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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 409/2016

M/S SRM INFRACON PVT LTD & ANR Plaintiffs

Through: Mr. Dinesh Garg, Ms. Rachna
Agrawal & Mr. Pradeep Goel, Advs.

Versus

M/S AN ELEGANT HOSPITALITY & ANR Defendants

Through: Mr. Yogesh K. Jagia, Mr. Amit Sood
& Ms. Sushma Yadav, Advs. for D-
1&2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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07.12.2016

**IA No.14694/2016 (of both the defendants under Section 8 of the
Arbitration & Conciliation Act, 1996)**

1. This application came up first before this Court on 28th November, 2016 when the following order was passed:

“1. The defendants in this suit for ejectment from immovable property on determination of lease seek reference to arbitration in accordance with Clause 24 of the registered lease deed.

2. The counsel for the plaintiffs appears on advance notice and states that the defendants have not filed the written statement and hence their defence is liable to be struck off and the suit be decreed and for which purpose, an application under Order VIII Rule 10 CPC has already been filed.

3. Even if that be so, that in my view would not defeat the application.

4. Section 8 of the Arbitration & Conciliation Act, 1996 would be applicable as long as the written statement on the merit of the defence has not been filed and which has admittedly not been filed.

5. The counsel for the plaintiffs next contends that as per the arbitration clause itself, the same is not applicable in case of default of rent. He contends that the determination of lease was on the ground of default in payment of rent and in any case, the term of the lease has also expired.
6. I have enquired from the counsel for the defendants / applicants as to what is the dispute to be referred to arbitration qua the claim for ejectment if the term of the registered lease has expired.
7. The counsel for the defendants / applicants first states that he has not examined whether the term of the lease has expired.
8. Finding it to be preposterous, the counsel for the defendants / applicants has been asked to check just now whether the term of the lease has expired or not but seeks time to obtain instructions.
9. The plaintiffs, if feels the need to file a reply to the application, may file a reply to the same or before 2nd December, 2016 with advance copy to the counsel for the defendants/applicants.
10. List for hearing on 7th December, 2016 as already scheduled.”
2. The counsel for the defendants today fairly admitted that the term of the registered lease deed has expired.
3. Once that is the admitted position, there appears to be no dispute to be referred to arbitration as far as the claim of the plaintiffs for ejectment of the defendants from the premises earlier leased out to the defendants is concerned.
4. The counsel for the defendants states that the term of the registered lease has expired on 14th October, 2016; however the present suit was filed prior thereto on the ground of determination of the lease prior to the expiry of term thereof and has to be decided on the cause of action on which it has been filed and not on a cause of action which may have accrued to the plaintiffs subsequent to the filing of the suit. It is argued that as far as the

cause of action for the relief of ejectment on the basis of determination of lease prior to the expiry of term thereof is concerned, the same is arbitrable in accordance with the arbitration cause between the parties and the parties have to be referred to arbitration. It is yet further contended that if the plaintiffs now desire the relief of ejectment of the defendants from the property on the cause of action of determination of the lease by efflux of time, the plaintiffs have to file a fresh proceeding therefor.

5. I am unable to agree. The question is no longer *res integra*.

6. It has been held in ***Hindustan Petroleum Corporation Ltd. Vs. Uma Rani*** (1996) 2 LW 568, ***T.B. Nath Vs. Hindustan Petroleum Corporation Ltd.*** (1999) 2 LW 552, ***Mohinder Pal Singh Vs. Sunil Kumar*** 2013 SCC Online Del 3292 and in judgment dated 28th July, 2015 of this Court in Case No.RFA 285/2015 titled ***Dilip Nigam Vs. Sanjay Kumar*** that even where the suit for ejectment has been filed prior to expiry by efflux of time of the term for which the premises are let out, if the said time expires during the pendency of the suit or where the renewal / extension of lease period pleaded and on the basis whereof the suit for ejectment is defended comes to an end during the course of court proceedings, the tenant is liable to be ejected forthwith without requiring the landlord to file a fresh proceeding for ejectment.

7. Thus though the present suit is found to have been filed on 16th August, 2016 i.e. prior to 14th October, 2016 when the term of the registered lease deed was to expire but now that the term for which the premises were admittedly let out has expired, the defendant is left with no defence of the termination of tenancy earlier effected being bad and is liable to be ejected merely on the ground of the expiry by efflux of time during the pendency of

the suit and is liable to be ejected forthwith.

8. Order VII Rule 7 of the CPC provides that it shall not be necessary in a plaint to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. The Court, for its delays in adjudication, cannot penalize the litigants by compelling them to file successive suits seeking a relief which is implicit in the relief sought for at the time of institution of the suit.

9. Reference in this regard can also be made to the legal principle evolved by the Supreme Court in ***Nopany Investments (P) Ltd. Vs. Santokh Singh (HUF)*** (2008) 2 SCC 728. It was held that even if 15 days' notice of termination of tenancy under Section 106 of the Transfer of Property Act, 1882 is not given but since the institution of suit 15 days have expired, then the technicality of failure to prove service of such notice or to prove such notice should not be allowed to come in the way of granting the relief of ejectment. The said principle was invoked in ***Saurabh Buildcon Pvt. Ltd. Vs. Aster Technologies Pvt. Ltd.*** 2013(5) R.A.J. 562 (Del) to hold that even if letting was for manufacturing purpose requiring a six months notice and which was not given, since more than six months had lapsed since the institution of the suit, the said plea was of no avail.

10. There is thus no merit in the contention of the counsel for the defendants of the plaintiffs being not entitled to the relief of ejectment for the reason of the cause of action for the suit being termination of the lease prior to the expiry of term thereof and not the expiry of the term of the lease.

11. Section 8 of the Arbitration & Conciliation Act, 1996 requires this Court to refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists. Section 7 of the Act defines 'arbitration

agreement’ as an agreement by the parties to submit to arbitration “disputes” which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.

12. Thus, for the existence of an arbitration agreement and / or for reference by this Court of the parties to arbitration, the existence of “disputes” is a must.

13. Once it is found that there is no dispute between the plaintiffs and the defendants insofar as the claim of the plaintiffs for ejectment of the defendants from the premises is concerned, no purpose will be served in referring the parties to arbitration.

14. The counsel for the plaintiffs in this regard relies upon ***Sanjay Saxena Vs. K. Sudershan Reddy*** 190 (2012) DLT 33 where also it was held that where the tenant owing to determination of tenancy has no legal right to stay in possession, the arbitrator would *de facto* be unable to perform his functions as there are no disputes which require adjudication and the arbitration agreement would stand superseded so far as disputes of possession is concerned and on ***Saurabh Buildcon Pvt. Ltd.*** supra following ***Sanjay Saxena*** supra.

15. Thus, the occasion for referring the parties to arbitration insofar as the relief of ejectment is concerned, does not arise. The counsel for the defendants also has not urged any reason as to why the defendants would not be liable to ejectment.

16. The counsel for the plaintiffs states that though the plaintiffs have claimed *mesne* profits / damages for use and occupation at the rate higher than the agreed rent but for the sake of expediency and without prejudice to the rights and contentions of the parties are willing to give up the claim for

mesne profits / damages for use and occupation at the rate higher than agreed rate of rent and seek a decree for recovery of arrears of rent / *mesne* profits since the date when the defendants are not paying and till the date of ejection.

17. The counsel for the defendants states that the defence of the defendants is of suspension of payment of rent owing to the plaintiffs having not fulfilled their obligations under the lease agreement.

18. The counsel for the plaintiffs states that the arbitration clause as under:

“24) That in case of any dispute or controversy that may arise between the parties at any time with regard to the Deed or interpretation or applicability of any provision of this Deed, the same shall be finally settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996, by Mr. Shyam Lal Chopra, Partner, Evergreen Sweet House, Green Park, New Delhi or in his absence by a mutually appointed Arbitrator. The arbitration proceedings shall be conducted in the English language and the venue for the same shall be New Delhi. The Award of the Arbitrator shall be final and binding upon the parties. All dispute between the parties shall be decided within a period of 6 months from the date of the reference of the dispute to the arbitrator. The Arbitration clause will not however, be applicable in case of default of rent. In case any further litigation arises in connection with the Said Premises or this Lease Agreement, then the Courts of New Delhi shall have exclusive jurisdiction.”

between the parties excludes arbitration “in case of default of rent” and thus does not come in the way of adjudication by this Court of the claim of the plaintiffs for arrears of rent / *mesne* profits at the agreed rate. Reliance in this regard is placed on ***Maruti Suzuki India Ltd. Vs. India Tourism***

Development Corporation Ltd. 2013 (136) DRJ 171 and on *National Textile Corporation Ltd. Vs. Ashval Vadera* 155 (2008) DLT 221.

19. As far as the latter of the aforesaid two judgments holding that an arbitration clause in an unregistered lease deed cannot be looked into, is no longer good law in view of the subsequent judgment of the Supreme Court in *SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Private Ltd.* (2011) 14 SCC 66. The former judgment in *Maruti Suzuki India Ltd.* supra was with respect to exclusion of arbitration clause from the applicability of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and would also not have any bearing.

20. At this stage, both counsels agree that the disputes between the parties as to recovery of arrears of rent / *mesne* profits (at whichever rate the plaintiffs may deem fit) be referred to the sole arbitration of Mr. B.B. Choudhary, Additional District Judge (Retd.), Mob. No.9910384611 instead of the named arbitrator in the arbitration clause aforesaid.

21. Both counsels are required to have this order signed from the duly authorized representatives of the two plaintiffs and from the defendant no.1 and the partner of defendant no.1.

22. The application is disposed of in above terms.

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23. In accordance with above, a decree is passed in favour of the plaintiffs and against the defendants for recovery of possession of basement, ground floor, first floor (excepting one small office room), second floor and third floor (excepting one office / room) and all other portions in occupation of the defendants of property No. 2105, Ward No.XVI, Khasra Nos.425&426, Nai Wala Estate, Desh Bandhu Gupta Road, Karol Bagh,

New Delhi-110005, leaving the parties to bear their own costs.

Decree sheet be prepared.

24. So far as the claim of the plaintiffs against the defendants for recovery of arrears of rent, *mesne* profits, interest, service tax, electricity charges, water charges or of any other nature relating to occupation by the defendants of the aforesaid properties is concerned, the same is referred to the sole arbitration of Mr. B.B. Choudhary, Additional District Judge (Retd.).

25. The fee of the arbitrator, besides out of pocket expenses, is fixed at Rs.1,50,000/- to be borne equally by the plaintiffs and the defendants.

26. The arbitrator is requested to endeavour to render the award within six months of the parties first appearing before him.

27. The parties to appear before the Arbitrator with prior appointment on 6th January, 2017.

DECEMBER 07, 2016

‘gsr’

RAJIV SAHAI ENDLAW, J