

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION (LODG.) 513 OF 2017

Trent Limited

.. Petitioner

Vs.

Mr.Nanasaheb Govindrao Aher & Ors.

.. Respondents

Mr.Dinyar Madon, senior advocate a/w. Ms.Smriti Biradar i/b P & C Legal for Petitioner.

Mr.V.P. Sawant a/w. Mr.Ajay Gadegaonkar and Mr.Nikhil Patil i/b Prabhakar M. Jadhav for Respondent Nos.1 to 3.

CORAM : K.R.SHRIRAM, J.

DATE : 1ST AUGUST 2017

P.C.

1. Petitioner and Respondents had entered into a Lease Deed dated 6th February 2003 by which Respondents granted to Petitioner lease of 5 acres of land being a portion of a larger property admeasuring 9.5 acres. The given term under the Lease Deed was for 15 years commencing from 13th June 2002 and expiring on 12th June 2017. Monthly lease rent was Rs.83,275/- with an escalation of 10% at the expiry of every 5 years of the term. The lease of the property was granted for the purpose of Petitioner to construct, use and occupy a warehouse for storage of its goods as mentioned in the Lease Deed.

2. Clause 2 of the Lease Deed gave Petitioner the option to renew the

lease for a further period of 15 years on the same terms and conditions as contained in the Lease Deed. Of course, Respondents are now contending that they had not agreed for extension of lease on same terms and conditions. That is a subject matter of evidence.

3. It is the case of Petitioner that Petitioner and Respondents had mutually agreed upon such renewal of the lease in order to establish a long term relationship with each other as Petitioner was going to invest large sums of money to construct the warehouse. Clause 2 of the Lease Deed reads as under :

“Further, upon the expiry of the initial period o 15 years, the Lessee shall have an option to renew the lease for a further period of 15 years on the same terms and conditions contained therein. Such option shall be exercised by the Lessee by giving a notice in writing of such of its desire, at least 2 month before the date of expiration of the initial 15 years period. Fresh Lease Deed(s) shall be stamped and registered on renewal, if any.”

The relationship between the parties was rather cordial during these 15 years. Petitioner paid Respondents the increased rent of 10% after the expiry of 5 years and further increase of 10% on the increased amount after the period of 10 years.

4. On 2nd February 2016, another Lease Deed was entered into between Petitioner and Respondents for a term of 15 years. Under this Lease Deed,

Petitioner was given certain rights by which they could extend the warehouse which they have built at the current location. The second Lease Deed dated 2nd February 2016 is not a subject matter of this petition. Mr. Madon for Petitioner relied on this second Lease Deed only to show the intention of the parties was the 1st Lease Deed would continue for a further period of 15 years.

5. As the term of 15 years under the 1st Lease Deed was to end on 12th June 2017, Petitioner, by their letter dated 28th January 2017, exercised its option of renewal under Clause 2 of the Lease Deed for further period of 15 years and requested Respondents to execute and register a fresh Lease Deed in favour of Petitioner for a further period of 15 years commencing from 13th June 2017. Respondents, instead of agreeing on the same terms and conditions, vide their letter dated 28th January 2017 stated that they would agree for renewal of the Lease Deed for a further period of 15 years provided Petitioner agreed to pay a higher amount. Petitioner refused to pay a higher amount than the amount prescribed under the Lease Deed dated 6th February 2003 and Respondents refused to budge and insisted on higher lease rent if they had to enter into a further Lease Deed. It is at this stage that Petitioner approached this Court under Section 9 of the Arbitration and Conciliation Act, 1996 (The Arbitration Act) for the following reliefs :

- a) *that pending the process and final disposal of the arbitration proceedings including execution of the arbitral award, due to be initiated between the Petitioner and Respondents, this Hon'ble Court be pleased to grant :*
- (i) *A temporary order and injunction restraining the Respondents from in any manner, either directly or indirectly, alienating, selling, dealing with, encumbering, disposing off or in any manner creating third party rights in or from parting with possession of the Property or any part thereof to any person other than the Petitioner.*
 - (ii) *A temporary order and injunction restraining the Respondents from dispossessing the Petitioner from in any manner the Property and/or interfering with the possession or enjoyment of the Property by the Petitioner.*

6. Petitioner has approached this Court on the basis that in the arbitration proceedings that will be commenced by Petitioner, Petitioner will be in effect seeking specific performance of the Lease Deed which would mean renewing the same for a further period of 15 years on the same terms and conditions as set out in the Lease Deed. Mr.Madon submitted that Petitioner is not seeking for a restraintment against Respondents from dispossessing Petitioner but what in effect Petitioner is seeking is only specific performance.

7. On 13th June 2017, when Petitioner had moved for urgent orders, this Court considered an affidavit dated 12th June 2017 and granted ad-interim order in terms of prayer clause a(ii). Respondents have filed an affidavit in reply of respondent No.1 affirmed on 10th July 2017 denying that (a) they had agreed to extend the Lease Deed by another 15 years on the same terms

and conditions; and (b) the provisions of Section 26 of the Provincial Small Causes Courts Act, 1887 override Clause 18 of the Lease Deed regarding referring the dispute to arbitration and therefore the dispute, if any, arising of the said Lease Deed is not arbitrable. Rejoinder has been filed by Petitioner stating that Section 26 of the Provincial Small Causes Courts Act is not applicable because Respondents are not seeking possession but are only seeking not to be dispossessed from the property. Therefore, it is quite clear that though Petitioner has approached this Court on the basis that they are going to seek specific performance of the Lease Deed and particularly Clause 2 of the Lease Deed and Mr.Madon also maintained that line of argument. The net effect, however, is Petitioner does not want to be dispossessed from the property.

8. Mr.Sawant for Respondents relied upon two judgments of this Court to submit that the Court should reject this Petition and direct Petitioner to approach the Small Causes Court. Mr.Sawant relied on judgments of this Court in (i) ***Vinayak Balkrishna Samant and Ors. Vs. Mahanagar Telephone Nigam Ltd.***¹ and (ii) ***ING Vysya Bank Limited vs Modern India Limited and Anr.***²

Though in *Vinayak Balkrishna Samant* (supra), the Division Bench

1 2003 SCC Online Bom.1025

2 2008 (2) Mh.L.J.653

has concluded that when it comes to possession or recovery of the license fees or rent in a dispute between the lessor and lessee, only Small Causes Court will have jurisdiction, the facts and circumstances in that case were slightly different.

So far as *ING Vysya Bank Limited* (supra) is concerned, the facts and circumstances of that case is almost, I would say, identical to the facts and circumstances of the present case. The issue which fell for determination of the Court in *ING Vysya Bank Limited* (supra) was whether the provisions of Section 41 of the Presidency Small Causes Court Act, 1882 would bar the jurisdiction of Arbitral Tribunal to entertain a claim for specific performance of an agreement of renewal contained in an agreement of license executed between the licensor and licensee. The relief that was sought in those proceedings under Section 9 of the Arbitration Act was an order of injunction restraining the licensor from terminating the agreement of licence and acting upon a communication calling upon the licensee to hand over vacant possession and, in particular, restraining the licensor from initiating proceedings for the recovery of possession of the licensed premises and an injunction was also sought restraining the licensor from disturbing the use and occupation of the premises by the licensee and from entering into any third party rights in respect of the licensed premises. The only difference with the case in hand is in *ING Vyasya Bank Limited* (supra), a termination

notice was issued by the licensor whereas in our case, the license has come to an end by efflux of time. Otherwise, the facts are similar including the reliefs sought. The submissions by the opposing counsels in *ING Vyasya Bank Limited* (supra) were also similar to the submissions made in the present petition.

The Court, in *ING Vyasya Bank Limited* (supra) after considering the rival submissions, came to a conclusion that the parties will have to go to the Small Causes Court of competent jurisdiction as the dispute was not arbitrable. The Court came to conclusion that the reliefs sought in the arbitration petition under Section 9 was indicative in some measure of the nature and character of the dispute between the parties. The Court held, the relief which Petitioner claims in the application under Section 9 is an injunction restraining Respondents in any manner either directly or indirectly alienating or selling or dealing with or creating any third party rights or parting with possession of the property or any part thereof to any person other than Petitioner; and to restrain Respondents from dispossessing Petitioner in any manner from the property and/or interfering with the possession or enjoyment of the property by Petitioner and therefore, there can be absolutely no manner of doubt that the relief sought relates to the recovery of possession of the property.

9. The Apex Court in *Mansukhlal Dhanraj Jain Vs. Eknath Vithal Ogale*³, while considering the provisions of Section 41(1) of the Presidency Small Causes Courts Act, 1882 which was *pari materia* with Section 26 of the Provincial Small Causes Courts Act, 1887 held that in a suit instituted by a person claiming to be a licensee of the premises for an injunction restraining the licensor from dispossessing the licensee or interfering with the possession or enjoyment of the property by the licensee would relate to the recovery of possession and fell within the exclusive jurisdiction of the Small Causes Court. The Court observed that the words '*relating to the recovery of possession*' were wider than '*for the recovery of possession*'. This judgment was considered and relied upon by this Court in *ING Vyas Bank Limited* (supra) and paragraph 10 of the said judgment reads as under :

10. *Thereafter in Mansukhlal Dhanraj Jain V. Eknath Vithal Ogale, the Supreme Court construed the provisions of Section 41(1) of the Presidency Small Cause Courts Act, 1882. In a suit instituted by a person claiming to be a licensee of the premises for an injunction restraining the licensor from recovering the possession by forcible means, the Supreme Court held that the suit related to the recovery of possession and fell within the exclusive jurisdiction of the Small Causes Court. Observing that the words 'relating to the recovery of possession' were wider than 'for the recovery of possession', the Supreme Court held thus :*

It is pertinent to note that Section 41(1) does not employ the words "suits and proceedings for recovery of possession of immovable property". There is a good deal of difference between the words "relating to the recovery of possession" on the one hand and the terminology "for recovery of possession of any immovable property". The words 'relating to' are of wide import and can take in their sweep any suit in which the grievance is made that the defendant is threatening to illegally

3 1995(2) SCC 665

recover possession from the plaintiff - licensee. Suits for protecting such possession of immovable property against the alleged illegal attempts on the part of the defendant to forcibly recover such possession from the plaintiff, can clearly get covered by the wide sweep of the words "relating to recovery of possession" as employed by Section 41(1).

10. Mr.Madon submitted that *ING Vysya Bank Limited* (supra) is not applicable to the facts and circumstances of this case because in *ING Vysya Bank Limited* (supra), the provision was deemed renewal and there was a termination whereas in our case there is a letter of renewal and no termination. In my view, this difference is immaterial and even if there was a letter of renewal and no termination, the conclusions arrived at by this Court in *ING Vysya Bank Limited* (supra) would be the same.

11. Having considered the documents annexed to the Petition and the reply and having heard the counsel, indisputably the parties had a pre-existing relationship of lessor and lessee and that in pursuance of a provision for renewal contained in the Lease Deed, Petitioner was seeking a continuation of that relationship. Even though Petitioner states that they are only seeking specific performance, when a Court hears such a matter, the Court must find out what does the suit in substance and in essence say and whether it is relating to the recovery of possession or the recovery of licence fee, rent or other charges between a landlord and tenant or a licensor and

licensee. The Court will decide the issue by looking at the kernel and disregarding the chaff, the nature of the cause of action; the character of the reliefs sought and whether the claim of the Petitioner arises from and out of the obligations of the parties as licensor and licensee or landlord and tenant. The garb or cloak which is wrapped around the pleadings by an astute draftsman must be kept aside to deduce the pith and substance of the pleadings.

12. In my view, considering the averments in the Petition, prayers sought in this Petition and the averments contained in Paragraph 11 of the rejoinder, this dispute certainly relates to recovery of possession and it is a matter to which Section 26 of Provincial Small Causes Court Act, 1887 applies notwithstanding the fact that some of the reliefs or a portion of the cause of action is structured around a claim for specific performance.

13. The petition, therefore, stands dismissed. Interim relief granted on 13th June 2017 stands vacated.

14. Mr.Madon seeks stay for a period of four weeks. Mr.Sawant objects stating that when this Court has come to a conclusion that it has no jurisdiction under Section 9, the question of extending stay does not arise.

I am in agreement with Mr.Sawant. Stay refused.

(K.R. SHRIRAM, J.)