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(2021) 01 P&H CK 0253

In the Punjab And Haryana At Chandigarh

Case No : First Appeal Order No. 2917 Of 2020 (O&M)

Innovative Facility Solutions Private Limited — APPELLANT

Vs

M/S Aec Digitial Studio Private Limited And Another — RESPONDENT

Date of Decision : 19-01-2021

Acts Referred:
Arbitration And Conciliation Act, 1996 — Section 9, 9(1), 9(2), 11, 17, 21

Citation : (2021) 01 P&H CK 0253

Hon'ble Judges : Sudhir Mittal, J

Bench : Single Bench

Advocate : Himesh Thakur, Akhil Sachar, Nakul Gandhi, Rubina Virmani, Karan Valecha

Judgement

Sudhir Mittal, J

1. This appeal has been filed against order dated 08.10.2020 passed by the learned Additional District Judge, Gurugram in a petition filed under Section

9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). The appellant is the Maintenance Agency (hereinafter referred to

as 'MA'). Respondent No.1 is the sub-lessee under sub-lease dated 06.02.2018 (hereinafter referred to as 'the sub-lessee') and respondent No.2 is the

sub-lessor under said sub-lease deed (hereinafter referred to as 'the sub-lessor'). The sub-lease dated 06.02.2018 is in respect of area measuring 7045

square feet on the fourth floor of a building known as AIHP Horizon and was let out for the purpose of office use of IT/ITES.

2. The aforementioned sub-lease deed is an unregistered document. Lock in period of three years has been provided in terms thereof. Interest free

refundable deposit payable thereunder was Rs. 20,00,780/- i.e. four months rent in terms of Clause 5.1. The sub-lessee was bound to execute a

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separate maintenance agreement with the appointed maintenance agency on the terms and conditions stipulated by the said maintenance agency.

Thus, maintenance agreement dated 01.06.2018 was executed between the sub-lessee and the MA and the same is also on registered document.

3. Difficulties arose amongst the parties on account of order dated 23.03.2020 issued by the State of Haryana ordering closure of all commercial

establishments due to the outbreak of COVID-19 pandemic. Vide order dated 24.03.2020, Ministry of Home Affairs ordered a country wide lock

down. Thus, rent could not be paid for March 2020. Some maintenance charges were also in arrears. The sub-lessee issued notice dated 15.04.2020

invoking Clause 12.1 of the sub-lease agreement which gives a right to sub-lessee not to pay rent for the period the area under the sub-lease could not

be used on account of Force Majeure. This was responded too by the sub-lessor vide its letter dated 16.04.2020 objecting to invocation of the said

clause on the ground that the COVID-19 pandemic was not included in the definition of Force Majeure. Ultimately, the sub-lessor issued notice dated

14.06.2020 terminating the sub-lease followed by notice dated 27.06.2020 invoking Clause 9.1 of sub-lease for referring the dispute to arbitration. The

sub-lessee responded vide letter dated 17.07.2020 and inter alia submitted that no action could be taken under the sub-lease as the same was

insufficiently stanked and unregistered. Instead refund of Rs. 15,00,195/- was demanded, after deduction of rent for the month of March 2020 from

the security amount. I have been informed that on refusal to refer the dispute to arbitration, a petition under Section 11 of the Act has been filed in the

High Court and the same is pending. The sub-lessee is hotly contesting the said petition on the ground of sub-lease deed being unregistered, apart from

other grounds. Meanwhile on account of the dispute, the sub-lessee was not permitted to enter its office space or to remove its

belongings/equipments/movable property therefrom. Thus, a petition under Section 9 of the Act was filed for grant of interim relief and the same has

been allowed.

4. This appeal has been filed by MA and along therewith, e-mails dated 12.08.2019, 19.08.2019, 26.08.2019, 02.09.2019, 24.09.2019, 30.09.2019 and

01.10.2019 have been annexed to establish that the sub-lessor had all along been requesting the sub-lessee to come forward to pay its share of stamp

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duty and registration charges so that the sub-lease deed may be registered. Based thereon it has been submitted that said document had remained

unregistered on account of the inaction of the sub-lessee.

5. Learned counsel for the appellant has argued that the order impugned in the appeal deserves to be set aside because the same is based upon an

assumption that the actual dispute is between the sub-lessee and the MA and by placing reliance upon the terms of the maintenance agreement,

although, the petition under Section 9 of the Act had been filed with reference to sub-lease agreement. The maintenance agreement was not even on

record. Further, the sub-lessee is opposing reference of the dispute to arbitration on the ground that the said lease deed is unregistered, whereas it had

filed the petition under Section 9 of the Act by referring to the same document. A party cannot be permitted to approbate and reprobate. Moreover,

filing of a petition under Section 9 pre-supposes an intention on the part of such petitioner to invoke arbitration soon thereafter. If the same is not done,

as is the position in the instant case, the petition would be rendered not maintainable and order based thereupon would deserve to be set aside.

Reliance is placed upon Sundaram Finance Ltd. vs. NEPC India Ltd., (1999) 2 Supreme Court Cases 47 a9s well as Firm Ashok Traders and another

vs. Gurumukh Das Saluja and others, (2004) 3 Supreme Court Cases 155. That apart it is submitted that Section 9(2) of the Act stipulates that

arbitration must commence within 90 days of the passing of the order under Section 9(1) of the Act and if the same is not done, the order would be

rendered non-est. Reliance is placed upon Minochar @ Minoo Aspandyar Irani vs. Deenyar Sheriar Jehani and others, 2015(3) Maharashtra Law

Journal 173 and judgment dated 04.03.2020 passed by the Madras High Court in Application No. 9466 of 2019.

6. Learned counsel for the sub-lessee submits that the MA and the sub-lessor are one and the same agency and are colluding with each other. This is

apparent from the fact that a common written statement was filed before the learned Additional District Judge, Gurugram and they were both

represented by the same counsel. Thus, this appeal is actually for and on behalf of the sub-lessor and has only been filed on behalf of the MA to

enable challenge to the impugned order on the ground of the same having been passed under the maintenance agreement even though Section 9

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petition was not based thereupon. Moreover, the appellant can only have a claim for unpaid dues and the same stands secured by the security deposit

made by the sub-lessee and as has been found by the learned Additional District Judge, Gurugram. No prejudice is being caused to the appellant and,

thus, it is not entitled to challenge the impugned order. Learned counsel places reliance upon M/s Universals Enterprises vs. Deluxe Laboratories Pvt.

Ltd., 2016(5) Maharashtra Law Journal 623 to submit that the issue of registration of the sub-lease deed was not required to be decided in a petition

under Section 9 of the Act and that the same could be decided at the time of registration. He also relies upon Shri Chaudhary Avadesh Kumar vs.

Volleyball Federation of India, 2017 SCC Online Madras 19117 to submit that the period of 90 days provided under Section 9(2) of the Act is not

sacrosanct and mandatory and that the same is extendable.

7. Having heard learned counsel for the parties and with their assistance having perused the record, I am of the considered opinion that the only

material question for decision is whether the impugned order deserves to be set aside on the ground that the Court failed to examine the issue of

intention to refer the dispute to arbitration ?

8. In Sundaram Finance Ltd. (supra) it has been held as under :-

â??19. When a party applies under Section 9 of the 1996 Act it is implicit that it accepts that there is a final and binding arbitration agreement in

existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. Section 9 further contemplates arbitration

proceedings taking place between the parties. Mr. Subramaniam is, there-fore, right in submitting that when an application under Section 9 is filed

before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral

proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act. In

order to give full effect to the words ""before or during arbitral proceedings"" occurring in Section 9 it would not be necessary that a notice invoking the

arbitration clause must be issued to the opposite party before an application under Section 9 can be filed. The issuance of a notice may, in a given

case, be sufficient to establish the manifest intention to have the dispute referred to arbitral tribunal, but a situation may so demand that a party may

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choose to apply under Section 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so

made the Court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration.

Once it is so satisfied the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances

warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while

exercising jurisdiction under Section 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective

steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the Court is not debarred from dealing

with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act.â??

9. In Firm Ashok Traders (supra) it has been held as under :-

â??Under the A & C Act 1996, unlike the predecessor Act of 1940, the arbitral tribunal is empowered by Section 17 of the Act to make orders

amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the

existence of the arbitral tribunal and its being functional. During that period, the power conferred on the arbitral tribunal under Section 17 and the

power conferred by the Court under Section 9 may overlap to some extent but so far as the period pre and post the arbitral proceedings is concerned

the party requiring an interim measure of protection shall have to approach only the Court. The party having succeeded in securing an interim measure

of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the 'proximately contemplated' or

'manifesty intended' arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the

relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be

an order made 'before' i.e. in contemplation of arbitral proceedings. The Court, approached by a party with an application under Section 9, is justified

in asking the party and being told how and when the party approaching the Court proposes to commence the arbitral proceedings. Rather, the scheme

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in which Section 9 is placed obligates the Court to do so. The Court may also while passing an order under Section 9 put the party on terms and may

recall the order if the party commits breach of the terms.â??

10. Thus, it can no longer be disputed that a party invoking the jurisdiction of the Court under Section 9 of the Act must have the immediate intention

of referring the dispute to arbitration as only then, the interim protection granted would remain proximate to the arbitraral proceedings. A party not

intending to refer the dispute to arbitration would not be entitled to grant if interim relief under Section 9 of the Act. This view is supported by the

Single Bench Judgment of Bombay High Court in Minochar @ Minood Aspandtyar Irani (supra) wherein a petition under Section 9 of the Act was

dismissed on the ground of lack of intention of the petitioner therein to refer the dispute to arbitration.

11. In the present case the sub-lessee is opposing the petition filed under Section 11 of the Act as is evident from its written statement dated

03.10.2020, a copy of which is on record as Annexure A-10. The intention of not referring the dispute to arbitration is also revealed from reply dated

17.06.2020 given to the notice dated 27.06.2020 issued by sub-lessor invoking arbitration. Even during the course of arguments, learned counsel for the

sub-lessee has not attempted to submit that his client is willing to refer the dispute to arbitration. Thus, evidently the appellant is feeling sanguine after

having succeeded in obtaining interim relief. Learned Additional District Judge, Gurugram has failed to examine this aspect of the matter and has

assumed that the arbitration would commence in course of time.

12. Thus, impugned order dated 08.10.2020 is not sustainable in law and is set aside. No opinion is being expressed on other issues raised by learned

counsel and the same are left open.

13. However, the sub-lessee would be at liberty to obtain appropriate interim relief from the arbitrator in case it agrees to refer the dispute to

arbitration.

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