

(2013) 04 P&H CK 0050

In the Punjab And Haryana At Chandigarh

Case No : First Appeal from Order No. 2114 of 2013 (O and M)

M/s. Hymn Hospitality Services Pvt. Ltd.

APPELLANT

Vs

M/s. JVL Properties and Reavels Pvt. Ltd.

RESPONDENT

Date of Decision : 26-04-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 36, 9, 9(ii), 9(ii)(b)
Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5, Order 38 Rule 6

Citation : (2013) 171 PLR 447

Hon'ble Judges : A.N. Jindal, J

Bench : Single Bench

Advocate : Anil Goel, for the Appellant;

Final Decision : Dismissed

Judgement

A.N. Jindal, J.—This petition has arisen out of the order dated 20.03.2013 passed by the Additional District Judge, Gurgaon, directing the appellant to submit bank guarantee of Rs. 2,35,32,230/- towards future dues and interest till the final adjudication of the claim of the respondent by the arbitrator, to be appointed. M/s. JVL Properties & Travels Pvt. Ltd.-respondent is the owner of a hotel premises located at land measuring 1750 Sq. yards, out of Khasra No. 762/1, situated at village Nathupur, Tehsil and District Gurgaon. The appellant-company had taken the said property on lease for the purpose of running a hotel, at the rate of Rs. 18,00,000/- per month w.e.f. 22.09.2010. The lease agreement dated 22.09.2010 was executed in this regard. But, the appellant started committing default in payment of the rent. However, the respondent, on assurance of the appellant that it would make payment of the due amount with the passage of time, further extended the lease period vide separate lease deed executed between the parties on 13.10.2011, which was duly registered with the Sub Registrar, Gurgaon. As per covenant No. 2.1 of the said lease deed, the appellant was under legal obligation to pay a sum of Rs. 18,00,000/- per month and if the appellant claims and gets the benefit of income tax exemption in its return, then

the rent was to be enhanced up to Rs. 20,00,000/- from the date, from which the income tax exemption would apply. It was further agreed that the amount of rent would be increased by 7% at the end of every year. Accordingly, the respondent had handed over a fully furnished hotel premises to the appellant. However, the appellant committed default in payment of rent and the rent summary is given as under:-

2. Thus, balance against the appellant, as on 08.09.2012, came to be Rs. 2,35,32,230/-. As per clause 15.1 of the lease agreement, executed between the parties, in case of any dispute or difference between the parties, the matter was to be referred to the Arbitrator. Clause 15.1 of the lease agreement is reproduced as under:-

15.1. Any dispute or difference arising between the parties shall be resolved amicably at the first instance. Unresolved disputes, controversies, contests, disputes, if any shall be submitted to arbitration. The arbitration shall be conducted in accordance with the provisions of the Arbitration and conciliation Act, 1996 along with Rules thereunder and amendments thereto. The arbitration shall be conducted in English. The decision/award of the arbitrator shall be final/conclusive and binding on the parties. The seat of the arbitration shall be at New Delhi.

3. Since the appellant was not paying the rent, the respondent moved an application u/s 9 of the Arbitration and Conciliation Act, 1996 (for brevity "the Act") before the Court as an interim measure, to direct the appellant to deposit a sum of Rs. 2,35,32,230/- in the shape of FDR in a nationalized bank, towards the rent due and compensation for use and occupation in respect of the premises in dispute and further direct the petitioner to submit appropriate and adequate bank guarantee towards the future dues and interest till final adjudication of the claim by the Arbitrator is decided. The said application was accepted by the Court and the appellant was directed to submit the appropriate and adequate bank guarantee of Rs. 2,35,32,230/- towards future dues and interest till the final adjudication of the claim of the respondent by the Arbitrator, to be appointed, within one month from the date of passing of the order. However, the bank guarantee was not to be withdrawn till the dispute is adjudicated by the Arbitrator. It is also not in dispute that the matter has been referred to the Arbitrator and is pending adjudication.

4. Arguments heard.

5. Learned counsel for the appellant has submitted that since the matter is already under adjudication with regard to the payment of rent, then the question of asking for bank guarantee does not arise. It has been further urged that the provisions of Section 9(ii) of the Act are equal to the provisions of Order 38 Rule 5 of the CPC, therefore, in the absence of any such pleadings regarding the malafide intention of the appellant, no order for directing the appellant to furnish the bank guarantee could be passed.

6. To the contrary, learned counsel for the respondent has contended that in the light of the admission that the appellant is in possession of the fully furnished hotel and has not been paying the rent regularly, he never indicated, if there was any fault on the part of the respondent, which compelled him to withhold the rent. He had no right to withhold the same. On one side, he is running the hotel, owned by the respondent and on the other, he is not paying the rent. As such, the order passed by the Court was not, in any way, prejudicial or illegal, warranting interference by this Court. Even otherwise, the respondent was entitled to receive the rent in the light of the provision of Order 15 Rule 5 of the CPC, wherein it is envisaged that the rent could be paid on the first date of the hearing and on failure to make the payment, the appellant was bound to vacate the premises.

7. It is not in dispute that the respondent is the owner of the hotel premises. The agreement itself reveals that a fully furnished hotel was handed over to the appellant for running a hotel on a monthly rent of Rs. 18,00,000/- w.e.f. 22.09.2010. It is also clear that on 25.06.2012, the respondent had issued a notice terminating the registered lease deed dated 13.10.2011 by invoking clause 12.2 of the said agreement. Therefore, on the termination of the lease deed, the appellant was bound to surrender the physical vacant possession of the demised premises, but he did not comply with the terms of the lease agreement, obviously for the reason that the respondent, if dragged into the litigation, it would consume a lot of time and in the meanwhile, he would be able to enjoy the premises, without payment of rent.

8. As regards the another malafide on the part of the appellant to make the payment, it may be observed that on 20.03.2012, the appellant had issued a cheque bearing No. 889483 dated 20.03.2012, drawn on Dena Bank, Sector 19, Noida, for an amount of Rs. 13,51,734/-. The said cheque was returned unpaid for the reason "payment stopped by the drawer" vide memo dated 09.04.2012. Thereafter, the respondent had issued a legal notice on 19.04.2012. However, in order to avoid the criminal liability, the appellant had paid the said amount through another cheque.

9. It may further be observed that the respondent had called upon the appellant to pay the rent along with interest within two weeks of the issuance of the notice dated 25.06.2012, but the said notice was not responded. Even otherwise, the rent summary, as shown above, indicates that the appellant never paid whole of the amount of rent, as due against him and he has been making partial payments, which resulted into deficiency of Rs. 2,35,32,230/-, as on the date of filing of the petition. All this goes to show that the appellant had malafide dishonest designs and had withheld the said amount for no valid reasons. Section 9 of the Act has been enacted to safeguard the rights of the parties at advantage. The said section reads as under:-

9. A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced in accordance with section

36, apply to a Court-

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

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10. A bare reading of Section 9(ii)(b) indicates that the Court was well within its jurisdiction to direct the appellant to furnish a bank guarantee in order to secure the amount in dispute during the pendency of the arbitration proceedings, which may take long time for disposal and also for the future amount, which may become due on account of the use and occupation of the premises by the appellant. The law with regard to payment of rent, which comes at the rescue of the landlord has been introduced after the State amendment (Punjab, Haryana and Chandigarh) by inserting Rule 5 in Order 15 of the CPC, which reads as under:-

5. Striking off defence for failure to deposit admitted rent.-(1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of the default in making the deposit of the entire amount admitted by him to be due or monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2) strike off his defence.

11. If the provisions of Order 38 Rule 5, Order 15 rule 5 CPC and Rule 9(ii) of the Act are read conjunctively, then it comes out that these provisions have been incorporated in the Code as well as in the Act in order to safeguard the rights of the parties at advantage, so that they may not remain deprived to secure the benefits, which may accrue to them on finalization of the proceedings.

12. The argument raised by learned counsel for the appellant that the provision of Order 38 Rule 5 CPC could be equated with Section 9(ii)(b) of the Act, is devoid of any merit. Order 38 rule 5 CPC deals with attachment before judgment and the attachment could be made where the Court is satisfied that the defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the

jurisdiction of the Court with an intention to obstruct or delay the execution of any decree that may be passed against him. Thus, this provision implied when the defendant is; (i) about to dispose of whole or any part of the property; (ii) where the property has already been disposed of, which may give rise to a reasonable apprehension that he may dispose of the rest and (iii) where the whole or any part of the property is being removed from the local limits of the jurisdiction of the Court.

13. Rule 6 of Order 38 CPC attracts the demand of security, to be furnished, which reads as under:-

6. Attachment where cause not shown or security not furnished.-

(1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(ii) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

14. On perusal of the aforesaid provisions, it transpires that calling for the security does not require any such essential condition to be fulfilled, as required for attachment of the property. Therefore, the provisions of Order 38 Rule 5 CPC may not be applicable, but the Court, under Rule 6 of Order 38, could ask for furnishing the security.

15. The right of rent, as provided under the admitted covenant between the parties, if challenged or is likely to be challenged by way of a suit or proceedings under the Arbitration Act, then the provisions of Section 9(ii)(b) of the Act, which simply require that the security could be asked for securing the amount in dispute in the arbitration, could be brought into operation.

16. Similarly, Section 9(ii)(b) of the Act could be equated with the provisions of amended Rule 5 of Order 15 of the CPC, where it has been stated that in case of eviction of a lessee, the defendant could be directed to make the payment of the agreed rent and if he fails to make payment of such rent, the defence of the lessee could be struck off.

17. Thus, the trial Court, keeping in view the conduct of the appellant, appears to have rightly directed the appellant to furnish the bank guarantee. However, it appears that the trial Court has committed an error while holding that the said bank guarantee would be towards future dues and interest till the final adjudication of the claim petition, whereas this bank guarantee should have been qua the arrears due against the appellant. In these circumstances, this petition is dismissed with modification in the impugned order to the extent that the bank guarantee, to be furnished by the appellant within one month from the passing of this order, would be qua the arrears due against it. However, the respondent

would be at liberty to claim security of the future arrears independently by having recourse to law.