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India: After Drop in Sales, Will COVID 19 Lead to Eviction of Retailers from Malls?

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Tips on how to mitigate losses.

Mall Leases:

Mall leases have ceased to be in the nature of a tenancy agreement. The clauses are no longer limited to availability of the premises, rent, lock-in period, repairs, and exit. Mall owners have come to impose sale targets on the retailers operating from their malls. Rent consists of both a percentage of the revenue earned by the retailer as well as a fixed monthly payment. Non-compliance with any of the provisions of the lease can trigger (a) termination of the lease, or (b) forfeiture of the security deposit by the mall owner. In this background, Covid-19, and the consequent shut-down of malls in Mumbai, announced by the government would naturally make everyone very anxious.

This article examines the applicable laws for combatting contagious diseases, *force majeure*, and their impact on leases.

Applicable Laws:

The Mumbai Municipal Corporation Act, 1888, empowers the Municipal Commissioner to take plenary measures for prevention of any 'dangerous disease'. Under Sections 421 to 434, the Municipal Commissioner can order eviction of carriers of infectious disease, raze hutments, order shut-downs, inspect any premises, have the premises disinfected etc. The use of an expression as wide

as *dangerous disease* is not by accident. Health hazards need not escalate into epidemics for the authorities to take corrective measures.

It may be noted that any order promulgated by a public servant is not an empty statement. Disobedience of such orders is punishable with imprisonment for a term that may extend to one month under Section 188 of the Indian Penal Code, 1860. Should the disobedience be of such a nature that it may cause a riot or affray then the term of imprisonment may extend to six months. Offence of the said Section 188 is cognizable offence under the provisions of the Code of Criminal Procedure, 1973. Also, Part B of Chapter X captioned *Public Nuisances* under the Code has several provisions for removal of public nuisances.

All municipal corporations or councils have similar powers for prevention of spread of dangerous diseases.

Force Majeure:

It obvious from discussions above, that the measures adopted by several municipalities to contain Covid-19 are not only legally tenable but also strongly enforceable. Many nations have already pronounced Covid-19 as a force majeure event. At home, the Ministry of Finance (Department of Expenditure / Procurement Policy Division) issued an Office Memorandum dated February 19, 2020, on similar lines.

Declaration of Covid-19 as a force majeure event lets off the affected party. Hence, no lessee or licensee can fault the owner for not allowing it use of the demised premises. The question that needs to be answered, therefore, is whether the licensee/ lessee can seek waiver of rent or revenue targets. Argument per and contra can be put forth till the cows come home. But the strength of the contracts executed shall be now put to test.

Contractual mitigants negotiated under the lease:

A well-negotiated contract shall have specific exclusion for waiver of rent or meeting of revenue targets. It may come to such a pass that the force majeure event has occurred during the lock-in period applicable to the retailers. A well negotiated contract, invariably, also has an exit clause in favour of the retailer, allowing it to break the lease notwithstanding the lock-in period.

Under the revamped Specific Relief Act, 1963, courts are bound to uphold specific statements. Even otherwise, in law, specific provisions override general ones. In the absence of express clarifications, the better argument shall win the day.

Hours spent negotiating leases, leave and license agreement are not a wasteful effort but an assurance against future vagaries. As they say, one pays the advocate not for the hours spent on the work, but for the years that allow him / her to do a good job.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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