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HIGH COURT OF DELHI: NEW DELHI

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Judgment decided on: 22.09.2011

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**O.M.P. No.430 of 2011 & I.A. No. 15251/2011 &
Crl. M.A. No. 11268/2011**

M/s Wingsfield Knitwear Pvt. Ltd. Petitioner
Through: Mr. P.S. Bindra, Adv.

Versus

Nanak S. Bamrah & Ors. Respondents
Through: Mr. R.S. Chauhan &
Mr. A.K. Talesara, Advs. for
R-1 & 2.
Mr. Sumesh Dhawan &
Mr. Vatsaua Kak, Advs. for R-3.

AND

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O.M.P. No.585 of 2011

Nanak S. Bamrah & Another Petitioners
Through: Mr. R.S. Chauhan &
Mr. A.K. Talesara, Advs.

Versus

M/s Wingsfield Knitwear Pvt. Ltd. Respondent
Through: Mr. P.S. Bindra, Adv.

AND

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Arb.P. No. 280 of 2011

Nanak S. Bamrah & Another Petitioners
Through: Mr. R.S. Chauhan &
Mr. A.K. Talesara, Advs.

Versus

M/s Wingsfield Knitwear Pvt. Ltd. Respondent
Through: Mr. P.S. Bindra, Adv.

Signature Not Verified

Digitally Signed By:AMULYA
P No.430/2011, OMP No.585/2011 & Arb. P. 280/2011

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Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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

MANMOHAN SINGH, J. (Oral)

1. By this common order, I propose to decide the following petitions filed by the parties:

(a) O.M.P. No.430 of 2011 has been filed by M/s Wingsfield Knitwear Pvt. Ltd. under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for interim measures against Nank S. Bamrah, the respondent No.1 and Mrs Manjeet Kaur, the respondent No.2.

(b) O.M.P. No.585 of 2011 has been filed by Nanak S. Bamrah under Section 9 of the Act against M/s Wingsfield Knitwear Pvt. Ltd.

(c) Arb. P. No.280 of 2011 has been filed Nanak S. Bamrah and Mrs. Kanjeet Kaur under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator against M/s Wingsfield Knitwear Pvt. Ltd.

2. Brief facts of the case as stated in O.M.P. No.430/2011 are that

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by virtue of agreement to lease dated 29.03.2008 property bearing No.UG-15, on upper Ground Floor, West Gate Mall, Raja Garden, New Delhi were let out by the respondent Nos. 1 & 2 to the M/s Wingsfield Knitwear Pvt. Ltd. for a period of 9 years commencing from 22.02.2008 that is the date of possession and since then the M/s Wingsfield Knitwear Pvt. Ltd. has been in possession of the said property. It is stated that apart from paying the rent M/s Wingsfield Knitwear Pvt. Ltd. is also liable to pay electricity and maintenance charges to respondent No.3 directly, as per the bills raised by the said respondent. According to clause 7 of the agreement, respondents are liable to pay all the land and building taxes, lease/ground rent towards ownership of the said premises that may be due and payable to the Government or any other public authority. However, after the agreement dated 29.03.2008 had been signed, the respondents 1 and 2 insisted that the M/s Wingsfield Knitwear Pvt. Ltd. should pay the service tax as well, otherwise they will terminate the lease agreement.

3. It is further stated that by Finance Act 2010, the Government made renting of immovable property amenable to service tax, this decision of the Government was challenged by many parties by way of writ petitions. Therefore the same is a matter of challenge before the full bench of this court the judgment in the same has been reserved and is yet to be pronounced. In the May 2009 the M/s Wingsfield Knitwear Pvt. Ltd. received a letter from the respondents/ Nanak S. Bamrah and Mrs Manjeet

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Kaur demanding service tax from the M/s Wingsfield Knitwear Pvt. Ltd. for the months of March and April, 2011 and stating that the service tax had been long overdue since July, 2009.

4. Thereafter, the respondents/ Nanak S. Bamrah and Mrs Manjeet Kaur sent various invoices pertaining to service tax to the M/s Wingsfield Knitwear Pvt. Ltd. and some correspondence was exchanged between the parties. Further, it is stated that by letter dated 13.05.2011, respondents/ Nanak S. Bamrah and Mrs Manjeet Kaur requested the respondent No.3/Scale Maintenance Pvt. Ltd. to withdraw the maintenance services, thus, on 14.05.2011 respondent No.3 who is not a party to the agreement to lease dated 29.03.2008 disconnected the electricity supply to the said property. Being aggrieved by the said action of the respondents, the petitioner/M/s Wingsfield Knitwear Pvt. Ltd. filed this petition on 26.05.2011 praying that the respondents be directed restore the electricity supply to the said premises. The said petition was listed before Court on 27.05.2011 and after hearing, the following order was passed:

“The brief facts of the case are that the petitioner is a company incorporated under the Companies Act, 1956 having its registered office at C-119, Phase- 5, Focal Point, Ludhiana (Punjab). By virtue of the agreement dated 29.03.2008 premises bearing No. UG-15, on upper Ground Floor, measuring 1121.06 super area and 728.68 built up area in West Gate Mall, Raja Garden, New Delhi were let out by the respondent Nos.1 and 2 to the petitioner for a period of nine years commencing from the date of possession i.e. 22.02.2008 with 45 day fit out period from the date of possession. Since then, the petitioner has been in possession. It is averred in the

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petition that the petitioner has been regularly paying the rent as well as electricity and maintenance charges as per the bills raised by the defendant No.3. The agreement is between the petitioner and respondent Nos. 1 and 2.

As per Clause 7 of the agreement the respondent Nos. 1 and 2 are liable to pay all land and building taxes/ground rents, towards ownership of the said premises that may be due and payable to the Government and any other public authority etc.

It is further the case of the petitioner that the respondent Nos. 1 and 2 are insisting that the petitioner should pay the service tax etc. otherwise the respondent Nos. 1 and 2 would terminate the lease. The matter relating to the applicability of the service tax on rent of the property was challenged by many parties before this court by way of writ petition and the notification levying the tax relating to letting out was quashed. The petitioner in view thereof, asked the respondent Nos. 1 and 2 to return the Service Tax amount already paid. The Government of India by Finance Act, 2010 made renting of immovable property amenable to Service Tax and the same is a subject matter of challenge before the Full Bench of this Court in which the judgment has been reserved.

The petitioner has received the letter from respondent Nos. 1 and 2 during the first week of May, 2011 asking the petitioner to pay the rent as well as the service tax. As far as the rent, maintenance charges and electricity bills are concerned, the same are being paid accordingly as stated. As already mentioned, the rent is being paid to the respondent Nos. 1 and 2 and electricity and maintenance charges are being paid as per the bill raised by the respondent No.3. During the course of hearing, the learned counsel for the petitioner has informed that the petitioner is prepared to file an undertaking that if any amount is due towards respondent No.3, the petitioner would deposit the same. The respondent No.3 is admittedly not a party to the agreement. In support of his submissions, the learned counsel for the petitioner has referred the following judgments:

1. ***Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and Ors.*** : 1992(2)UJ 181 (SC)

2. ***Firm Ashok Traders and Anr. etc. v. Gurumukh Das Saluja and Ors. etc.***: AIR 2004 SC 1433.
3. ***Goyal MG Gases Pvt. Ltd. v. Air Liquide Deutschland GmbH and Ors. :***
4. ***CREF Finance Ltd. v. Puri Construction Ltd. & Ors. :*** 2000 (3) ARBLR 331 (Delhi)

Issue notice to the respondents, on filing process fee and registered A.D. cover, returnable on 22.07.2011. In the meanwhile the respondents, particularly respondent No.3, are directed to restore the electricity supply of the premises bearing No. UG-15, on upper Ground Floor, measuring 1121.06 super area and 728.68 built up area in West Gate Mall, Raja Garden, New Delhi. Dasti. As agreed, an undertaking be filed by the petitioner within one week from today.”

5. In the reply to this petition, the respondents/ Nanak S. Bamrah and Mrs Manjeet Kaur have stated that real lease agreement is dated 20.02.2008 which is a registered agreement and that the petitioner/M/s Wingsfield Knitwear Pvt. Ltd. have filed a forged document in the form of Annexure P-2 (lease agreement dated 29.03.2008). And in the real lease agreement there is a provision, as per which the petitioner/M/s Wingsfield Knitwear Pvt. Ltd. is liable to pay the service tax in respect of the property in dispute and that the petitioner/M/s Wingsfield Knitwear Pvt. Ltd. is in default of payment of service tax since July 2009. The respondents/ Nanak S. Bamrah and Ms. Manjeet Kaur have also filed I.A. No. 15251/2011 seeking interim directions and Crl. A. No. 11268/2011 under Section 340 of the Code of Criminal Procedure, 1973.

6. On 04.08.2011, Nanak S. Bamrah and Ms. Manjeet Kaur, who were respondent Nos. 1 & 2 in O.M.P. No.430 of 2011 filed O.M.P. bearing No.585 of 2011 praying that the respondent/ M/s Wingsfield Knitwear Pvt. Ltd. be directed to pay arrears of rent since April 2011 till 31.07.2011 wherein it is stated that the respondent/ M/s Wingsfield Knitwear Pvt. Ltd. has failed to pay the amount of service tax since July 2008 in terms of Clause 7 of the agreement 20.02.2008 and supply the copies of T.D.S. certificates from the rent and also pay a sum of Rs.8,50,000/- to the petitioners/Nanak S. Bamrah and Ms. Manjeet Kaur being the amount deposited by them with the Government on account of service tax for the period from July 2008 till March 2011 and also the amount due after March 2011 till the vacant possession of the demised premises is handed over to the petitioners/ Nanak S. Bamrah and Ms. Manjeet Kaur. Further to direct the respondent/ M/s Wingsfield Knitwear Pvt. Ltd. to pay all the maintenance and electricity charges up to date in respect of the demised premises as per the registered agreement dated 20.02.2008 and to also pay to the petitioners / Nanak S. Bamrah and Ms. Manjeet Kaur the user and occupation charges, the last paid rent Rs.10,000/- per day with effect from 01.08.2011 till it gives them the vacant possession of the demised premises.

7. It is stated by the petitioners/ Nanak S. Bamrah and Ms. Manjeet Kaur that the demised premises was leased out to the respondent/ M/s

Wingsfield Knitwear Pvt. Ltd. at monthly rent of Rs.229805/- calculated @ Rs.205/- per sq. ft. of super built area which was payable in advance by 7th day of each month subject to deduction of tax at source but, the respondent/ M/s Wingsfield Knitwear Pvt. Ltd. has neither been paying the rent on time nor providing the petitioners/ Nanak S. Bamrah and Ms. Manjeet Kaur with the TDS certificates and has even failed to pay the service tax since July 2008 and rent since April 2011 which was payable subject to escalation of 15% on the last rent paid which is Rs.2,29,805/- . It is also stated that in their letter dated 27.04.2011 the petitioners/ Nanak S. Bamrah and Ms. Manjeet Kaur demanded outstanding rent for the period from March and April 2011 and also service tax amounting to Rs.8,50,000/- and then reiterated their demand for service tax by another letter dated 05.05.2011 but in this letter dated 05.05.2011 due to typographical error the service tax overdue since July 2008 is wrongly mentioned as service tax overdue since July 2009. However, despite of these letters, the respondent/M/s Wingsfield Knitwear Pvt. Ltd. has not paid the outstanding amount except for the rent for March 2011. The above mentioned petition was listed before Court on 08.08.2011 and notice was issued to the respondent for 22.09.2011. By the interim order, the respondent was directed to deposit the rent payable to the petitioners with effect from 01.04.2011 till 31.07.2011 with the Registrar General of this Court. Upon service, the learned counsel appearing on behalf of respondent has informed the Court that respondent has deposited

the rent in terms of order dated 08.08.2011.

8. Thereafter, on 20.09.2011 Mr. Nanak S. Bamrah and Ms. Manjeet Kaur, filed an arbitration application bearing No.280 of 2011 for appointment of an arbitrator to adjudicate the disputes between the parties. In this application it is stated that the applicants/ Nanak S. Bamrah and Ms. Manjeet Kaur have deposited the service tax form July 2008 to March 2011 amounting to Rs.8,50,000/- to avoid any complications. Thus, the applicants/ Nanak S. Bamrah and Ms. Manjeet Kaur are entitled to the recovery of all service tax amounts that they have already paid as the respondent/ M/s Wingsfield Knitwear Pvt. Ltd., being the lessee is liable to pay the service tax both previous as well as future. It is also stated that since the respondent/M/s Wingsfield Knitwear Pvt. Ltd. is in breach of registered lease agreement dated 20.02.2008 and has failed to rectify the said breach therefore, the applicants/ Nanak S. Bamrah and Ms. Manjeet Kaur issued a legal notice dated 04.06.2011 to the respondent/M/s Wingsfield Knitwear Pvt. Ltd. terminating the lease w.e.f. 31.07.2011. Thus, w.e.f. 01.08.2011 the respondent/ M/s Wingsfield Knitwear Pvt. Ltd. is in illegal possession of the said premises. As the respondent/ M/s Wingsfield Knitwear Pvt. Ltd. failed to comply with the legal notice dated 04.06.2011, therefore, the applicants/Nanak S. Bamrah and Ms. Manjeet Kaur have invoked the arbitration clause i.e. clause 28 of the agreement dated 20.02.2008 have issued a notice dated 17.09.2011 suggesting the

names of persons to act as a sole arbitrator to adjudicate the disputes between the parties but, the respondent/ M/s Wingsfield Knitwear Pvt. Ltd. has failed to reply to the said notice. Hence the applicants/ Nanak S. Bamrah and Ms. Manjeet Kaur have filed the instant application for appointment of an arbitrator.

9. The learned counsel appearing on behalf of both the parties made their submission in all the three matters. Both the parties also agreeable to appoint Mr Anil Sapra, Senior Advocate, to adjudicate their disputes as per the suggestion of the respondent.

10. Mr Bindra, the learned counsel appearing on behalf of the M/s Wingsfield Knitwear Pvt. Ltd., is agreeable to pay rent as per lease agreement dated 23.03.2008 regularly to the respondents directly till the final determination of dispute along with the maintenance charges. He submits that the petitioner has no objection if the amount deposited with the Registrar General be released in favour of the respondents. Mr Chauhan who is appearing on behalf of Nanak S. Bamrah and Mrs. Manjeet Kaur has agreed that subject to the payment of rent, maintenance charges and service tax, his clients shall not disconnect the electricity of the petitioner. He has also informed the Court that the lease agreement has already been terminated. However, he has no objection if the matter be referred to the sole arbitration to adjudicate the dispute between the parties.

11. Lastly, Mr R.S. Chauhan, counsel appearing on behalf of Nanak

S. Bamrah and Mrs. Manjeet Kaur, has argued that a huge amount of service tax is payable by the petitioner and his clients have deposited the service tax from July 2008 to March 2011 amounting to Rs.8,50,000/- to avoid any complication and therefore, the petitioner is liable to pay the previous amount due as well as future.

12. On the other hand, Mr Bindra has stated that by Finance Act, 2010, the decision of the Government pertaining to renting of immovable property amenable to service tax was challenged by many parties by filing of the writ petitions and the Full Bench has reserved the judgment in this regard. Therefore, the Court should wait the outcome of the said decision of the Full Bench. It is pertinent to mention that after making of the submissions by the parties, the case of *Home Solutions Retails (India) Ltd. v. Union of India & Ors.*, being Writ Petition (C) No.3398/2010, has been decided on 23.09.2011 by the Full Bench, wherein the Court has dismissed the petition. The operative portion of the order reads as under:

“75. In view of the aforesaid analysis, we proceed to enumerate our conclusions in seriatim as follows:

(a) The provisions, namely, Section 65(105)(zzzz) and Section 66 of the Finance Act, 1994 and as amended by the Finance Act, 2010, are intra vires the Constitution of India.

(b) The decision rendered in the first Home Solution case does not lay down the correct law as we have held that there is value addition when the premises is let out for use in the course of or WP(C) No.3398/2010 with connected matters furtherance of business or commerce

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and it is, accordingly overruled.

(c) The challenge to the amendment giving it retrospective effect is unsustainable and, accordingly, the same stands repelled and the retrospective amendment is declared as constitutionally valid.

76. Consequently, the writ petitions, being sans substratum, stand dismissed without any order as to costs.”

13. In view of the aforesaid circumstances, all the above said petitions are disposed of with the following directions:

- a. The petitioner M/s Wingsfield Knitwear Pvt. Ltd. shall pay the rent, maintenance charges as well as the service tax in terms of the agreement to lease dated 29.03.2008. The respondents shall not disconnect the electricity. The petitioner shall also supply the T.D.S. Certificate to the respondents, if for any period lying with the petitioner.
- b. The service tax in terms of the agreement shall be paid by the petitioner to the respondent within four weeks from today.
- c. The amount deposited by the petitioner M/s Wingsfield Knitwear Pvt. Ltd. with the Registrar General in terms of order dated 08.08.2011 would be released by the Registry in favour of the respondents.
- d. As per the suggestion of the respondents, which is acceptable to the learned counsel for the petitioner, Mr Anil Sapra, Senior

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Advocate, Mob. 9999993385, R/o B-64, Sector-14, Noida-20301, is appointed as the sole arbitrator to adjudicate the disputes between the parties with liberty to file their respective claims. The learned sole arbitrator will issue notice to the parties and counsel concerned before commencement of first meeting.

- e. Both the parties are also entitled to move an application for interim measure before the learned sole Arbitrator.
- f. Fee of the learned arbitrator would be as per the schedule of the Delhi High Court Arbitration Centre.

In view of the order passed, all the above mentioned petitions and pending applications also stand disposed of.


MANMOHAN SINGH, J

SEPTEMBER 22, 2011
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