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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: 11.2.2008

Date of Order: 14.2.2008

+OMP No. 53/2007

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14.02.2008

Fortune Park Hotels Limited

... Petitioner

Through: Mr. Anil Kumar, Sr. Advocate
Mr.P.K.Mohapatra, Advocate

Versus

Marwar Hotels Limited

... Respondent

Through: Ms. Pinky Behera, Advocate
Ms. Hemantika Wahi, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not ?
3. Whether judgment should be reported in Digest ?

JUDGMENT :

This application/petition under Section 9 of the Arbitration and Conciliation Act, 1996 has been made by the applicant seeking relief that the applicant should be allowed to run hotel known as 'Fortune Ummed Hotel' situated at Banar Road, Jodhpur, Rajasthan till the end of 30th April, 2007 in terms of the agreement dated 3rd November, 2003. The other relief sought is that the respondent should be directed to furnish security, by way of a bank deposit, for a sum of Rs.6 crore being the outstanding amount and compensation payable by the respondent to the applicant and direct the respondent and its successors to provide 50 room nights per year, at the above-mentioned hotel on complimentary basis till the disputes between the parties are resolved through arbitration.

2. Brief facts relevant for the purpose of deciding this application are that the applicant entered into a Technical, Pre-opening, Operating and Marketing Services Agreement dated 3rd November, 2003 in respect of the above-said hotel with the respondent. The agreement was valid for a period of ten years commencing from operating date with

liberty to the parties to extend the operating terms of the agreement for two successive period of 5 years each. Under this agreement, applicant was to render services in connection with marketing, advertising and publicity of the hotel. In consideration of the services to be rendered, a pre-opening fee of Rs.2.5 lac was to be paid to the applicant and during each fiscal year of the operating term of the agreement, services fee equivalent to 5% of the Gross Operating Income of the hotel was to be paid to the applicant. The applicant was also entitled to a minimum of 50 room nights in each fiscal year on a complimentary basis for use in the hotel. However, during continuance of the agreement, the respondent sold the hotel to a third party and terminated agreement of the applicant. The applicant has moved this application under Section 9 of the Arbitration and Conciliation Act since the agreement contained an arbitration clause 'Article 15' wherein it was provided that all disputes and differences arising from the agreement or in any way connected thereto shall be settled by way of arbitration proceedings conducted at New Delhi by a sole Arbitrator appointed by ICA in accordance with the provisions of Arbitration and Conciliation Act. It was also provided that this clause shall survive termination of the agreement.

3. During arguments it transpired that the applicant has already invoked the arbitration clause and made request for appointment of arbitrator. It is submitted by the Counsel for the applicant that the respondent has illegally terminated the agreement and sold the hotel. As per terms of the agreement, respondent was to maintain the ownership of the hotel and because of sale of the hotel by the respondent, there was breach of agreement and the applicant was entitled to claim damages as well as the dues. It is submitted that the dues to the tune of Rs.36,33,666/- have been admitted and acknowledged by the respondent vide its letter dated 10th January, 2007. The applicant was entitled to get this much amount secured and this Court should ask the respondent to furnish a bank guarantee to the extent of this amount or to deposit this

amount in the Court as security.

4. Respondent in its reply has taken the stand that the respondent was forced to sell the property under threat of action under Securitisation Reconstruction of Financial Assets Act by the bankers of the respondent. It is stated that in case the respondent had not entered into sale of property and had not sold the property in the market, the property would have been sold as a distress sale under the Act by the Bank and would not have fetched the amount it fetched presently. The sale done by the respondent was under these circumstances and respondent had not sold it with any other motive. Regarding agreement dated 3rd November, 2003 it is not disputed that this agreement was entered into however, it is stated that applicant has not raised any dispute or difference in relation to the agreement and therefore, the applicant under Section 9 was pre-mature. It is also stated that the Court should not exercise its discretion under Section 9 of the Arbitration and Conciliation Act.

5. The Counsel for the applicant has submitted that respondent has itself taken the plea of its financial constrains and stated that the respondent had to sell the property under financial constraints in order to enter into one time settlement. The documents filed by the respondent show that there was term loan of Rs.700 lac and a funded interest loan of Rs.670 lac to the company and from the sale of this property the respondent had paid its dues of the Vijaya Bank, IDBI Ltd., LIC & SICOM Ltd but the respondent has not paid the admitted dues of the applicant ,thus the intention of the respondent was not bonafide. Even if the respondent sold the hotel for financial constraints under distress, the respondent was liable to pay admitted dues of the applicant and non payment of the dues despite sale of the hotel shows malafide on the part of the respondent.

6. The Counsel for the respondent has relied upon M/s Global Company v. M/s National Fertilizers Ltd. AIR 1998 Delhi 397 wherein a

Single Judge of this Court held that the relief sought under Section 9 for protection of the subject matter of the Arbitration Agreement or to secure the applicant was in the nature of relief under Order 38 Rule 5 CPC and the applicant had to prove that the respondent's intention was to defeat, delay or obstruct the claim of the applicant and only if the respondent proved, the applicant had a bonafide ground to claim the relief. On the other hand applicant relied upon *Nepa Limited v. Manoj Kumar Agrawal* AIR 1999 (MP) 57 wherein the Court observed that in an application under Section 9 and in order to safeguarding and preserving the subject matter of the contract, the order can be passed by the Court and Court can issue directions for measurement of the quantity of coal and preserve the contracted quantity of coal ash after due measurement and keep the amount safe in a nationalised bank. Court observed that this was necessary in view of the plea of taking poor financial condition of the appellant company.

7. In the present case, the respondent has not disclosed for what amount the hotel and building appurtenant thereto have been sold and why the respondent, while discharging other debts of financial institutions and banks, have not discharged its liability of the admitted amount to the applicant. I consider that the quantum of damages suffered by the applicant are yet to be determined by the Arbitrator and this Court cannot secure the applicant to the extent of the damages suffered by the applicant. However, since the admitted amount of the applicant was deliberately not paid, the applicant was justified in doubting the intentions of the respondent. The apprehension of the applicant that the respondent may dispose of all other assets and income and the balance amount available after paying debts from sale of the consideration of the hotel. The applicant, therefore, has reasons to believe that nothing may be available to the applicant after the award is passed in favour of the applicant. The Counsel for respondent in this case has not disputed the letter acknowledging dues of Rs.36,33,666/-.

8. I, therefore consider that the application of the applicant should be allowed to the extent of directing respondent to furnish the security either in the form of immovable property or a bank guarantee to the tune of Rs.36,33,666/-. The respondent is therefore directed to furnish bank guarantee/ valid security in the form of immovable property to secure admitted amount of the applicant to the tune of Rs.36,33,666/- within a week with the Registrar General of this Court.

With this direction, the OMP stands disposed of.

February 14, 2008
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SHIV NARAYAN DHINGRA, J.