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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.539 OF 2018

The Phoenix Mills Ltd.

..Petitioner

Vs.

Earthwise Hospitality and Entertainment
Holdings Pvt. Ltd.

..Respondent

Senior Advocate Mr.Prasad Dani with Advocates Ms.Komal Joshi, Mr. Sameer Tapia, Mrs.Mahalakshmi Ganapathy and Mr.Sameer Singh i/b. M/s.ALMT Legal for Petitioner.

Mr.Harmit Trivedi with Mr.V.D.Shetty for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 16th JANUARY, 2018

P.C.:

Heard Mr.Dani, learned Senior Counsel for the petitioner, and Mr.Trivedi for the respondent.

2. Challenge of the petitioner in this petition is to an order dated 20th December 2017 passed by the learned Judge, Small Causes Court at Mumbai on the petitioner's application below Exhibit 18 operative portion of which reads thus:-

“Application Exh.18 for grant of ad-interim relief by way of directing the defendant to deposit compensation stands filed in record in view of the decision of issue under Section 9A of the Code of Civil Procedure, 1908.”

3. The effect of the impugned order is that the application of the petitioner below Exhibit 18 wherein the petitioner had prayed for interim reliefs in the suit pending the decision on the respondent's

application under Section 9A of the Code of Civil Procedure (for short, “CPC”) stands filed in the record of the suit, in view of the respondent's application under Section 9A of the CPC having been decided by the learned trial Judge by an order dated 19th December 2017.

4. The learned trial Judge has passed a further order on the same day (20th December 2017) on the respondent's application (Exhibit 27) by which the respondent's application for stay of the proceeding of the suit has been allowed by directing that the proceeding of the suit shall remain stayed for a period of four weeks to enable the respondent/defendant to challenge the order dated 19th December 2017 passed on the respondent's Section 9A application. This order dated 20th December 2017 reads thus:-

- “1. Application Exh.27 is allowed.
2. Hearing of instant suit is stayed for period of four weeks from today.”

5. Mr.Dani, learned Senior Counsel for the petitioner points out from the impugned order dated 20th December 2017 that the application of the petitioner under Exhibit 18 for interim reliefs was heard substantially along with respondent's application under Section 9A of the CPC. The Court has also recognized the said fact in paragraph 5 of the impugned order dated 20th December 2017 passed below Exhibit 18. It is surprising that on one hand, learned Trial Judge has held that the Court has jurisdiction and the application of the petitioner (Exhibit 18) which was substantially heard was directed to be filed.

6. In my opinion, the approach of the learned trial Judge is unreasonable. Further a confusion is created by the learned trial Judge, when on the same day on an application filed on behalf of the respondent, the learned trial Judge has stayed the further proceedings of the entire suit. By this order, a situation is created that the application

of the petitioner below Exhibit 18 for interim reliefs would in any case revive for adjudication, however, the learned Judge nonetheless was not inclined to pass order on the Exhibit 18 application albeit the application being substantially heard directing that the Exhibit 18 application be filed.

7. Mr.Dani, learned Senior Counsel for the petitioner, submits that prior to the filing of this Exhibit 18 application seeking interim reliefs, the petitioner had filed an application for interim reliefs being an application below Exhibit 8. The said application had also remained pending and no orders were passed in view of the respondent moving an application under Section 9A questioning the jurisdiction of the Court. Mr.Dani submits that this necessitated the petitioner filing of the application below Exhibit 18 under the provisions of Section 9A Sub-Section (2) seeking similar interim reliefs as already prayed in Exhibit 8 application. Mr.Dani submits that entire anxiety of the petitioner is that either of the said applications of the petitioner for interim reliefs in the suit be heard and decided. This in view of the fact, that the respondent is using the petitioner's premises without paying any compensation whatsoever to the petitioner and as on date, the legitimate amount of compensation which become due and payable would amount to more than Rs.14 Crores.

8. On the other hand, learned Counsel for the respondent though justifies both the orders passed by the learned Judge, however, contends that an opportunity be granted to the respondent to file a reply to this petition, at the same time, he does not dispute that the application of the petitioner for interim reliefs was heard along with Section 9A application as filed by the respondent. It is submitted that the respondent is in the process of filing an appeal challenging the order dated 19th December 2017 passed by the learned trial Judge on the

Section 9A application holding that the trial Court has jurisdiction to try and entertain the suit.

9. Considering the above facts and circumstances, Mr.Dani is correct in his submission that serious prejudice is being caused to the petitioner as the application of the petitioner which was legitimately filed seeking interim reliefs is not being decided and that substantive rights of the petitioner to seek interim reliefs in the facts and circumstances of the case are being taken away by the order dated 20th December 2017 passed by the learned trial Judge.

10. Considering the above peculiar facts and the submissions as made by the learned Counsel for the parties, in my opinion, it is in the interest of justice that the learned trial Judge though has already heard the application of the petitioner below Exhibit 18 along with the Section 9A application, it would be appropriate that the application of the petitioner below Exhibit 8 is taken up for hearing and decided at the earliest. It cannot be countenanced that initially the Exhibit 8 application was pending and not decided. Further it was not a correct approach on the part of the learned trial Judge in delaying and not passing any order on the Exhibit 18 application of the petitioner and to keep the same pending till Section 9A application was decided and very peculiarly after 9A application is decided to pass the impugned order, that Exhibit 18 application be filed. In doing all this, the learned trial Judge has completely overlooked firstly that the law itself provides for the Court to consider granting ad-interim protection till the Section 9A application is decided by virtue of Section 9A Sub-Section (2). In any case, now it would be appropriate for the learned trial Judge to immediately take up the Exhibit 8 application as filed by the petitioner which also the learned Trial Judge does not want to do in view of the stay of the proceedings. The approach would be clearly an arbitrary approach oblivious to the

cause of justice which would be the paramount consideration to be kept in mind by the learned trial Judge. In the above circumstances, the writ petition is required to be allowed by setting aside the order dated 20th December 2017 passed by the learned trial Judge below Exhibit 18. Further the order dated 20th December 2017 passed by the learned trial Judge below Exhibit 27 also shall stand modified so as to enable the learned trial Judge to decide the application of the petitioner below Exhibit 8. Ordered accordingly.

11. The learned trial Judge is directed to decide the application of the petitioner below Exhibit 8 as early as possible and in any event within two weeks from today.

12. All the Contentions of the parties on merits are expressly kept open.

13. The petition is allowed in the above terms. No costs.

14. The parties are directed to initially appear before the learned trial Court on 22nd January 2018.

[G.S. KULKARNI, J.]