed out by the Counsel for the Applicant that in pursuance of Order passed on 17.10.2023, the inventory lying in the assets in question has been jointly prepared by the parties on 26.11.2023. Counsel for the Applicant states that the possession may be handed over and the cost of the inventory lying in the premises and shifting warehousing shall be borne by the Applicant and the said cost shall be treated as CIRP cost by the Resolution Professional. Counsel for the Resolution Professional is agreeable to this and further seeks three weeks’ time to hand over the possession to the Applicant. **In these circumstances prayer (b) is allowed with the directions to the Resolution Professional to hand over the possession to the Applicant within three weeks and the cost of shifting warehousing and the inventory lying in the premises shall be borne by the applicant and the said cost shall be treated as CIRP cost by the Resolution Professional.**”*

As regards, prayer (c) of the application, Counsel for the Resolution Professional seeks time to file reply. Time granted. Let the reply be filed within a period of two weeks by serving an advance copy to the other side. List the IA No. 4638/2023 on 09.01.2024 for hearing.”

- ii. Accordingly, in compliance of the directions of this Tribunal vide Order dated 06th December 2023, the Respondent has vacated the premises on 28th December, 2023. The Respondent also tried accessing the premises through authorised representatives/personnel of the Corporate Debtor in order to take control over the inventory and assets of the Corporate Debtor lying therein, however, the Respondent was unable to access the premises.
- iii. The Respondent had put the matter in respect of the rentals and all associated costs pertaining to the premises for the CIRP period to the Committee of Creditors (“CoC”) for their deliberation and views in the 19th CoC meeting held on 05th July, 2023 so that the CoC may take a decision on whether such dues should be considered as insolvency

resolution process costs. The CoC has considered and expressed a view that the same ought not to be treated as CIRP costs under the Code.

- iv. Since the leased premises was not accessible to RP until 17th October, 2023, any costs incurred in running premises should not form part of CIRP costs as defined u/s 5(13) of the Code.
- v. Taking the above contentions and submissions on record, the Respondent requests the Tribunal to pass appropriate directions in the matter.

4. Submissions of the Applicant:

- a. The Applicant submits that it is a matter of fact that the possession of the leased property was with the Corporate Debtor during the CIRP period and thus, the monthly rent and associated cost as per the Lease Deed are to be treated as CIRP cost.
- b. Counsel for the Applicants submits that the Applicants have not received monthly rent since December, 2021 and thus, they are incurring financial loss due to non-receipt of the said payment. Furthermore, the Applicants are paying utility bills from their own pockets which is adding further to their financial woes. The Applicant Nos. 1 and 2 are the senior citizens and their only source of income is through monthly rent received from the Leased Property.

5. Submissions of the Respondent:

- a. Counsel for the Respondent submits that since the Leased Property remained inaccessible to the Corporate Debtor/RP during the CIRP, no CIRP costs will accrue in respect thereof.
- b. Counsel for the Respondent has relied upon the judgment of Hon'ble Apex Court in Sunil Kumar Jain v/s. Sundaresh Bhatt reported in (2022) 7 SCC 540 to contend that when the premises were not utilized to run the Corporate

Debtor as a going concern, the lease rentals and other charges in respect of the Leased Property payable to the Applicants cannot be treated as CIRP costs.

FINDINGS

6. We have heard the counsels representing the Applicants 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.
7. In the present case, this Bench had passed the following order on 17.10.2023:
*"IA.No.4638/2023: - This IA has been filed by the Applicants/ landlords seeking possession of the property situated at B-15/474, Khasra No. 587/174/3, Near Woodland Store, Dabwali Road, Sangwan Chowk, Sirsa, Haryana – 125055 which was leased out to the Corporate Debtor. Counsel for the RP seeks time to file reply to this IA. The premises in question in accessible to the RP. Let the reply be filed within a period of two weeks. **In the meantime, the parties shall jointly visit the premises in question and prepare inventories of the article lying in the premises in question. List this matter on 28.11.2023.**" (Emphasis Supplied)*
8. Accordingly, the Leased Property was jointly visited by the authorised representative of the Corporate Debtor along with the Applicant and the list of assets/inventory was prepared as per the above directions of this Tribunal. Therefore, prayer in terms of Clause 16 (a) seeking directions to the Respondent to carry out inspection and take inventory of the assets lying inside the leased property has become infructuous and it is accordingly being dismissed.

9. We observe that the above-captioned application was listed for hearing on December 06, 2023 wherein this Tribunal directed the Respondent to vacate the leased property. The relevant extract of the said Order is reproduced below:

*“Adv. Jyoti A. Singh a/w Sakil Ansari appeared for the Applicant. Adv. Harit Lakhani appeared for the Resolution Professional. It has been pointed out by the Counsel for the Applicant that in pursuance of Order passed on 17.10.2023, the inventory lying in the assets in question has been jointly prepared by the parties on 26.11.2023. Counsel for the Applicant states that the possession may be handed over and the cost of the inventory lying in the premises and shifting warehousing shall be borne by the Applicant and the said cost shall be treated as CIRP cost by the Resolution Professional. Counsel for the Resolution Professional is agreeable to this and further seeks three weeks’ time to hand over the possession to the Applicant. **In these circumstances prayer (b) is allowed with the directions to the Resolution Professional to hand over the possession to the Applicant within three weeks and the cost of shifting warehousing and the inventory lying in the premises shall be borne by the applicant and the said cost shall be treated as CIRP cost by the Resolution Professional.**” (Emphasis Supplied)*

10. The Respondent in his reply has pleaded that in compliance with the Order dated 06.12.2023, the Leased Property was vacated and handed over to the Applicant on 28th December, 2023. The aforesaid fact has not been contested by the Applicant. Thus, the prayer in terms of Clause 16(b) has become infructuous, as the possession of the leased property has already been handed over to the Applicant. Hence, prayer in terms of Clause 16(b) is dismissed as infructuous.

11. 1. Now, the only dispute which remains to be adjudicated is with respect to the payment of CIRP costs. The Applicant has claimed that rent pertaining to the CIRP period along with electricity bills, water and sewerage charges in respect of the Leased Property be treated and paid as CIRP cost.

11.2. The Respondent/RP has vehemently contested the aforesaid demand of the Applicant on the ground that since the subject premises were inaccessible to the Respondent until 26th November 2023 when the joint visit was conducted by both the parties and therefore, the rentals and other charges during the CIRP period cannot be treated and paid as CIRP cost. The CoC also in its meeting dated 05.07.2023 has expressed a view that so long as the leased property was inaccessible to the RP, no CIRP costs will accrue for the said premises.

11.3. Learned Counsel for the RP has relied upon the ruling of Hon'ble Supreme Court of India in Sunil Kumar Jain & Ors. v/s. Sundaresh Bhatt & Ors. [Citation: (2022) 7 SCC 540] wherein it was held that the wages and salaries claimed by the workmen who have done no work during the CIRP period and have not assisted the liquidator/resolution professional during the CIRP, would not fall within the parameters of CIRP costs within the definition of Section 5(13)(c). Therefore, drawing an analogy with the above-cited case law, the learned Counsel for the RP contends that for the period when the leased property was inaccessible to the Corporate Debtor, no business was being carried out in the said premises to keep the Corporate Debtor as a going concern, and hence, the rent and charges payable during such period cannot form part of CIRP costs as per law.

11.4. Before considering the aforesaid rival contentions of the parties, it would be pertinent to have a look at the definition of "insolvency resolution process cost" as defined u/s 5(13) of the Code as well as Regulation 31 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 which are reproduced hereunder:

"Section 5(13)- "insolvency resolution process costs" means – (a) the amount of any interim finance and the costs incurred in raising such finance; (b) the fees payable to any person acting as a resolution

professional; (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern; (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and (e) any other costs as may be specified by the Board;”

Regulation 31 of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 has defined the insolvency resolution process costs u/s 5(13)(e) as under:

“31. “Insolvency resolution process costs” under Section 5(13)(e) shall mean- (a) amounts due to suppliers of essential goods and services under Regulation 32;

(aa) fee payable to authorised representative under [sub-regulation (8)] of regulation 16A;

(ab) out of pocket expenses of authorised representative for discharge of his functions under section 25A;

(b) amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d);

(ba) fee payable to the Board under regulation 31A;

(c) expenses incurred on or by the interim resolution professional to the extent ratified under Regulation 33;

(d) expenses incurred on or by the resolution professional fixed under Regulation 34; and

(e) other costs directly relating to the corporate insolvency resolution process and approved by the committee.”

11.5. It is evident from a bare perusal of the above provisions that amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d) are bound to be treated as the CIRP costs. In the context of this case, it cannot be disputed that the Applicants were not paid rent in respect of the pre-CIRP period from 01.12.2021 to 19.07.2022, nor any such payment has been made after the commencement of CIRP on 20.07.2022. It can also not be disputed that possession of the Leased Property was not handed over to the Applicants until 28.12.2023. The valuable rights of the Applicants as Lessors cannot be jeopardized merely on account of the fact that the premises were not accessible to the RP after the commencement of the CIRP. If this was the case, the Leased Property was not accessible nor any

business was being run therein, in that event, it was the bounden duty of the RP to take steps to put the Applicants in possession at the earliest possible to avoid the incurrence of lease rental and other charges during the CIRP period. However, no such steps were taken by the RP nor any attempt was made to remove the inventories lying in the premises. In fact, even the cost of removing the inventory has been borne by the Applicants and the possession has also been handed over to the Applicants only after they agreed to bear the costs of shifting of inventory and also the cost of warehousing of such inventory. Therefore, in our considered view, the valuable and legitimate contractual rights of the parties cannot be defeated merely on account of the fact that the Corporate Debtor has been admitted into insolvency.

11.6. Even otherwise, a conjoint reading of the provisions of Section 5(13)(e) and Regulation 31(b) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 makes it explicitly clear that amounts due to a person whose rights are prejudicially affected on account of the moratorium imposed under section 14(1)(d), is to be treated as CIRP cost. In the context of this case, it cannot be denied that with the imposition of moratorium, the Applicants could not have taken any legal recourse to reclaim possession on any ground whatsoever emanating from the contract between the parties nor the RP took any steps to handover the possession of the Leased Property despite the fact the property was not being utilized for keeping the Corporate Debtor as a going concern. In this scenario, in our considered view, the Applicants cannot be deprived of their legitimate dues during the CIRP period for no fault of their own. Had the possession of the Leased Property been given to the Applicants promptly by the RP, the Applicants would not have suffered unnecessary loss of lease rental income.

11.7. So far as the law laid down in *Sunil Kumar Jain & Ors. v/s. Sundaresh Bhatt & Ors.* [Citation: (2022) 7 SCC 540], which has been relied upon by the learned Counsel for the RP is concerned, we have gone through the cited case wherein it was held that the wages and salaries claimed by the workmen who have done no work during the CIRP period nor the corporate debtor was being run as a going concern, would not fall within the parameters of CIRP costs within the definition of Section 5(13)(c). In our considered view, the facts and circumstances of the instant case are altogether different and therefore, the same cannot be applied to the facts and circumstances of the present case, as here we are treating the lease rent and other charges as CIRP cost u/s 5(13)(e) read with Regulation 31 (supra). For the sake of repetition, it can be reiterated that despite the Leased Property not being used for keeping the Corporate Debtor as a going concern, it's possession was not handed over to the Applicants who themselves were incapacitated due to moratorium to take any legal steps to recover possession and since they were deprived of the possession due to imposition of moratorium, the lease rentals are liable to be paid as CIRP costs.

12. No other contentions have been raised on behalf of the Respondent and no other issue remains to be addressed.

13. 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:

ORDER

- a. **I.A. No. 4638 of 2023 is partly allowed;**
- b. The Respondent is hereby directed to treat the monthly lease rents due and payable to the Applicants as per the terms of the Lease Deed in respect of

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

I.A. NO. 4638 OF 2023
IN
CP(IB) NO. 527(MB)/2022

the Leased Property for the period from 20th July, 2022 (i.e. insolvency commencement date) to 28th December, 2023 (i.e. date of actual handing over of possession of the Leased Property) as CIRP cost.

- c. All other relief(s) prayed for are rejected as having become infructuous;
- d. This I.A. accordingly stands disposed of.

Sd/-

ANIL RAJ CHELLAN
(MEMBER TECHNICAL)

Sd/-

KULDIP KUMAR KAREER
(MEMBER JUDICIAL)