

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

Decided on : 04.08.2017

+ **FAO (OS) (COMM) 20/2017, C.M. APPL.3058/2017, 10488/2017
& 10939/2017**

**SORIL INFRA RESOURCES LIMITED (FORMERLY KNOWN AS
STORE ONE RETAIL INDIA LIMITED) Petitioner**

Through: Sh. Sandeep Sethi, Sr. Advocate with Sh.
Sudhir Sharma, Sh. Akhil Anand, Sh. Abhishek
Swaroop, Sh. Abhishek Shivpuri and Sh. Ritesh
Kumar, Advocates.

versus

M/S. ANNAPURNA INFRASTRUCTURE PVT. LTD. AND ORS.

..... Respondents

Through: Sh. Vijay Nair with Sh. Prashant Jain,
Advocates, for Respondent No.2.

Sh. Manish Sharma with Sh. Nimad Dogra,
Advocates, for Respondent No.3.

CORAM:

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P. GARG**

MR. JUSTICE S. RAVINDRA BHAT

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1. The appellant – M/s. Soril Infra Resources Limited [formerly known as “Store One Retail India Limited” and hereafter referred to as “Store One”] challenges an order of a learned Single Judge rejecting its objection under Section 34 of the Arbitration and Conciliation Act, 1996 [hereafter referred to as “the Act”].

2. The brief facts are that M/s. Pragya Products Pvt. Ltd. [hereafter

referred to as “Pragya”] entered into a Memorandum of Understanding (MoU) with Store One on 23.03.2004. Under the MoU, Pragya agreed to participate in a public auction by the Delhi Development Authority (DDA) of a commercial plot measuring 8710 sq. meters at Shalimar Bagh. On its part, Store One agreed that if Pragya became the successful bidder it would lease about 70,000 square feet at a rent of ₹ 55/- per sq. ft. per month. In the auction, Pragya was declared successful and was the lessee under the Perpetual lease deed dated 08.10.2004 with the DDA. It proceeded to construct a commercial complex on the plot. On 09.12.2004, Pragya entered into an agreement to sell with M/s. Annapurna Infrastructure Pvt. Ltd. [hereafter referred to as “Annapurna”] and M/s. Paliwal Overseas Pvt. Ltd. [hereafter referred to as “Paliwal”]. After this agreement, Pragya entered into a deed with Store One, leasing 52,000 sq. ft. of the space in the shopping mall for an initial term of 10 years with the option of extending by two further terms of 10 and 5 years respectively. Store One deposited ₹ 1,43,00,000/- with Pragya as interest free security deposit. After construction of the mall, Store One was given possession of 67,613 sq. ft. for its outlet. Store One started to pay the monthly rent of ₹ 41,78,348.18/- with effect from 20.09.2007 to Pragya.

3. Acting in furtherance of the agreements to sell, Pragya executed 16 sale deeds, conveying the property to Annapurna and Paliwal on 08.08.2008. Despite change of ownership and title, Pragya continued to be the service provider in respect of the facilities and maintenance etc. Store One, alleging deficiencies in service provided, stopped payment of Common Area Maintenance (CAM) from July, 2008. It thereafter issued a notice on 05.08.2008 under clause 7.2 of the Lease Deed to Pragya highlighting

alleged deficiencies and calling upon Pragya to rectify them. Since Annapurna and Paliwal had become owners, they sent notices on 01.09.2008 and 04.09.2008 to the tenant Store One, claiming rent from 01.04.2008. On 08.09.2008, Store One sent notice to Pragya alleging that it had failed to cure the deficiencies stated in its earlier letter. It accordingly proceeded to terminate the lease of the premises. Store One filed a petition under Section 9 of the Act before this Court. Annapurna and Paliwal applied for impleadment. The impleadment application was later withdrawn and the transferees – Annapurna and Paliwal filed CS(OS) 493/2009 seeking recovery of outstanding rents for the period 01.04.2008 onwards.

4. In these proceedings, Store One eventually handed over the keys to the premises to Annapurna on 22.03.2010. Later Pragya filed suit against Store One, seeking recovery of ₹ 2,62,36,672/- due to unpaid CAM and electricity charges. Store One thereafter moved this Court under Section 11 of the Act (Arb. Pet.86/2012) for appointment of an arbitrator. This led to the appointment of a sole arbitrator with consent of parties. Annapurna and Paliwal claimed rent for the period April 2008 to September 2012. Pragya further claimed CAM charges for the period 08.08.2008 to 19.03.2012 from Store One and Annapurna as well as Paliwal and electricity charges upto 08.08.2008 from Store One. The latter, Store One filed counter claim for refund of security deposit of ₹ 1.43 crores.

5. The arbitrator first ruled in his award that the notice alleging deficiencies, by Store One served upon Pragya was vague and untenable. The Tribunal also ruled that the notice of termination of lease was not sent to the owners/Annapurna and Paliwal and consequently, the termination of lease was not valid. The award, therefore, held that the owners Annapurna and

Paliwal were entitled to damages equivalent to rent for the unexpired period of lock-in. The arbitrator also was of the opinion that owners were liable to mitigate the damages by letting out the premises. Therefore, the damages were limited to six months' rent. The award in its operative portions reads as follows:

“9. The operative part of the impugned award is set out below:-

*“10. **CONCLUSIONS:***

10.1 In the light of the discussion, analysis and conclusion abovestated, all the issues as framed stand answered.

*10.2 **Annapurna is entitled to the following amount from Store One:***

a. Rs. 2,67,52,283/- on account of rent from 01.04.2008 upto 22.03.2010 along with interest @ 12% per annum w.e.f. 23.03.2010 upto the date of Award. Be it stated that the aforesaid sum is arrived at after deducting the security deposited by Store One and ordered to be paid back in terms of order contained herein.

b. Rs. 1,11,56,145/- on account of damages equivalent to rent for a period of 6 months from 22.03.2010.

c. Future interest @ 12% per annum on the amounts, as calculated above, from the date of the Award till the date of realization.

*10.3 **Paliwal is entitled to the following amount from Store One:***

a. Rs. 2,67,52,283/- on account of rent from 01.04.2008 upto 22.03.2010 along with interest@ 12% per annum w.e.f. 23.03.2010 upto the date of the Award. Be it stated that the aforesaid sum is arrived at after deducting the security deposited by Store One and ordered to be paid back in terms of order contained herein.

b. Rs. 1,11,56,145/- on account of damages equivalent to rent for a period of 6 months from 22.03.2010.

c. Future interest @ 12% per annum on the amounts, as calculated above, from the date of the Award till the date of realization.

10.4 Pragya is entitled to the following amount from Store One:

a. Rs. 27,63,199/- against Store One for Facility Management Services and Electricity Charges upto 07.08.2008 along with interest @ 12% per annum w.e.f. 08.08.2008 upto the date of Award.

b. Rs.28,08,000/- against Store One for Facility Management Services from 08.08.2008 upto 08.11.2008 along with interest @ 12% per annum w.e.f. 09.11.2008 upto the date of Award shall also be paid.

c. Future interest @12% per annum on the amounts, as calculated above, from the date of the Award till the date of realization”.

6. In its objections under Section 34, Store One contended that the findings with regard to un-tenability of the termination notice, was manifestly erroneous. It was argued that the notice, dated 05.08.2009 had specified the deficiencies. As far as the termination notice was concerned, Store One urged that Annapurna and Paliwal were always aware at all material times that it had terminated the lease; the mere fact that individual notice was not served upon them did not in any manner invalidate or render ineffective the notice terminating the lease. As long as Annapurna and Paliwal knew about the lease termination, they could not complain about lack of knowledge. It was also argued that the award of rent for six months beyond the date of handing over possession was utterly unwarranted. In this

regard, it was submitted that both Annapurna and Paliwal were aware that in the pending proceedings, Store One had been required to vacate the premises. As a matter of fact, Store One had not utilized the premises for over two years. In these circumstances, granting damages of compensation, which had no connection with or was not proximate with termination was unsustainable in law.

7. The learned Single Judge noticed clauses 7.2, 7.2.1, 7.2.2 and 7.2.3 which deal with “lock in period”. It was noted in the impugned judgment that Store One’s notice alleged frequent break down in supply and raised qualms over the efficacy of supply and amenities. At the same time, the notice did not mention any particulars as to when such breakdowns and other deficiencies had occurred and for what duration. According to the learned Single Judge, the complaint made was general in nature. It was further held that the Tribunal found that prior to issuance of notice of termination dated 08.09.2008 to Pragya, notices had been received on behalf of Annapurna and Paliwal on 01.09.2008 and 04.09.2008. These had clearly stated that Annapurna and Paliwal had become owners of the property. Consequently, when lease was terminated, the least expected of Store One was to issue a notice to the original owner. Its neglect meant that the termination was not effective and binding upon them. Learned Single Judge furthermore held that:

“18. The contention that Annapurna and Paliwal were always aware of the termination of the lease and therefore the termination of the Lease Deed ought to be held valid is also not sustainable. Indisputably, Annapurna and Paliwal had, to the knowledge of Store One, stepped into the lease of Pragya and were the lessors at the material time when the notice of

termination was issued by Store One. In view of this, issuance of a termination notice to persons other than the lessors cannot be accepted as a valid termination. This Court cannot accept the view expressed by the Arbitrator in this regard, to be patently illegal or perverse.

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23. The contention that the Arbitrator had grossly erred in arbitrarily fixing the period of six months for award of damages is also wholly bereft of any merit. Having held that the termination of the lease was invalid, Store One would be liable to pay rent or damages equivalent to the rent for the entire lock-in period of 54 months as agreed under the Lease Deed. However, the Arbitrator did not make an award for the said period as he was of the view that Annapurna and Paliwal could have mitigated the damages by locating new tenant(s) and assessed six months to be reasonable for the said purpose. The contention that no damages could have been awarded since Annapurna and Paliwal had not taken steps to mitigate the same, is unmerited. The Arbitrator has merely restricted the award of damages by assessing the reasonable period required by Annapurna and Paliwal to find new tenant(s). This Court is not persuaded to accept that the said view is in any manner unreasonable, perverse or opposed to the Public Policy of India.”

Contentions of the appellant

8. Mr. Sandeep Sethi, learned senior counsel for the appellant argues that the impugned judgment is in error as it upholds the tribunal’s finding that the termination of the tenancy was bad in law on account of the notice being vague. The learned Single Judge failed to notice that in terms of Clause 3.12 of the Lease Deed, Pragya had to provide maintenance services and to collect CAM charges towards the common area facility services. However, right since the rent commencement date, there were deficiencies in providing the

said service/facilities. Counsel highlighted Clause 8.4, which provided that if the services were interrupted for 50% or more of the premises for more than 07 (seven) days, then Store One was entitled to terminate the lease. Further, and in addition thereto, Clause(s) 7.2/7.2.1, on a stand alone basis, gave clear right to Store One to terminate the lease within the lock in period, if it is unable to run its operations by giving a prior written notice of 30(days). Since there was no let up in disruption and deficiency in the said facilities/services, Store One issued the notice dated 05.08.2008, specifically in terms of Clause 7.2, clearly enlisting the issues/problems it was facing, due to which it was unable to run the operations. By that notice, Store One called upon Pragya to remedy the breaches within the stipulated time. Since Pragya neither responded to the aforesaid notice dated 05.08.2008, nor cured/remedied the breaches complained of, Store One, by its termination notice ended the Lease Deed. The impugned judgment, in relying upon Clause 7.2, erred in appreciating that in terms of Clause 7.2 the appellant was only required to show that it was unable to run the operations of the demised premises due to Pragya's default, act or omission to act, so as to be entitled to terminate the lease.

9. It is argued that the learned Single Judge's finding that no specific instances were mentioned in the termination notice, which was general in nature as it did not specify any particular covenant of the Lease deed that had been breached is erroneous. The notice, dated 05.08.2008 was issued, according to Mr. Sethi, in terms of Clause 7.2, which did not oblige the appellant to mention the specifics, but only that it was unable to carry out its operations.

10. It was also argued that the finding regarding notice not being addressed to the landlord is also untenable. Mr. Sethi argues that the tribunal and the learned Single Judge did not correctly appreciate that the termination notice was validly issued to Pragya. Admittedly, on 05.08.2008, when the notice of default was issued and served upon Pragya, it was the owner/landlord of the premises, and no sale deed by that time had been executed, let alone any attornment taken place as per the provisions of the lease deed. Subsequently, while Pragya, Annapurna and Paliwal might have executed/registered a sale deed on 08/18.08.2008 there was no intimation of the same as no copy of the said sale deed was provided to the appellant, let alone a proper attornment of the lease deed in terms of clause 3.8.2. Therefore, Pragya continued to be the landlord/owner of the premises and the tribunal's finding was wholly unreasonable.

11. Learned senior counsel also faulted the tribunal with applying the mitigation principle from 22.03.2010, i.e. the date when Store One handed over the keys in terms of the order dated 18.03.2010 made by the Court. It is submitted that the respondents, after having been offered possession of the premises on 14.09.2008 itself, were under an obligation to take reasonable steps to secure a new tenant immediately. They failed to take any step for mitigation of their losses due to early termination of the lease deed. It is also stated that Store One had pleaded and proved the fact that it had removed all its belongings from the premises after 08.09.2008 and had offered the vacant possession of the said premises on 14.09.2008. It removed all its belongings from the premises – a fact confirmed by the witness (CW-1 Shri D.P. Vashist on behalf of Annapurna and Paliwal) i.e. in his cross-examination. Mr. Sethi

also relied on two decisions, *Adidas India Marketing Pvt. Ltd. v. Hicare India Properties Pvt. Ltd.* 2015 DRJ 147 481 and *Indian Oil Corporation v. Amritsar Gas Service* 1991 (1) SCC 533.

12. Mr. Vijay Nair, appearing for the respondents argued that this Court, in appeal, should not re-appreciate factual findings. It was emphasized that the record clearly revealed that despite being aware of the transfer of title to Annapurna and Paliwal, the appellant wished to part with the suit premises to Pragya, which led to initiation of legal proceedings. The appellant not only did not comply with the Court's order in CS (OS) No. 493/ 2009 but did not surrender the premises. It was urged that in the terms of the lease clearly stipulated a lock in period. The said stipulation is as follows:

"2.4 Lock-in-Period

Except as otherwise agreed in this Lease Deed, the Lessee shall not terminate this Lease Deed during a period of fifty four (54) months from Rent Commencement Date"

13. It was argued that during the arbitration proceedings, Pragya placed a certified copy of a letter dated 14.11.2007 acknowledging that in case there was a transfer of the property, Store One, had *"no objection in case there is a sale and transfer of the captioned property, in accordance with law,"* and that the terms of the lease would continue to bind it, and that assignees of Pragya *"will step in the shoes of the original Lessor, i.e Pragya.."* It was argued that the terms of the Lease Deed, a notice under Clauses 12 and 8.4 could have been validly addressed only to the Lessor i.e. Annapurna and Paliwal because they, as transferees had stepped into the shoes of Pragya as the Lessor by that date and through the notices dated 01.09.2008 and 04.09.2008, Store One was duly informed about the change in the

ownership. Even if it were assumed that Store One did have notice about transfer, the fact was that the notices given by them were received by it (Store One).

14. Mr. Nair argued that the award disclosed no patent illegality or infirmity in approach, because it proceeded to render factual findings, based on the materials available and the evidence led by the parties. It was submitted that so far as the legality of payment of compensation for any period beyond the date of surrender of premises is concerned, the amount awarded was on the basis of 6 month's charges of use for the premises, which was a reasonable measure, based on the contractual rate. It was submitted that the contract or lease provided 4 months' time to the lessee to wind up from the premises at the time of vacation; at least 6 months' time was reasonable to secure a new tenant and obtain payments of rentals.

15. As is apparent from the above discussion, the appellant's complaint is that the award, by the arbitral tribunal is untenable on two scores: one, about the termination notice being vague and the allied issue about its vacation of the property and two, the fixation of compensation beyond the date of its handing over the leased premises to the new owners.

16. As far as the first issue is concerned, the arbitral tribunal found- and to do so, it had material and evidence- that the appellant had agreed to make payments to the new owners, in its letter dated 14.11.2007, to Pragya. Even if its contention that the new owner's title was not brought to its notice initially is accepted, at least when they did write to it, the least it could have done, was to verify the claim from Pragya and issue notice of termination. It concededly did not take any such action; instead it terminated the lease-

again by intimation to Pragya. The finding in the award that Store One could have, but did not surrender the premises, despite Court orders, till 22.03.2010, is a matter of record. Ostrich like, the appellant obstinately refused to accept that Pragya had conveyed title to the respondents who were entitled to vacant possession; the appellant even resisted handing over possession to the new owners, despite its obligations under the letter dated 14.11.2007 to Pragya. Therefore, the Court is of opinion that in depriving the owners legitimate possession, and continuing to occupy the premises, the appellant had to pay for use and occupation charges as part of the lock in period at least. The award- and the impugned judgment in sustaining it, are neither erroneous nor contrary to facts or unreasonable.

17. Before this Court, it was asserted that mere issuance of the letter by Store One, terminating the lease, citing lack of adequate services, sufficed in terms of the lease deed. This argument is unmerited. Both the arbitrator and the Single Judge noticed the relevant conditions, i.e Clause 7.2.1 and 7.2.2. The structure of these conditions envision specificity of the breaches as a condition for termination of the lease; they are quoted below:

*“7.2 During the Lock-in-period and the Term of the LEASEDEED, the LESSEE shall have the option to terminate this LEASE DEED with a prior written notice of thirty (30) days
on the occurrence of any of the following events:*

7.2.1 The LESSEE is unable to run the operations of the STORE from the LEASED PREMISES due to LESSOR'S default, act or omission to act.

7.2.2 Any material breach of representations, warranties and other obligations and covenants of the LESSOR, which are not

rectified or remedied within a period of thirty (30) days of the receipt of the notice by the LESSEE to the LESSOR; or..”

18. The 30 day notice, relied upon by the lessee/appellant, mentioned, *inter alia*, the following inadequacies:

“The problems for the Demised Premises includes but are not limited to

(a) Security misdemeanour,

(b) AC and its standard temperature are not maintained at desired levies and require maintenance.

(c) Dedicated Chillers not performing and requires maintenance.

(d) Frequent breakdown of lifts and escalators..”

19. It is quite evident from the findings of the arbitrator that the notice lacked any particulars. There are no dates, time, or *any details* with regard to shortfall in the services or inadequacies. In these circumstances, the Court is of opinion that these factual findings are based on evidence, and interpretation of contract. There is no illegality or unreasonability in the approach or findings of the tribunal.

20. As regards the post handing over period and compensation amounting to 6 months use charges is concerned, the tribunal refused to award compensation for the entire lock in period, holding that Annapurna and Paliwal could not claim such amounts without any proof of mitigation. It was held, *inter alia*, that:

“Annapurna and Paliwal cannot be awarded their claim of rent for the entire un-expired lock-in period from 23.03.2010 to 19.03.2012. Only a reasonable sum can be awarded to Annapurna and Paliwal. As a result, Store One will be liable to compensate Annapurna and Paliwal for rent for a reasonable

period, beyond 22.03.2010. This is to account for a period that a landlord would reasonably take to find a new tenant after factoring in the time required to repair the Premises from the normal wear and tear caused by the previous tenant, to advertise the vacant Premises, find a new tenant, and offer the tenant any rent-free periods to install new fixtures, equipment, improvement, etc. In my opinion, having regard to the size of the Premises and the quantum of rent involved, 6(six) months is a reasonable time period during which Annapurna and Paliwal could have secured an alternative tenant. Thus, Annapurna and Paliwal are entitled to damages equivalent 6 (six) months of rent post 22-3-2010 and not up to 19-3-2012 as claimed by them.”

21. This award, in the discussion leading up to the award of compensation, considered Section 73 of the Contract Act, the principles applicable for the award of damages for breach of contract, and then proceeded to assess the compensation. Given these factors, the award of 6 months post handing over possession charges for use and occupation as damages, is neither patently illegal nor unreasonable.

22. In the light of the above findings, this Court is of the opinion that there is no merit in the appeal; it is, therefore, dismissed, without any order on costs.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

AUGUST 04, 2017