

IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

MA NO. 2319/2019

IN

C.P. (IB) 4301/2018

Under section 60 (5) of the IBC, 2016

Amar Universal Private Limited

.... Applicant

In the matter of:

BMW India Financial Services Private Limited

.... Petitioner

v/s.

SK Wheels Private Limited

.... Corporate Debtor

Order delivered on: 16.10.2019

Coram: Hon'ble Bhaskara Pantula Mohan, Member (Judicial)

Hon'ble Shyam Babu Gautam, Member (Technical)

For the Applicant: Mr. Manan Sanghai, Advocate, i/b Mr. Sudarshan
Bhosale Advocate for Ajit Talwar & Co.

For the Respondent: Mr. Anirudh Purshottam, Advocate

Per: Hon'ble Bhaskara Pantula Mohan, Member (Judicial)

ORDER

1. This Miscellaneous Application is filed by Amar Universal Private Limited, (hereinafter called "Applicant") which is a Private Limited Company against SK Wheels Private Limited being represented by the Resolution Professional (hereinafter called "Corporate Debtor"). The said Resolution Professional was appointed by the order of this Hon'ble Tribunal dated 29.03.2019 which was passed in view of the Petition filed by BMW India Financial Services Private Limited (hereinafter called "Petitioner") under section 7 of the Insolvency and Bankruptcy Code, 2016 against the Corporate Debtor.

FACTS OF THE CASE

2. The Applicant submits that the Corporate Debtor in June 2015 had approached him to occupy the Premises owned by the Applicant. Accordingly, the parties entered into a Leave and License Agreement dated 07.08.2015, based on the agreement it was decided that a

License Fee was due and payable on or before 7th of each Calendar Month.

3. The Applicant further states that the Corporate Debtor was irregular in making payment of the license fees and since June 2018, the Corporate Debtor with *mala fide* intention defaulted in making monthly payments of the said license fees.
4. Thereafter, the Applicant who was aggrieved by the default in the payment of license fees committed by the Corporate Debtor issued a letter on 11.07.2018 to the Corporate Debtor as a reminder to immediately clear the pending dues or else the Applicant would be compelled to terminate the Agreement. However, since the said letter was completely ignored by the Corporate Debtor, the Applicant issued a second reminder dated 23.03.2018, as per which a time of two days was given to clear the dues.
5. Even after these reminders the Corporate Debtor failed to clear the pending dues of the license fees and therefore the Applicant vide a Termination Notice dated 23.08.2018 terminated the 'Leave and License Agreement' with the Corporate Debtor, after which the Applicant through a Final Notice dated 19.09.2018 directed the Corporate Debtor to vacate the said premises within 15 days.
6. Once again since the Final Notice fell on deaf ears of the Corporate Debtor, the Applicant thereafter filed a Civil Suit against the Corporate Debtor in the month January 2019 bearing number "Special Civil Suit No. 61 of 2019" in the court of Civil Judge, Senior Division, Thane. Applicant vide this suit prayed the court for vacating the premises and for possession, recovery of arrears of monthly license fees valuing Rs. 1,08,44,655/-.
7. A petition against the said Corporate Debtor was filed and the same was admitted on 29.03.2019 by an order of this Tribunal. Therefore, due to aforesaid order the moratorium was declared in accordance with section 14 of the Code and the suit between the Applicant and the Corporate Debtor came on a stand still.
8. Applicant filed his claim before the Resolution Professional as per the provisions of the Code. The Applicant filed his claims in Form-B

under the Regulation 7 of Insolvency and Bankruptcy Board of India, Regulations, 2016.

9. The Applicant has further apprised the bench that even after various communications with the Resolution Professional and providing him with every document required by him, the Resolution Professional has not accepted his claim and has also not cited a reason for the same.
10. Reply has been filed on behalf of the Resolution Professional wherein he has denied every argument and averment made by the Applicant and based on the said Reply he has raised mainly following objections with regards to this Application –
 - a) This Application is not maintainable since the Applicant has not come to the court with clean hands. It is stated that the disputed premises, since it had been handed over to the Corporate Debtor by the Applicant it was not in a proper condition for which the Corporate Debtor had to carry out repairs. It is submitted that the since the Corporate Debtor failed to fulfill his obligation the Applicant herein was compelled get the repairs done from time to time. Due to this the Corporate Debtor ended up paying an amount of Rs. 2,53,81,621/- towards the repairs. When a dispute regarding the same was raised by the Corporate Debtor, the Applicant assured to adjust the said amount towards payment of monthly license fee payable.
 - b) Another objection raised by the Respondent is that there have been various discrepancies with regards to the claim submitted by the Applicant, such as the Form B submitted is not duly signed, the Applicant seems to have claimed monthly license fee by raising tax invoices but the same have not been declared and uploaded on the GST Portal. Applicant also claimed interest on outstanding license fee when it is stated by the Respondent that there is no provision in the Agreement for the same.
 - c) It is also argued that the said Application is not maintainable since the Resolution Professional has not yet decided on the

claim of the Applicant and the same is under consideration as it is pending for clarification and substantiation from the Applicant.

11. Applicant has after this filed their Rejoinder and Written Statement, wherein they've denied all the allegations of the Respondent and argued that there is no clause in the Agreement with regard to adjustment of amount spent on repair works, if there were any, with the lease payable. It is also said the interest even though not mentioned in the Agreement, the same is covered by Clause 18 of the Agreement which refers to damages. Our attention is also drawn towards the Termination Notice dated 21.08.2018, which is the basis of the Applicant seeking possession of the premises.

ORDER

12. We have gone through all the pleadings filed by both the parties and heard the counsels at length. We have also perused all the judgements relied upon by both the parties to make good of their case.

13. The Resolution Professional in all his pleadings has made a submission that the Claim of the Applicant is under process and that a part of the Applicant's claim has already been admitted. However, it is to be noted herein that the claim of the Applicant was filed in 04.06.2018, it has been more than 4 months since then, the Resolution Professional has not yet decided the claim of the Applicant.

14. It is an undisputed fact that the land on which the Resolution Professional/Corporate Debtor currently has his possession on, belongs to the Applicant herein. Keeping in mind that the Applicant is being deprived from his right of using the land that owns is patently illegal and wrong, therefore cannot be allowed.

15. It is trite law that this tribunal has been provided with vast powers under section 60 (5) of the Code. Therefore, based on the above this bench is of the view that the actions or rather inaction on the part of the Resolution Professional in not taking a decision with respect to the claim of the Applicant is an abuse of the powers given to him under the code and contrary to justice and public policy. His actions are nothing more but an abuse of his dominant position.

16. Furthermore, the arguments raised by the counsel representing Resolution Professional cannot be at all considered since the Applicants has complete right over the possession of his land and his dues, hence we are of the view that since the Resolution Professional seems to have been sitting over the claim of the Applicant for a long time and this cannot be allowed since the same would cause heavy prejudice to the Applicant and defeat the purpose of the Code.
17. Furthermore, it is undisputed that there is a civil suit pending before the Court of law. Based on the agreement between the parties is clear that the tenancy/license fee is to be paid on 7th of every month, which entitles the owner of the land to re-claim the property if the rent is not paid. This is a very peculiar case where the Resolution Professional maliciously neither paid the rent nor vacated the premises and on the other hand, he wanted to hand over the said premises to the successful Resolution Applicant as a going concern, putting the landowner to further trouble.
18. This kind of injustice carried out by the Resolution Professional herein is completely unacceptable. The landowner is just not entitled to receive the license fee but also, he has to right to receive the possession of the said premises. The tenancy rights automatically get terminated, the moment default in payment of rent is committed.
19. Hence, this Miscellaneous Application is allowed with cost, and the Resolution Professional is directed to hand over of the possession of the said premises forthwith to the Applicant and pay the claim amount as raised by the Applicant in his claim within a week from the date of this order.
20. Accordingly based on the above discussion, this Application is allowed with cost of Rs. 1,00,000/- to be paid by the Resolution Professional to the Applicant within a week from the date of this order.

Sd/-

Shyam Babu Gautam
Member (Technical)

Sd/-

Bhaskara Pantula Mohan
Member (Judicial)