
(2017) 03 DEL CK 0230

In the Delhi High Court

Case No : 6 of 2017

ARANYA HOSPITALITY MANAGEMENT SERVICES PVT LTD

APPELLANT

Vs

K.M. DHOUNDIYAL & ANR.

RESPONDENT

Date of Decision : 21-03-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 37](#), [Section 9](#), [Section 17](#) -
Appealable orders - Interim measures, etc., by Court - Interim measures ordered by
arbitral Tribunal

Citation : (2017) 03 DEL CK 0230

Hon'ble Judges : Vibhu Bakhru

Bench : SINGLE BENCH

**Advocate : Rajat Aneja, Chandrika Gupta, Manish Sharma, Pranay Raj Singh,
Chandni Mehra, Ninad Dogra**

Judgement

1. Allowed, subject to all just exceptions.
2. The application stands disposed of. ARB. A. (COMM.) 6/2017 & IA No.3609/2017
3. Aranya Hospitality Management Services Private Limited (hereafter "the Lessee") has filed the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act") impugning an order dated 10.03.2017 passed by the sole arbitrator (hereafter "the impugned order"). By the impugned order, the sole arbitrator has dismissed the Lessee's application under Section 17 of the Act for modification of the order dated 21.04.2016 passed by this Court in a petition preferred by the respondents under Section 9 of the Act (being OMP (I) No. 100/2015), whereby this Court had inter alia directed the Lessee to deposit the arrears of rent from March, 2014 till 30.04.2016 within two weeks from the said date. This Court had further directed the Lessee to continue paying rent as per the lease deed dated 01.10.2013, on or before 7th day of each month till the conclusion of the arbitration proceedings.

4. Briefly stated, the relevant facts necessary to address the present appeal are as under:- 4.1 Respondent Nos. 1 and 2 are husband and wife (hereafter jointly and severally referred to as "the Lessors"). The Lessors had purchased the property bearing No. 1768/1, First Floor, Central School Road, Behind Spinal Injury Hospital, Vasant Kunj, New Delhi (hereafter "the property"). The Lessors entered into a lease deed dated 01.10.2013, whereby the respondent no. 1 leased a portion of the property to the Lessee for a period of nine years commencing on 01.10.2013 and expiring on 30.09.2022 at a monthly rent of Rs. 2,00,000/- per month. The Lessors (respondent No.2) also simultaneously entered into an agreement for providing fittings, fixtures, furniture and maintenance with the Lessee. The Lessee defaulted in payment of rent; in their petition under Section 9 of the Act, the Lessors claimed that the Lessee had not paid any rent since March, 2014 and as on 31.03.2016, the total amount outstanding was Rs. 57,24,250/-. It was also alleged that the Lessor has misused the said property for running a restaurant without any licence. Consequently, the Lessee was served with the notice dated 11.11.2014 under Section 417, 421 and 397 of the Delhi Municipal Corporation Act, 1957 and this was followed by a closure notice dated 02.12.2014.

4.2 The Lessors terminated the two agreements (lease deed dated 01.10.2013 as well as the agreement for fittings, fixtures, furniture and maintenance) on 15.12.2014. Notwithstanding the termination, the Lessee did not vacate the property and continues to occupy the same till date.

5. In view of the disputes that had arisen, the Lessors invoked the arbitration clause and by a notice dated 14.01.2015, appointed an arbitrator. However, the Lessee did not accept the appointment of arbitrator. Consequently, the Lessors filed a petition (being Arb. P. 141/2015) which was disposed of on 14.09.2015 and the sole arbitrator was appointed to adjudicate the disputes between the parties. It was further directed that arbitration shall be conducted under the aegis of Delhi International Arbitration Centre (DIAC).

6. As stated above, the Lessors also filed an application under Section 9 of the Act (OMP (I) No. 100/2015) inter alia praying for ad interim orders directing the Lessee to maintain status quo with regard to the property and further restraining the Lessee from operating the restaurant without obtaining Municipal Health Trade Licence and Police Licence. Lessors also prayed for an order directing Lessee to pay a sum of Rs. 48,01,500/-, being the amount claimed as payable till 15.12.2014.

7. The said petition was taken up for hearing on 25.05.2015 and after hearing the parties, this Court passed the following orders:- "1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, seeking the following reliefs:

a) Pass ex-parte ad-interim orders directing the respondents to maintain status quo with regard to the property in question i.e. 1768/1, Central School Road,

behind Spinal Injury Hospital, Vasant Kunj, New Delhi comprising of the first floor being a hall of 1625 sq. ft., open deck of 2000 sq. ft., Kitchen of 465 sq. ft., Washrooms of 110 sq. Ft. and other areas of 500 sq. ft. by not utilizing the said property in any" manner contrary to the terms of the lease deed dated 01.10.2013 (in particular clause 6 thereof) and to restrain the respondent No. 1 from operating any restaurant in the said property till the respondent No. 1 obtains a Municipal Health Trade License and Police License for the property.

b) Direct the respondent No.1 to deposit without prejudice a sum of Rs. 48,01,500/- being the amount payable by the respondent No.1 to the petitioners as on 15.12.2014 pending arbitration between parties.

2. Mr.Manish Sharma, learned counsel for the petitioner has drawn my attention to page 56 of the documents to state that the total dues payable by the respondent till March 2015 is Rs. 57,24,250/-.

3. The learned counsel for the respondent would state that the rent in terms of the lease agreement for the period March to November 2014 has been paid. He concedes that the rent for the period December till May 2015 has not been paid. He states that rent from May to December 2015 shall be deposited in this Court. Let the same be deposited within a period of four weeks from today. On such deposit, the said amount shall be kept in FDR with periodical renewals.

4. He also states that the respondent No. 1 shall continue to deposit the rent as per the lease deed dated October 1, 2013 on or before 7th day of month in this Court till such time the matter is referred to and decided by the Arbitrator. The said statement is taken on record. The rent to be deposited every month henceforth shall also be kept in FDR with periodical renewals.

5. Let reply be filed on the issue of rent for the period March 2014 to November 2014 within a period of four weeks. Rejoinder within two weeks thereafter. Renotify on 14th September, 2015."

8. Admittedly, the said order was not complied with as the Lessee failed to deposit the rent for the property. In the circumstances, the Lessors filed a fresh application (being I.A. No. 17203/2015) seeking further directions. The Lessors also disputed that any rent had been paid by the Lessee for the period March to November, 2014 as claimed by it. Since the orders dated 25.05.2015 had not been complied with, this Court passed an order attaching the bank accounts maintained by the Lessee with YES Bank, Chanakya Puri Branch to the extent of Rs. 21,76,875/-. The Lessee filed an application for recalling of the said orders. The Lessors also filed an application for amendment. The petition (OMP (I) No. 100/2015) was heard and disposed of by an order dated 21.04.2016. The operative part of the order reads as under:- "12. I do not agree with the arguments of the respondent No.1. No doubt, when the original petition was filed, the rent due as on 15th December, 2014 was for a sum of Rs.48,01,500/-. However, the said amount was not paid by the respondent No.1. It is a matter of record that the respondent No.1 has misled the Court by making the statement

that the rent in terms of the lease deed for the period, i.e. from March to November, 2014 was paid whereas the said amount was not paid, nor any proof is produced before the Court.

13. At the time of hearing, the learned counsel for the respondent No.1 has admitted that an incorrect statement was made by the earlier counsel who appeared on behalf of respondent No.1 and admits that the respondent No.1 has no proof to show that any rent is paid during the period, i.e. from March to November, 2014. I do not agree with the learned counsel for the respondent No.1 that this Court has no jurisdiction to try the present petition as well as to allow the amendment sought for, in view of the reason that respondent No.1 had made incorrect statement before the Court which was recorded in para 3 of the order dated 25th May, 2015. Further, the recovery of the rent in terms of the lease deed for subsequent period is a recurring cause of action. Therefore, there is no impediment but to allow the amendment and to recover the said amount due towards the lease agreement up to the date of hearing.

14. Even otherwise, I have been informed that if the total amount due along with interest is calculated, the same is more than Rs.1 crore. Thus, the amendment application is accordingly allowed. The main petition is also disposed of with the directions that the respondent No.1 in view of the statement/undertaking already given shall pay the arrears of rent for the period, i.e. from March, 2014 till 30th April, 2016 to the petitioners, within two weeks from today. The said respondent shall also keep on paying the rent to the petitioners as per the lease deed dated 1st October, 2013 on or before 7th day of every month till such time the arbitration proceedings are finally decided. In case the order is not complied with by the respondent No.1, liberty is granted to the petitioners to take the necessary steps to enforce the order."

9. The Lessee did not comply with the said order. Consequently, the Lessors were constrained to file the Contempt Petition (being Cont. Cas. (C) No.598/2016). On 08.07.2016, a Coordinate Bench of this Court inter alia recorded the following finding against the Lessee: "Upon a perusal of the paper book, this Court finds that the respondents are deliberately and wilfully not complying with binding Court orders". Consequently, respondents therein, Directors of the Lessee, were directed to be personally present on the next date.

10. A perusal of the orders passed subsequently also indicates that despite orders and despite statements made by the Directors of the Lessee, the rentals were not paid. Finally, the Coordinate Bench of this Court in judgment dated 05.10.2016 held the respondents Nos. 1 and 2 (therein) guilty of contempt of Court and deferred their sentencing till the next date of hearing (that is, 19.12.2016).

11. On 19.12.2016, the learned counsel appearing for the contemnors in Contempt Petition 598/2016, furnished demand drafts totalling Rs. 30,00,000/, which was directed to be deposited with the Registrar General of this Court. This

Court further directed that the said amount of Rs. 30,00,000/- along with Rs. 11,00,000/- already deposited, be released to the Lessors (respondent No.1). In the meanwhile, the Lessee filed an appeal inter alia against the order dated 21.04.2016 passed in OMP (I) No. 100/2015 before the Division Bench of this Court.

12. By an order dated 23.12.2016, the Division Bench of this Court passed an order directing that the amount lying with the Registrar General of this Court not be released to the Lessors till 07.02.2017 or till further orders.

13. The aforementioned appeal was disposed of by an order dated 10.02.2017 extending the aforesaid order by further period of 10 days to enable the Lessee to make an application before the arbitrator under Section 17 of the Act.

14. In terms of the liberty granted by the Division Bench, the Lessee made an application under Section 17 of the Act to the arbitrator inter alia praying that the order for release of the amount of Rs. 41,00,000/- deposited in this Court (in Contempt Petition 598/2016), be stayed till the disposal of the arbitration proceedings. The aforesaid application was disposed of by the impugned order.

15. Before the arbitrator, it was inter alia contended on behalf of the Lessee that in terms of clause 6, 17 and 20 of the lease deed, the Lessee was entitled to suspend payment of rent. The Lessee claimed that the property was taken on lease on a representation that a water connection existed at the time of entering into the lease deed. However, the Lessors have been unable to provide a water connection. Secondly, it was stated that the property is located in an unauthorised regularised area and, therefore, Lessee has been unable to obtain the Municipal Health Trade Licence. It was contended that the Lessee is entitled to withhold the rent in terms of clause 20 of the lease deed - force majeure clause - which entitled the Lessee to suspend or cancel the lease on account of failure on the part of a party to perform the obligations including a force majeure event.

16. It was also claimed on behalf of the Lessee that the property in question had been acquired by the Government and, therefore, the Lessors were not entitled to claim any rent for the said property as they were not the real owners of the property. The Lessee also claimed that rent for the period March, 2014 to November, 2014 was paid in cash. The aforesaid contentions were disputed by the Lessors.

17. The arbitrator considered the rival contentions. He found that no evidence was filed by the Lessee regarding payments of rent from March, 2014 to November, 2014, which were allegedly paid in cash, and rejected the Lessee's claim in that regard. The arbitrator also rejected the contention that on a joint reading of clause 6, 17, 20 of the lease deed, the Lessee was entitled for suspension of rent, for several reasons. First, he noted that the lease deed was an unregistered document and the Lessee could not have relied on the same.

18. Second, the arbitrator held that Lessee could not claim the sealing of the property by the Government as a force majeure event. He held that the force majeure situation arises only where the matters are beyond the control of the parties and not in matters within the control of parties.

19. Third, insofar as the lack of water connection is concerned, the arbitrator noted that the same was only being used as an excuse since the same did not find mention in the initial reply dated 26.12.2014 sent in response to the legal notice terminating the lease. The arbitrator concluded that non-availability of health licence due to lack of water connection, was only an excuse to avoid paying rent.

20. Mr Aneja, learned counsel appearing for the Lessee has assailed the impugned order only in respect of the arbitrator's finding with regard to clause 20 of the lease deed.

21. He referred to clause 20 of the lease deed and contended that the said clause was not limited to force majeure event alone. He earnestly contended that the arbitrator had grossly erred in concluding that lease rental could not be suspended on the ground of lack of water connection or on account of sealing of the said property, even if the same were not considered as force majeure events.

22. I have heard the learned counsel for the parties.

23. Before proceeding further, it would be relevant to refer to clause 20 of the lease deed, which reads as under:- "20. FORCE MAJURE

That in case of any of the party fails to performs its part of the obligations due to the reasons which are beyond the control of the party including but not limited to the force majeure event then present agreement may be cancelled or suspended at the sole option of the lessee.

The lessee shall not be liable to pay the lease rent till the time force majeure event continues. The force majeure event shall include fire without any negligence of the staff of the lease, riots, war, civil disturbance, earthquake, flood government action/change in policy etc."

Plainly, the said clause cannot be read as enabling the Lessee to continue holding the property indefinitely without paying rent. The said clause would be applicable only where a party fails to perform its obligations and such failure is for reasons which are beyond the control of that party. In such cases, the Lessee would have the option to cancel or suspend the agreement.

Thus, if the Lessors are not in a position to perform their obligations for reasons which are beyond their control then in such event, the Lessee would have the option to either cancel the agreement or suspend the same. In either case, the Lessee cannot avoid its payment obligations if it seeks to retain the possession of the property; it is not open to the Lessee to selectively suspend its obligations only.

24. Mr Aneja had earnestly contended that the words "including but not limited to the force majeure event" in clause 20 of the lease deed indicated that the payment of rent could be suspended for reasons other than a force majeure event. The said contention is unmerited as the second sentence of clause 20 expressly provides that Lessee will not be liable to pay lease rent "till the time force majeure event continues". This makes it amply clear that liability to pay lease rent would be suspended only in case of a force majeure event and only till such time, the force majeure event continues.

25. The contention that since the Lessee has been unable to obtain the necessary permissions for running a restaurant for want of water connection and/or the property being in an unauthorised area, it is not liable to pay lease rental, is plainly a ruse to avoid paying the lease rentals.

26. Admittedly, the property was leased only for the purposes of running a restaurant after obtaining the necessary permissions. If it is the Lessee's case that such permissions cannot be obtained and the property cannot be used for the purpose it was leased, there is no possible justification for the Lessee to continue to retain the possession of the same. Similarly, the contention that no rent is payable as the water connection is not available on the property, is also an excuse raised by the Lessee to avoid meeting its obligations. The Lessee is in possession of the property since October, 2013 and has always been aware of the lack of water connection; yet, admittedly, no such ground for non-payment of rent was raised at the material time. More importantly, if the Lessee is unable to run a restaurant without a water connection as is sought to be contended then there is no plausible reason for the Lessee to continue to insist on keeping the possession of the property.

27. Mr Aneja had contended that South Delhi Municipal Corporation had denied the necessary permissions for want of safe water connection only on 23.12.2015 and therefore, the said reason was not mentioned in the Lessee's response dated 26.12.2014 to the legal notice.

28. This Court finds little merit in this contention primarily for the reason that the Lessee had not paid rent - as noticed by the arbitrator since March 2014 - and this default cannot be sought to be justified by the notice/ communication dated 23.12.2015 which was received much later. The arbitrator had observed that these were not the reasons claimed by the Lessee in its response dated 26.12.2014; on the contrary, the Lessee had expressed its willingness to pay rent if the lease deed was registered. The arbitrator, had therefore, rejected the aforesaid contention and in my view, rightly so.

29. The fact that the Lessee has been unable to obtain the requisite permissions to run a restaurant cannot be a ground for the Lessee to avoid its obligations to pay rent while insisting on retaining the possession of the property.

30. The arbitrator had also pointedly asked whether the Lessee would be willing to hand back the possession of the property in view of the alleged difficulties in

running the restaurant and the Lessee had unequivocally declined to handover the possession.

31. This Court does not find any infirmity with the decision of the arbitrator.

32. It is also necessary to observe that the conduct of the Lessee has been less than fair and plainly dishonest. The Lessee has avoided making payments despite making commitments before this Court. As noted hereinbefore, although statements were repeatedly made on behalf of Lessee that it would make the payments, the Lessee had failed to do so. Even in the proceedings initiated for wilful disobedience of the orders of this Court (Contempt Case No. 598/2016), the Directors of the Lessee were not readily forthcoming to live up to their commitments and had avoided making any payment while continuing to hold the possession of the property without paying the agreed rent as directed.

33. Shorn of all the grounds urged regarding non-availability of water and disability to use the premises, the plain fact is that the Lessee has been in possession of the property for three and a half years and has effectively denied the rent to the Lessors while continuing to hold the property.

34. In view of the above, the present petition and the pending application are dismissed with costs of Rs. 1,00,000/-. The costs shall be paid within a period of two weeks from today.

35. It is clarified that all observations made in this order are only, prima facie, and will not preclude the parties from pursuing their claims and counter-claims before the arbitrator. All such claims/counter-claims will be considered by the arbitrator uninfluenced by any observations made or views expressed herein.