

\$~5

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Date of Judgment: 22.08.2012

+ CO.PET. 267/2012 & CO. APPLS. No.1104-05/2012 & 1211/2012

M/S MARKIT INDIA SERVICES PVT LTD Petitioner
Through Mr. P.C. Sen, Adv.

versus

M/S ISHAN SYSTEMS PVT LTD Respondent
Through None.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 M/s Market India Services (P) Ltd. (hereinafter referred as the 'petitioner company') seeks winding up of M/s Ishan Systems (P) Ltd. (hereinafter referred to as the 'respondent company').

2 Contention of the petitioner is that an agreement dated 11.01.2011 had been entered into between the parties whereby the petitioner had agreed to take on lease the 4th floor in Tower 'B' of the building of the respondent; pursuant thereto he had paid a security amount of

Rs.1,39,15,605/- as also nine months' advance rent of Rs.1,07,15,760/- and maintenance charges of Rs.31,99,845/-; the possession of the premises had been handed over to the petitioner on 11.01.2011; there was a rent free period of 60 days to carry out fit-outs of the petitioner.

3 Further submission is that on 19.04.2011 without any warning or notice, physical possession of the property was taken over by a Receiver appointed by the Debt Recovery Appellate Tribunal (DRAT) pursuant to its order dated 11.04.2011 in proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act); submission being that it was at this stage that the petitioner became aware of the fact that the M/s Phoenix ARC Pvt. Ltd. had been assigned the debt owed by the respondent company to Vijaya Bank in respect of which proceedings had been initiated against the respondent; Vijaya Bank had in turn assigned its debt to M/s Phoenix ARC Pvt. Ltd.; this was known to the petitioner only on 19.04.2011.

4 Termination notice (dated 11.05.2011) was sent to the respondent company by virtue of which the petitioner had sought refund of its security deposit. Reply filed to this notice denied any liability. The

petitioner had moved an application seeking impleadment in the proceedings pending before the DRAT and on 30.08.2011, the DRAT had directed the petitioner to take back its fittings and fixtures and other moveable lying in the aforementioned premises. Further submission of the petitioner is that the liability of the respondent towards the petitioner (of the security deposit which it has received) is an admitted liability; inspite of legal notice dated 19.01.2012 issued under Sections 433 & 434 of the Companies Act, 1956, the payment of the petitioner has not been liquidated. Reply filed by the respondent to the aforementioned legal notice dated 19.01.2012 has set up a sham defence; the petition is liable to be admitted.

5 The original documents relied upon by the petitioner had not been filed. The photocopies of the said documents had been placed on record; submission being that the original documents had been seized by the Receiver appointed by the DRAT.

6 The lease deed relied upon by the petitioner is dated 11.01.2011; this is admittedly an un-registered document. The reply (dated 09.02.2012) filed by the respondent company to this legal notice is relevant.

7 The submission of the respondent was that this security amount of Rs.1,39,15,605/- was forfeited on account of premature termination of the contract which was done on 17.05.2011 i.e. within less than four months of the date of the execution of the lease. Further submission in the reply being that the proceedings initiated by Vijaya Bank and their pendency before the DRAT was a fact well known to the petitioner even at the time when the agreement dated 11.01.2011 had been entered into between the parties as this finds a specific mention at internal page 17 of the aforementioned lease agreement; clause 14.2 of the lease deed clearly states that the lessor shall obtain a no-objection from Vijaya Bank with which it has a subsisting loan; learned counsel for the petitioner also fairly concedes that he was aware of the mortgage having been effected by the lessor in favour of Vijaya Bank. As such it does not now lie in the mouth of the petitioner to state that he first became aware of the debt owed to Vijaya Bank only on 19.04.2011 i.e. when the Receiver seized the property.

8 The lease deed dated 11.01.2011 is admittedly an un-registered document. In view of Section 49 of the Registration Act read with Section 107 of the Transfer of Property Act, an un-registered lease deed

can best be looked into only for a collateral purpose; what is a collateral purpose depends upon the facts of each case.

9 The present lease deed has a lock-in period which is contained in clause 10; admittedly this period of three years would expire on 11.01.2014. Clause 10 specifies that the lease may be terminated by the lessee by giving a three months' notice in advance which right can be exercised by the lessee only during a renewed lease term. On no other count, the lessee is entitled to terminate the lease prematurely; learned counsel for the petitioner is also not able to point out any other clause in the lease deed which permits him to terminate the lease prior to the three year lock-in period. Clause 10.3 specifically states that if the lease is terminated by the lessee during the lock-in period, the lessee agrees to pay to the lessor the rent for such portion of the remaining lock-in period for which the lessor is unable despite its best efforts to secure an alternate tenant/lessee for the premises at the same or higher rent. Clause 10.4 also reaffirms the liability of the lessee to pay to the lessor the rent for the remaining lock-in period in case the lease is terminated during the lock-in period. Clause 8 of the document provides that the security deposit shall be refunded by the lessor to the lessee without interest at

the time of the expiry of the lease; it further provides that in the event the security deposit is not refunded, the lessee will be entitled to remain in possession of the premises without payment of rent.

10 Record shows that the payment of the security by the petitioner to the respondent is an admitted fact but the terms of the document dated 11.01.2011 clearly stipulate that there is a lock-in period of three years which would expire only on 11.01.2014; prior thereto, neither of the parties could terminate the lease; in case of an eventuality where on account of 'force majeure' (clause 20), the lease is terminated prior in time to the lock-in period, the lessor would be entitled to rent for the entire lock-in period including compensation; even otherwise, it is not the case of the petitioner that it was on account of 'force majeure' that the lease had been terminated.

11 The facts as detailed and elicited supra clearly show that the respondent has raised a bonafide dispute about the return of the security deposit. These disputes cannot be gone into in a winding up petition.

12 Alternate submission of the petitioner before this Court is that the document dated 11.01.2011 cannot even be termed as a 'lease deed; this was only an agreement entered into between the parties and the parties

had in fact agreed that they would enter into a formal lease at a later point of time which is evident from Clause 12 which states that the registration of this document will be carried out within the time frame permitted by law; submission being that the parties were yet to enter into a lease deed.

13 Be that as it may all these questions have become disputed questions of fact.

14 Relevant would it be to also state that the petitioner has admitted that even in the proceedings under the SARFAESI Act before the DRAT, he had sought impleadment; he had filed an application therein wherein in terms of the order of the DRAT dated 30.08.2011, it has been noted that the prayer made by the petitioner was only for a return of his belongings i.e. movables lying in the property for which an inventory had been prepared and which were ordered to be returned to him. The DRAT in this order has also noted that the tenant does not want to continue with the premises and he voluntarily seeks to vacate the premises. Relevant extract of this order is noted here-in-below:-

“There is no dispute between the parties that an inventory was prepared. Since the tenant does not want to continue to be a tenant therefore voluntarily the

premises is being vacated by the applicant/tenant.

Under these circumstances, a prayer is made that the movable and the fixtures belonging to the tenant be decided to be taken over by the tenant. To this extent there seems no dispute among the parties. Since the applicant/tenant is voluntarily relinquishing his right not only of tenancy but right and interest on all the fixtures and movables in the property are claimed, therefore, it is directed that the tenant shall be permitted to take away his belonging as per the inventory and the appellant as well as the responding shall cooperate. The receiver, as appointed, shall monitor the return of the belongings of the tenant as per the inventory in presence of the borrower and the representative of the bank.

This order disposes of all the applications filed by the tenant. ”

15 In the reply filed by the respondent to the legal notice this part of the order has been quoted; it has been pointed out by the respondent company that the petitioner at no point of time had made any prayer for the refund of the security deposit; this is also clear from the order of this Court dated 09.08.2011 in W.P.(C) No.5693/2011 wherein also it had been noted that the only claim made by the petitioner was for the return of his fittings and fixtures which he has installed in the property prior to the property being sealed.

16 The further fact that the proceedings by the Vijaya Bank against the lessor were known to the petitioner is also evident from clause 14.2

(v) of the lease deed dated 11.01.2011. It definitely now does not lie in CP No.267/2012

the mouth of the petitioner to urge this argument that this fact was never informed to him.

17 The lease deed also provides that the parties may resort to arbitration.

18 There is no dispute that a petition for winding up is independent of the remedy of arbitration and if the claim of the petitioner is admitted and the defence sought to be raised by the respondent appears to be illusory or moonshine, the Company Court can proceed with the winding up petition. However this is not one such case. The disputes raised by the respondent qua the lease agreement dated 11.01.2011 and the defence that the security deposit stood forfeited for the reasons that the lease was terminated in the intervening lock-in period as also the fact that at no point of time either before the High Court or before the DRAT the petitioner had ever raised any claim for the refund of the security deposit, the question whether the petitioner is entitled to refund of the security deposit (not being an admitted claim) cannot be gone into by this Court. The disputes raised by the respondent company in its reply (dated 19.02.2012) appear to be genuine and bonafide; they amount to complex questions of fact which cannot be entertained by the Company

Judge in a winding up petition.

19 This petition is not maintainable. It is accordingly dismissed with cost of Rs.25,000/-. Needless to state that if a civil remedy is available to the petitioner, he is advised to take recourse to that.

INDERMEET KAUR, J

AUGUST 22, 2012

A