

COVID-19: IMPACT on COMMERCIAL LEASE PAYMENTS



Whether a *force majeure* clause in a commercial lease agreement or deed would *release the lessee from the payment of monthly lease of a commercial property during this Lockdown Period?* coz it is quite clear that the Lockdown Order issued by the government to stop the spread of COVID-19 would qualify as a *force majeure*. Isn't it?

Let's analyse this....

Force majeure is in the nature of a contractual obligation whose invocation is dependent upon happening of certain events (largely they are covered in such clause). Moreover, this is ruled by Section 56 of the *Indian Contract Act*.

Therefore, we must assess whether Section 56 attracts to a lease? However, the answer is probably **NO** coz lease agreement or deeds are basically ruled or governed by the Transfer of Property Act, 1882 and it's a Special Statute rather than a General Statute. As you may be aware, it is a settled principle of law that special statute prevails over general statute.

The Supreme Court has held that:-

"Where the property leased is **not destroyed** or substantially and permanently **unfit**, the lessee **cannot avoid** the lease because he does not or is **unable to use** the land for purposes for which it is let to him." [Raja Dhruv Dev Chand v. Raja Harmohinder Singh]

DOES DESTRUCTION OF THE TENANTED STRUCTURE EXTINGUISH THE TENANCY AND THE RIGHT OF OCCUPATION OF THE TENANT UNDER THE CONTRACT OF TENANCY BETWEEN THE PARTIES?

'NO'

BOMBAY HIGH COURT HELD IN HIND RUBBER INDUSTRIES PRIVATE LIMITED VS TAYEBHAI MOHAMMEDBHAI

In the case of (1948) 1 All ER 306 Denning, J. as he then was, in connection with the rights of the lessee of a house destroyed in any enemy action, made the following observations:-

"The position at common law is plain. She had a contractual tenancy, and that tenancy had never been determined by due notice to quit. It, therefore, continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy of the land on which it stands..... No doubt, the landlord still has

the contractual right to determine the tenancy..... The tenancy, therefore, remains in being. The fact that a new house has been erected on the site does not make any alteration to the legal position..... That house is substantially the same as the old one. It is annexed to and part of the land which was let under the tenancy and, therefore, it is now included in the tenancy which has never been determined. The tenant, Mrs. Simper, is still the tenant of the premises, and is entitled to possession of them”

Kerala High Court in Dr. V. Siddhartha v. Pattiori Ramadasan held

“The circumstances detailed therein the *lease shall be void at the option of the lessee*. The reason behind this option appears to be if the leasehold is destroyed or rendered unfit for the purpose of the lease it would be pointless for the lessee to pay the rent but if he chose, he could continue to pay it. *This clause is one of the clauses dealing with the rights and liabilities of the lessee and does not describe the effect of the destruction of the subject of the lease upon the lease itself”*

Considering above analysis, does Force Majeure clause provide any kind of protection from payment of Lease Rentals?

Read Further....

Force Majeure – means "Superior Force" (A common clause in Contract / Agreement that essentially frees parties from liability or obligation when an extraordinary event or circumstance beyond their control happens)

Force Majeure clause cannot be implied and needs to be specifically included in the Agreement. *A force majeure clause does not excuse a party's non-performance entirely, but only suspends it for duration of the force majeure.*

Law governing the Lease Agreement
(Here, we are not referring to Leave & License Agreement¹)



Section 108 of Transfer of
Property Act, 1882

Section 108(e) of the Transfer of Property Act, 1882 :- If by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, **any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let**, the lease shall, at the option of the lessee, be void: Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he/it shall not be entitled to avail himself / itself of the benefit of this provision.

Essentials:-

¹ They are mainly governed by the terms contained in L&L Agreement

1. Material Part of property
 - Either destroyed completely; or
 - become permanently unfit

Does COVID-19 Lockdown provide opportunity to escape from payment of Lease Rentals?

Legal Position:-

From above it is quite clear that COVID-19 Lockdown does *neither make any property unfit permanently nor it leads to destruction of any property*. As such this does not give option to Lessee to avoid the payment of Lease Rentals.

Despite aforesaid Legal Position, the terms and conditions as mentioned in the agreements will get priority and this varies on case to case basis. Need is to check and follow the process steps set out in the Contract/Agreement.

Parties should mutually consider their remedies during this uncertain business environment and shall explore commercially viable solutions to avoid a scenario where such health pandemic may lead to a monetary pandemic for a long duration.

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Thanks and Regards
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