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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: September 01, 2009

Date of Order: September 08, 2009

+OMP 180/2009

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Time Broadband Services Pvt. Ltd.

Through: Mr. Sanjay Jain, Advocate

08.09.2009

...Petitioner

Versus

Colombian Software Solutions Pvt. Ltd.

...Respondent

Through: Mr. Ravi Gupta, Sr. Adv. with Mr. Ankit Jain, Advocates for R-1
Mr. Rishab Ran Jain, Advocate for R-2 to 4.

AND

+OMP 236/2009

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Colombian Software Solutions Pvt. Ltd.

...Petitioner

Through: Mr. Ravi Gupta, Sr. Adv. with Mr. Ankit Jain, Advocates

Versus

Time Broadband Services Pvt. Ltd.

...Respondent

Through: Mr. Sanjay Jain, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

1. By this order, I shall dispose of these two petitions under Section 9 of the Arbitration & Conciliation Act, 1996, one preferred by the petitioner and one by respondent who had entered into a lease deed/ agreement dated 21st January 2008 in respect of premises bearing number 29, Okhla Industrial Estate, Phase-III, New Delhi.

2. Time Broadband Services Pvt. Ltd., petitioner in OMP No.180 of 2009 shall hereinafter will be referred "the Lessee" and the petitioner in OMP 236 of 2009 Colombian Software Solutions Pvt. Ltd. shall hereinafter be referred "the Lessor".

3. It is submitted by Lessee that the Lessee deposited a sum of Rs.192,61,440/- equivalent to six months' rent and Rs.13,48,560/- equivalent to six months maintenance charges with the Lessor at the time of taking this premises on lease under the lease deed. The Lessee had taken on lease the entire property consisting of basement, ground floor, first floor, second floor and terrace with the understanding that the second floor shall be available for occupation of Lessee on or about 15th February 2008 and the Lessee shall be liable to pay rent for basement and second floor from 15th February 2008. It is stated by Lessee that despite follow up by the Lessee with the Lessor, the construction of second floor was not completed so as to make it habitable for use by the Lessee. However, with the onset of global meltdown and recession in the market, the Lessee on 1st February 2009 wrote to the Lessor that it was not able to pay the rent for the entire premises and in the circumstances it was interested in retaining only two floors viz. ground floor and first floor of the property, which it had been using since inception of the Lease. Pursuant to this letter meetings took place between the parties for re-negotiation of the existing rent structure. However, the Lessor was not prepared to melt-down and threatened that in case the Lessee would retain only two floors of the property, then Lessor shall forfeit the entire security amount lying with it and a fresh lease deed would have to be entered requiring fresh security deposit qua limited portion of the premises. The Lessee submitted that in between MCD pasted a notice on the property stating therein that the

property was being used contrary to the authorized use and it required the Lessor to change the usage of the premises. The notice specified that the property was an 'industrial unit block' and could not be converted to commercial use or office use contrary to the existing development control norms. MCD directed to comply with the notice within 15 days and asked to stop usage of the property within that period. On this, the Lessee made inquiries with MCD and learnt that the superior Lessor had given the property on perpetual lease to the Lessor for the purpose of factory and for carrying on manufacturing or for running an industry and these conditions were binding on the Lessor. It is submitted that the Lessor had offered the property to the Lessee for office use representing that the property could be legally used for this purpose, despite being aware that the property cannot be used for office purpose. The Lessor misrepresented to the Lessee and made it to enter into the lease deed. The Lessee could ill-afford to continue to occupy the property in view of the notice of MCD and threat of MCD, therefore, the Lessee searched for alternative office accommodation to rehabilitate itself and after identifying suitable premises shifted its office and operations there. The Lessee terminated the lease deed and required the Lessor to refund to the Lessee the amount lying with it as security deposit, after deducting rent for the months of January, February and March 2009 from the said amount. However, the Lessor did not pay heed to the request of Lessee in the notice/ letter dated 16th March 2009 with the result that the Lessee was compelled to move this Court under Section 9 and to invoke the arbitration clause. The Lessee has made a prayer that in view of the global meltdown and recession, it was necessary and desirable that the Court should secure the balance amount of security payable to the Lessee by the Lessor by attaching the bank account of the Lessor. It is submitted that the Lessor did not take the keys of

the premises from the Lessee despite the Lessee having vacated the premises and shifted to another premises and despite the Lessee having terminated the lease deed. So a prayer was made that the Lessee should be allowed to deposit the keys with this Court and the Lessor should be directed to take the keys. The Lessor should also be restrained from entering into the property without leave of the Court or deal with the property by making sale or transferring, alienating the property, without first securing the amount in dispute. The Lessee also made a request for attachment of specific bank account of the Lessor with HDFC Bank, Vasant Vihar Branch.

4. In response to the petition, the Lessor also filed an application under Section 9 of the Act being OMP 236 of 2009. The contention of the Lessor is that the Lessee was in need of space to set up office in the beginning of January 2008 and officials of the Lessee contacted the Lessor through an Estate Agent M/s Sagar Estates and expressed desire to take the premises in question on rent and after negotiation between the parties, the rent was settled and the lease deed was executed between the parties. The Lessee, before signing the lease, had gone through perpetual lease dated 5th February 1982 in favour of the predecessor of the Lessor executed by the Directorate of Industries in favour of the original allottee and was aware of the nature of usage allowed in the property. It is submitted that various other nearby similarly situated buildings have been let out by their owners for being used as an office.

5. It is submitted that as per the lease deed, the premises was to be occupied by the Lessee for a period of nine years with effect from 21st January, 2008 and there was an initial lock-in-period of 60 months during

which period the Lessee was not entitled to vacate the premises nor the Lessor was entitled to terminate the tenancy. It was specifically agreed that in case the Lessee vacates the premises before the lock-in-period of sixty months, it shall pay to the Lessor rent for the balance outstanding period. It is submitted that the second floor was agreed by the Lessee to be taken on rent on as is where basis and the Lessee was to use the same as per his own wishes and desire. All terms and conditions as agreed to between the parties were reduced into writing. Thus, there was no issue which could be raised in respect of the terms and conditions and no amount of oral submissions contrary to the lease deed can be entertained. The Lessor further submitted that after execution of the lease agreement, the Lessor had requested the Lessee to obtain requisite stamp paper so that a formal lease deed could be executed on the appropriate stamp papers and got registered. However, the Lessee kept on delaying the matter on one pretext or the other, but the Lessee was completely satisfied with the terms and conditions and had been enjoying the premises without interference from anyone. The Lessee for the first time defaulted on payment of maintenance charges in January, 2009. On 7th February, 2009, the Lessor received a letter dated 1st February 2009 from the Lessee wherein the Lessee had expressed his inability to keep the entire premises on rent due to meltdown and recession and desired to keep only the ground floor and first floor of the premises on rent and to vacate the rest of the premises. Since there was a lock-in-period, the Lessee had no right to alter the terms and conditions of agreement; therefore, the Lessor was not agreeable to this offer. Two meeting had been taken place between the parties without any result. The rent for the month of January and February 2009 was not paid by the Lessee. However, on 16th March 2009, the Lessor received an e-mail from the Lessee stating therein that the agreement

between the parties shall stand terminated after expiry of 15 days from the date of e-mail. In the said e-mail, the Lessee demanded various amounts from the Lessor and it was also alleged that no maintenance services were being provided to the Lessee so the Lessee was not liable to pay the charges for maintenance services. The Lessor gave response to the e-mail dated 30th March 2009 asking the Lessee to obtain necessary stamp paper to get the lease deed executed and the Lessor to pay an amount of Rs.1,03,05,000/- as arrears of rent and not to vacate the premises till expiry of the lock-in-period of 60 months expiring on 29th December, 2013. The Lessor did not hear anything from the Lessee, thereafter received a notice of the present petition.

6. During arguments, counsel for the Lessee brought it to the notice of the Court that the Lessor was very well aware of the fact that the premises in question could not be used for the office purpose and even earlier the Lessor had given the same premises on rent to another party for office purpose and the premises was sealed by MCD. Thus, the Lessor made deliberate misrepresentation to the lessee. It is further argued that since the lease agreement between the parties was not a registered lease agreement and the Lease agreement was contrary to the terms of superior lease, the Lessee was within its right to terminate the lease by giving 15 days' notice and vacate the premises. The counsel for the Lessor per contra argued that there was a lock-in-period of five years and the Lessor was entitled to recover rent for the remaining period out of lock-in-period of 60 months from the Lessee and the claim of the Lessor was much more than that raised by the Lessee regarding security deposit and the Lessee was not entitled to any relief.

7. It is an undisputed fact that the so-called lease deed between the

parties is an unregistered document and it is not on stamp paper. It is only a lease agreement between the parties and a registered lease deed was yet to be executed between the parties. In view of this fact, the lease cannot be considered to be for a fixed period of five years or of a period more than a year and has to be considered as a month to month lease. Any lease which creates a right in the property in favour of lessee for a period of more than a year is required to be registered and it has to be made on an appropriate stamp paper. The Lessee had entered into the premises in January 2008 and till filing of the petition under Section 9, the Lessor had not taken any steps for specific performance of the lease agreement and had not initiated any action against the Lessee for execution of the lease deed. Thus, it is presumed that the Lessor and the Lessee were quite happy with the month to month lease between them. The lease agreement which has been placed on record being an unregistered document, cannot be looked into by the Court and has to be considered only as a piece of junk except that it can be seen for collateral purposes. However, an arbitration agreement entered into between the parties for resolution of disputes is a separable contract and is a valid arbitration agreement and these petitions under Section 9 of the Act filed by the parties would be maintainable.

8. In view of the fact that the lease was a month to month lease, the contention of the Lessor that there was a lock-in-period and the Lessee was bound to retain the premises for a minimum period of five years, prima facie cannot be entertained. A month to month lease is terminable by 15 days' notice and it is admitted by the Lessor that 15 days' notice was received by the Lessor through an e-mail which was duly accepted by the Lessor. Thus, I prima facie find that the Lessee was not liable to pay rent after 31st March

2009 and the Lessor was liable to take the possession of the premises from midnight on 31st March 2009 and was liable to refund the security after adjusting the rent for January, February and March 2009.

9. It is also not in dispute that the Lessor had earlier entered into a lease deed with a similar lease agreement with M/s Y.K.K. India Pvt. Ltd. for use of the same premises for office purpose and even to Y.K.K. India Pvt. Ltd., a representation was made that the premises could be used for office purpose and the lease agreement was entered into for a period of four years. M/s. Y.K.K. India Pvt. Ltd shifted to the premises and after shifting to the premises, M/s Y.K.K. was yet to become fully operational in the premises when MCD officials visited the premises and informed M/s Y.K.K. that the premises could not be used for office purposes under the law and the same was required to be sealed immediately. The premises was sealed by MCD officials on 20th September 2007 despite M/s Y.K.K. India Pvt. Ltd. request of not sealing the same. After sealing of this premises M/s Y.K.K. India Pvt. Ltd. had to vacate the premises and it also initiated proceedings against the Lessor in this respect. Keeping in view the fact that under similar circumstances, when the premises was let out for office use, MCD had sealed the premises, it was obligatory upon the Lessor to not to re-let the premises to any other tenant for office purpose. This fact of sealing could not have been discovered by the Lessee as it was within the special knowledge of the Lessor. This fact was discovered by the Lessee during pendency of these proceedings and the counsel for the Lessee has filed copies of the proceedings between M/s Y.K.K and the Lessor.

10. In view of the fact that the premises could not be used for office

purposes and MCD had earlier also sealed the premises, I consider that the lease agreement executed between the parties for use of the premises for office purpose itself seems to be a result of fraud. Even otherwise, the Lessee was within its rights to vacate the premises. I, therefore, find that there was a good prima facie case in favour of the Lessee and there was no case in favour of the Lessor. The OMP No.180 of 2009 made by the Lessee is allowed and the petition being OMP No.236 of 2009 of the Lessor is hereby dismissed. Keeping in view of the conduct of the Lessor of retaining the security even of the earlier Lessee, I consider that it is appropriate that the remaining security amount of the Lessee should be protected either by way of bank guarantee or by way of deposit of the amount in the Court till disposal of disputes between the parties by arbitration.

11. The possession qua property in question has already been handed over by the Lessee to the Lessor during pendency of proceedings of present case and the Lessor has been given liberty to rent out the premises.

12. In the result, the petition of the Lessee being OMP No.180 of 2009 is hereby allowed to the following terms:

- (i) The bank account number 0011232001636 of the Lessor with HDFC Bank, Vasant Vihar, New Delhi to the tune of approximately Rs.80 lac shall remain attached. This amount shall not be withdrawn or transected by the Lessor and the Bank shall not allow transactions of this amount by the Lessor.
- (ii) The Lessor shall furnish a bank guarantee of the balance amount of Rs.24 lac approximately (after deducting the amount lying in

the bank from Rs.1,03,05,000/-) which is the balance amount after adjusting the rent for the month of January, February and March, 2009 lying with the Lessor, within 30 days from passing of this order. In case the Lessor furnishes a bank guarantee in favour of the Lessee for entire amount of Rs.1,03,05,000/- within 30 days from today, the Lessor shall be entitled to operate its bank account with HDFC Bank, Vasant Vihar, New Delhi. The bank guarantee shall be kept valid by the Lessor during pendency of the arbitral proceedings.

13. This interim order shall be operational till disposal of arbitral proceedings between the parties and 30 days thereafter.

14. The petitions stand disposed of in above terms.

September 08, 2009
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SHIV NARAYAN DHINGRA J.