
(2012) 05 BOM CK 0041

In the Bombay High Court

Case No : Arbitration Petition No. 1010 of 2011

BNP Paribas Securities India Pvt.Ltd.

APPELLANT

Vs

Cable Corporation of India Ltd.

RESPONDENT

Date of Decision : 07-05-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Presidency Small Cause Courts Act, 1882 — Section 18, 19, 41, 41(1), 41(2)

Citation : (2012) 3 ARBLR 55 : (2012) 4 BomCR 251 : (2012) 114 BOMLR 1863 : (2012) 4 MhLj 782

Hon'ble Judges : G.S. Godbole, J

Bench : Single Bench

Advocate : P.K. Samdani, assisted with ith Ms. Bindi Dave and Mrs. Brigitta John instructed by Wadia Ghandy and Co, for the Appellant; Cyrus Ardeshir a/with Ms. Charmeen Unadkat and Vishal Talsania instructed by y Desai and Desai Currimjee and Mulla, for the Respondent

Judgement

G.S. Godbole, J.—Heard learned Advocates for the respective parties at length. By order dated 15th November, 2011 the parties were already put to the notice that the Petition will be disposed off finally at the stage of admission. Accordingly, I have heard the learned Advocates at length.

2. By this Petition filed u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"), the Petitioner has sought following interim measures :

(a) That pending the hearing and final disposal of the arbitration proceedings and the making and implementation of the award therein, this Hon"ble Court be pleased to pass an order and injunction restraining the Respondent from in any manner selling and/or transferring and/or alienating and/or encumbering and /or parting with and/or disposing off [and/or disturbing the Petitioner"s occupation and possession of] the said Premises.

(b) That pending the hearing and final disposal of the arbitration proceedings and

the making and implementation of the award therein, this Hon''ble Court be pleased to pass a mandatory order and direction against the Respondent to deposit with the Hon''ble court the balance Deposit of Rs. 5,99,11,376 (Rupees Five Crore Ninety Nine Lac Eleven Thousand Three Hundred and Seventy Six only) together with penal interest thereon at the rate of 18% from July 1, 2011 till the date of such deposit;

(c) In the alternative to prayer (b) above, this Hon''ble Court pleased to pass an order and direct the Respondent to secure the aforesaid amount of 5,99,11,376 (Rupees Five Crore Ninety Nine Lac Eleven Thousand Three Hundred and Seventy Six Only) together with interest thereon by furnishing a bank guarantee or such other security as may be deemed appropriate by this Hon''ble Court; and....

3. At the time of hearing of the Petition, Mr. Samdani, learned senior Advocate for the Petitioner made a statement that the Petitioner was not seeking any injunction in respect of the bracketed portion of prayer (a) and that prayer was being given up.

4. The Respondent has filed Affidavit-in-Reply and raised objections regarding maintainability of the Arbitration Petition on the ground that by virtue of Section 41 of the Presidency Small Causes Court Act, 1882, the Arbitration Petition u/s 9 is not maintainable in this court and this Court does not have jurisdiction to grant any relief of whatsoever to the Petitioner. In this Judgment I propose to consider the said objection. The Defendants have advanced argument even on the merits of the controversy and I also propose to decide the question on merit after deciding the question of maintainability.

5. The facts which are necessary and which emerge from the pleadings are as under:

(a) It is an admitted position that the Respondent is owner of the premises, admeasuring about 9074 sq. ft. of carpet area 30-arbp-1010-11.sxw located on the 6th floor of B-Wing in the building known as "Poonam Chambers" at Worli. Admittedly, the Respondent executed a Leave and Licence Agreement dated 26th November, 2008 in favour of the Petitioner in respect of the said premises for a period of 52 months commencing from 1st December, 2008 and expiring on 31st March, 2013. The Agreement provided for lock-in period of 28 months, expiring on 31st March, 2011 during which a monthly license fee of Rs. 20/- lakhs was to be paid. For the balance period of 24 months, the licence fees was to be enhanced to Rs. 23,60,000/- per month. A separate Agreement of Amenities was also executed which is on record at Exh. "B" and various amounts were payable under the said Agreement. A sum of Rs. 36 lakhs per month was payable for the first 28 months, excluding the fit out period and for the balance 24 months, a sum of Rs. 42,48,000/- per month was payable.

6. At this stage it is necessary to reproduce Clauses 6, 7 and 9 of the Leave and License Agreement which read thus:

6 It is agreed by and between the parties hereto that, subject to Clause 7 below, during the initial 28 months (herein referred to as the "Lock in Period") of the License Period, neither party shall be entitled to terminate this Agreement. On expiry of the said Lock in Period, in case the Licensee desire to terminate the License at any time before the expiry of the License Period, the Licensee shall be entitled to do so by giving 3 months prior written notice in advance to the Licensor.

7. It is hereby clarified and the Licensor and the Licensee hereby agree and confirm having understood and accepted that:

(a) After the expiry of the first 18 months of the License Period but before the expiry of the Lock in Period, the Licensee may at its option and after giving 3 months advance written notice vacant the Licensed Premises, PROVIDED HOWEVER THAT the Licensee pays to the Licensor the License Fee for the entire notice period of three months plus a compensation equivalent to three months License Fee. It is further clarified that in the case of vacation of the licensed premises in accordance with this clause the licensee shall stand terminated on the date of vacation of the Licensed Premises and the provisions herein contained relating to refund of Security Deposit shall apply.

9. If upon expiry of this Agreement by efflux of time or upon the sooner determination of this Agreement in accordance with the terms hereof, in the event the Licensor shall fail to refund to the Licensees the said Security Deposit in accordance with the terms herein contained despite the Licensee being ready and willing to simultaneously hand over quiet, vacant and peaceful possession of the Licensed Premises, then in such event, without prejudice to any other right/remedy available to the Licensee under law, the Licensor shall be liable to pay to the Licensee, penal interest at the rate of 18% per annum on the amount of the Security Deposit calculated from the date on which the Licensee has offered quiet vacant and peaceful possession of the Borey Licensed Premises to the Licensor to the date of actual refund of the Security Deposit by the Licensor to the Licensee in accordance with the terms hereof. Further, in such event the Licensee shall be also entitled to retain the possession of the Licensed Premises without payment of License Fee or any payment of any nature whatsoever till the Licensor refunds the Security Deposit, with accrued interest to the Licensee in accordance with the terms hereof. However, such continued occupation of the Licensed Premises by the Licensee during the period of non refund of Security Deposit shall not be treated as default/breach on the part of the Licensee. It is clarified that while refunding the Security Deposit, the Licensor shall be entitled to deduct the amounts specified in Clause 4.

Clause 24 of the Agreement is the Arbitration clause.

7. It is not necessary to reproduce all the correspondence between the parties and suffice it to say that by Notice dated 1st September, 2010, the Petitioner gave a notice of its intention to terminate the License w.e.f. 30th April, 2011. By

a sub-sequent Notice dated 20th December, 2010 the date of termination was changed from 30th April, 2011 to 30th June, 2011. The Respondent specifically acknowledged this fact by writing a letter dated 6th January, 2011 (Exh. "E" page 58) and confirmed that the Leave and Licence Agreement would stand terminated w.e.f. 30th June, 2011. By the subsequent letter dated 18th April, 2011 the Petitioner wanted to pre-pone the date of termination to 31st May, 2011. However, that was not accepted by the Respondent. Thereafter by letter dated 26th April, 2011 the Respondent for the first time claimed that it was entitled to get compensation equivalent to three months licence fees under the Leave and Licence Agreement plus three months monetary compensation under the Amenities Agreement for issuing the notice of termination during lock-in period. The disputes and differences started between the parties on the aforesaid issue wherein the Petitioner declined to pay any such additional compensation and invoked the arbitration clause. The Respondent contended that the dispute was not arbitrable since the same falls within the exclusive jurisdiction of the Small Causes Court.

8. A preliminary objection to the maintainability of the Petition is raised u/s 41 of the Presidency of Small Causes Court, 1882 and it is therefore, necessary to quote sub-section (1) thereof which reads thus:

41 (1) - Notwithstanding anything contained elsewhere in this Act [** **] but subject to the provisions of sub-section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefore ,irrespective of the value of the subject matter of such suits or proceedings.

9. It is also necessary to state that Respondent has factually filed L.E.& C. Suit No. 47/55 of 2012 in the Court of Small Causes against the Petitioner, seeking recovery of possession and other monetary claims arising out of the aforesaid Leave and License and Amenities Agreement. The said Suit is presently pending.

10. In support of his preliminary objection, the learned Advocate for the Respondent firstly relied upon the Judgment of the Division Bench in the case of Carona Limited Vs. Sumangal Holdings, . Heavy reliance was placed on the observations in paragraphs 7 to 12 of the said Judgment. It was submitted that even in that case a Section 9 Petition in respect of the premises given on Leave and Licence had been filed and the Division Bench has held that Section 41 clearly bars the jurisdiction of the High Court in entertaining the Petition filed u/s 9. The learned Advocate for the Respondent thereafter relied upon the Judgment of the learned single Judge (Dr. D.Y. Chandrachud, J.) in ING Vysya Bank Limited Vs. Modern India Limited and Another, and submitted that even this Judgment lays down the same propositions. The learned Advocate for the Respondent also relied upon the Judgment of the learned single Judge (A.V. Mohta,J.) in the case of Genesis Colors Private Limited Vs. Anil Ramlabhaya Suri and Another, and

contended that in an identical situation the learned single Judge has held that the Petition is not maintainable.

11. While meeting the preliminary objection Mr. Samdani, learned Advocate for the Petitioner advanced following submissions :

(a) He submitted that the prayer in the Petition was for an interim measure, pending arbitral proceedings and all that was being sought was the refund of the security deposit amount that had been paid by the Petitioner to the Respondent under the Leave and Licence and Amenities Agreements. He, therefore e, submitted that this relief is not covered by Section 41 of the Presidency Small Causes Courts Act, 1882 and the jurisdiction was not ousted.

(b) Heavy reliance was placed on the Judgment of the learned single Judge (S.U. Kamdar, J.) in the case of RMC Readymix (I) P. Ltd. Vs. Kanayo Khubchand Motwani, and it was submitted that the Civil Court has jurisdiction to entertain the summary suit for refund of deposit under the Leave and License Agreement and that jurisdiction is not barred. Reliance was also placed on the Judgment of the Division Bench (D.K. Deshmukh & Anoop V. Mohta, JJ.) dated 25th April, 2011 in Summons for Judgment No. 445 of 2007 in Summary Suit No. 29 of 2004 and the observations in paragraph 12 of the said Judgment were relied upon to contend that the jurisdiction of the Civil Court was not barred when the claim was for refund of the security deposit paid under the Leave and License Agreement.

(c) It was submitted that the Judgments in the case of Carona Limited and ING Vysya Bank Ltd., (supra) were clearly distinguishable since reliefs claimed in those proceedings u/s 9 were clearly falling within the scope and ambit of Section 41 of PSCC Act, 1882.

(d) On the merits of the controversy Mr. Samdani submitted that since the Respondent was having precarious financial condition and since the premises in question are already mortgaged to HDFC Ltd., for securing the amount of security deposit paid by the Petitioner appropriate interim direction deserves to be granted.

12. On the other hand on the merits of the controversy Mr. Ardeshir, Advocate for the Respondent submitted that the Petitioner is in possession of the licenced premises and that the Respondent has already made a statement that it will not dispossess the Petitioner without following due process of law and that such a due process of law has already been followed by filing the suit. He submitted that the Respondent has also a substantial monetary claim against the Petitioner and hence, there is no propriety in passing any interim order. It was further submitted that the Petitioner has wrongfully refused to vacate the suit premises and hence, the Respondent has a claim of Rs. 4 Lakhs per day as against the Petitioner.

CONSIDERATION OF SUBMISSIONS:

13. It is necessary to first deal with the preliminary objection about the maintainability of the Petition u/s 9 and to decide whether the Petition is barred by Section 41. My answer to the aforesaid question is in the negative and I am inclined to hold that Petition is not barred. It is necessary to note the crucial words in Sub-Section 1 of Section 41 which are as under:

relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor.

(Emphasis supplied by me)

14. Thus it is clear that only if a claim made in Arbitration Petition or Civil Suit falls within the scope of the aforesaid expressions used in Section 41 then and only in that eventuality the jurisdiction of the Civil Court will be barred. In the present Petition u/s 9 which is filed for interim measures, pending adjudication about the principal relief to the Petitioner of refund of security deposit, the relief is obviously not the one covered by Sub-section 1 of Section 41. The Petitioner is not seeking a recovery of licence fees or charges or rent nor is the Petitioner seeking the recovery of possession nor an injunction is sought that the Petitioner should not be dispossessed from the licensed Premises. The Petitioner is already in possession of the premises and is continuing to be in possession. Whether the act of the Petitioner of retaining possession after expiry of the license period is legal act as contended by the Petitioner or an illegal act as contended by the Respondent is the matter which will be decided by appropriate forum in an appropriate proceedings.

15. However, suffice it to say that the present proceedings or in the proceedings of arbitration which are proposed to be commenced by the Petitioner to get relief which is being sought is for refund of the security deposit. On the careful reading of Section 41, this relief is not covered by Section 41.

16. It is necessary to deal with the three Judgments relied upon by the learned Advocate for the Respondent. In the case of Carona Ltd., (supra), paragraph 2 of the said Judgment clearly quoted prayers in the Arbitration Petition which were the subject matter of that Judgment. In that case it is clear that the principal relief which was sought was direction to the Respondents to hand over possession of the licensed premises. There was no prayer of refund of the security deposit. In this context the said Judgment is clearly distinguishable and has no application. Similarly, a careful perusal of the Judgment in the case of ING Vysya Bank Limited (supra) would indicate that the Petitioner therein was claiming a right to occupy the licensed premises on the ground that it had exercised the option of renewal which was available under the Agreement. Paragraph 1 of the said Judgment indicates that the Petition u/s 9 in that case sought injunction restraining licensee from terminating the Agreement of license and acting upon a communication calling upon the licensee to hand over vacant possession and in particular, restraining the licensor from initiating proceedings

for the recovery of possession of the licensed premises. An injunction was also sought, restraining the licensor from disturbing the use and occupation of the premises by the licensee. This prayer in the Petition in case of ING Vysya Bank Limited was directly in respect of the matter "relating to the recovery of possession of any immovable property" as contemplated by Section 41. The actual prayer may not be for possession but it was clearly a prayer relating to the recovery of possession. In that context, the learned single Judge was justified in holding that the relief was barred by Section 41. In this context what is observed by the learned single Judge in paragraph 8 of the said Judgment was as under:

8. The first thing to be noted about Section 41 is that it is prefaced with a non obstante provision as a result of which the provisions of sub section (1) are given overriding force and effect notwithstanding anything contained elsewhere in the Act nonetheless, however, subject to subsection (2). The jurisdiction to entertain and try all suits and proceedings between a licensor and a licensee and/or a landlord or tenant is conferred upon the Court of Small Causes where the suit relates to the recovery of possession of immovable property or to the recovery of licence fees or charges or rent therefore, irrespective of the value of the subject matter of such suit or proceeding. The words "irrespective of the value of the subject matter of such suits or proceedings" are intended to indicate that even though the value of the subject matter would exceed the pecuniary limits on the jurisdiction of the Court, it is the Court of Small Causes which is conferred with the jurisdiction to entertain and try suits of the descriptions specified in subsection (1). However, subsection (2) carves out an exception in respect of those suits for the recovery of possession or of licence fees, rent or charges to which the Rent Act, the other Acts enunciated or any other law for the time being in force apply. The non obstante clause in Sub section (1) of Section 41 has overriding effect over all the other provisions of the Act. That would include the provisions contained in Section 18 defining the pecuniary limits of the jurisdiction of the Small Causes Court. Suits falling in the description contained in Sub section (1) of Section 41 would lie within the exclusive jurisdiction of the Small Causes Court notwithstanding the fact that the value of the subject matter exceeds the limits on its pecuniary jurisdiction. The non obstante provision in Sub section (1) of Section 41 will also prevail over Section 19 because when the suit is of the description contained in the former provision that will prevail over the latter. The primary determination which the Court must make in every such case is whether the suit in substance and in essence is a suit relating to the recovery of possession or the recovery of licence fee, rent or other charges between a landlord and tenant or a licensor and licensee. The Court will decide the issue by looking at the kernel and disregarding the chaff. The existence of a jural relationship of licensor and licensee or, as the case may be, of landlord and tenant; the nature of the cause of action; the character of the reliefs sought and whether the claim of the Plaintiff arises from and out of the obligations of the parties as licensor and licensee or, landlord and tenant are important considerations. The garb or cloak which is wrapped around the pleadings by an

astute draftsman must be kept aside to deduce the pith and substance of the pleadings. If the suit relates to the recovery of possession, it is a suit to which Section 41(1) applies notwithstanding the fact that some of the reliefs or a portion of the cause of action is structured around a claim for specific performance. The Court must ask itself : Does the theme and the foundation relate to the recovery of possession? And in answering that question, the pleadings must be considered as a whole without severing its constituents or reading parts in isolation.

17. In my opinion, the claim in the present Petition u/s 9 is not the one relating to the recovery of possession of the premises.

18. The third Judgment of the learned single Judge in the case of Genesis Colors Pvt. Ltd., (supra) is also of no assistance to the case of the Respondent for the simple reason that the said Judgment does not lay down any ratio which can be considered to be a binding precedent. A perusal thereof shows that the learned single Judge has merely quoted some paragraphs from the Judgments in the case of Carona Limited and ING Vysya Bank Ltd., and has thereafter arrived at a conclusion that the dispute falls within the ambit of Section 41. It is no doubt true that in that case the Petitioner therein was also seeking refund of the security deposit. However, in my opinion, since the said Judgment of the learned single Judge merely relies on the earlier two Judgments in the case of Carona Ltd., and ING Vysya Bank Ltd. which I have already held are not applicable to the facts of this case; in my opinion, the Judgment in the case of Genesis Colors Pvt. Ltd., does not constitute a binding precedent.

19. On the other hand the Judgment of the learned single Judge S.U. Kamdar, J. in the case of RMC Readymix (I) Pvt. Ltd., (supra) is more to the point. The learned single Judge has rightly laid down the correct proposition of law in paragraph 9 of the said Judgment in the case which reads thus:

9. The said provision of Section 41 only applies in cases where the suit is related to "recovery of possession" of premises or for demand of compensation under the leave and licence agreement. The present suit is for refund of security deposit paid under the licence agreement with interest thereon. The said suit for refund of security deposit is in my opinion not covered by the provisions of Section 41 of the Presidency Small Causes Court Act. It is not possible to accept the contention of the learned counsel for the defendant that the suit for recovery of security deposit relates to recovery of possession of the licensed premises. The judgment of the apex court in the case of Mansukhlal Dhanraj Jain (supra) is interpreting the words "relating to recovery of possession" and it is held that these words are wide enough to cover all kinds of suit which pertains to possession of the suit premises. In my opinion the aforesaid judgment has no application on the fact of the present case because this suit is purely a money suit and is in respect of refund of the security deposit. Such monetary claims for refund of security deposit are not covered by the word "relating to recovery of possession". It is because even for the recovery of possession the section itself

provides specifically that the suit will lie u/s 41 of the Presidency Small Cause Courts Act. In the present case the suit is also not for recovery of compensation amount but it only pertains to refund of security deposit. Thus in my opinion the contention advanced by the learned counsel for the defendant that this court has no jurisdiction to entertain and try the suit in the light of the provisions of Section 41(1) of the Presidency Small Cause Courts Act, 1882 has no merits and the same is required to be rejected.

20. It is worthwhile to note that while holding that a Reference made by the learned single Judge to the case of Sanjog Sadanand Parab vs. B.P. Gharda & Co. was unwarranted, in the relevant case, the Division Bench while deciding the said Reference in the case of Sanjog Sadanand Parab (supra) has observed in paragraph 12 thus:

12. The present suit is, on the basis of the averments in the plaint, is a suit by the erstwhile tenant or licensee for recovery of the amount of unpaid security deposit and therefore if one goes by the averments in the plaint and provisions of section 41, this court will have the jurisdiction to entertain the suit

21. Though the Reference is returned, the aforesaid observations support the case of the Petitioner. I, therefore, hold that despite the provisions of Section 41 of the Presidency Small Causes Courts Act, 1882, the present Petition is not barred.

22. Now turning to the merits of the controversy it is necessary to bear in mind that the Respondent has already filed a Suit for possession and other reliefs including recovery of licence fee and damages etc. against the Petitioner in the Small Causes Court. The Petitioner claims that as the security deposit paid by it has not been refunded by the Respondent it is entitled to continue with possession of the licenced premises. Considering the area and location of the licenced premises it is undisputed that the value of the licenced premises is several times more than the claim of the Petitioner for security deposit. In such circumstances at least at this stage when the Petitioner is continuing in possession of the premises in question, I do not see any justification for granting any emergent interim measures or orders as against the Respondent for securing the claim of the Petitioner. Being in possession of the premises, the claim of the Petitioner is as on today substantially secured. As on today, no case is made out for grant of interim measures as prayed for in the Petition. However, if the Petitioner in future relinquishes the possession of the premises to the Respondent, the Petitioner may have a prima facie case for applying for interim measures against the Respondent in terms of the prayers made in this Petition.

23. Hence, while disposing off this Petition, I deem it necessary to grant a specific liberty to the Petitioner to make an Application for interim measures in case the Petitioner relinquishes the possession of the premises in question to the Respondent. Order accordingly.