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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 23rd May, 2018

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O.M.P. (I) (COMM) 167/2018

APEEJAY SURRENDRA PARK HOTELS LIMITED Petitioner

Through: Mr.Nikhil Nayyar and Mr.Divyanshu
Rai, Advs.

versus

SILVER STREAK HOTELS PVT. LTD. Respondent

Through: Ms.Tanu Priya Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner praying *inter alia* for the following reliefs:-

“(a) Restrain the changing its management or selling, pledging, or otherwise transferring, assigning, alienating or granting a security interest in the 2918 sq. mt. plot situated at Five Rathas Road Near Five Rathas Monument, Opposite Chariot Beach Resort, Mahabalipuram, Tamil Nadu - 603 104 and the constructed structure on it comprising of 42 rooms with Food & Beverage facilities along-with 2400 sq. ft. banquet hall, one meeting room and lawns, as described in Schedule I of the Management and Technical Services Agreement dated 4th July, 2014 or any part thereof either directly or indirectly till the completion of arbitration proceedings.

(b) Restrain the Respondent and using Petitioner's operational standards, technical expertise, know-how and

brand name till the completion of arbitration proceedings.”

2. It is the case of the petitioner that the petitioner had entered into a Management and Technical Services Agreement dated 04.07.2014 with the respondent whereunder the petitioner was to provide technical services and pre-operation advice to the respondent relating to the recruitment of personnel, training, setting up of rooms, food and beverages and other related operational services as also coordinate with the respondent for setting up and launch of the Hotel at the premises owned by the respondent. In lieu of the said services, the petitioner was to be paid management fees as provided for in Clause 5 of the Agreement.

3. The petitioner claims that while the petitioner was working in discharge of its obligations under the said Agreement, the respondent vide its notice dated 27.09.2016 sought to terminate the Agreement in terms of Clause 8.2.1 of the same. Clause 8.2.1 of the Agreement is reproduced herein below:

“8.2.1 Subject to Clause 8.1, the Parties agree that this Agreement shall not be terminated for the Lock-In Period of 5 (Five) years from the Opening Date. However, in case the Agreement is terminated during the Lock-In period by a 60 day notice given either by the Owner or the Operator, then the Owner shall be liable to pay Termination Fees for the unexpired term of the Lock-In Period, as compensation to the Operator. The Termination Fees shall be computed in the following manner:

<i>Highest Management Fee of</i>	
<i>Financial year till the time</i>	<i>(5- no. of years hotel</i>
<i>Hotel is operated by Operator X</i>	<i>is operated by</i>
<i>Operator)</i>	

The Owner agrees that for the first year of operation, the Highest Management Fee, for the purpose of Clause 8.2.1, shall be computed on the Budgeted Gross Operating Income and Budgeted Gross Operating Profit. The maximum fees payable on termination will be up to 3 years management fees only. The termination fee shall not be applicable in case the notice is given by the Operator.”

4. Learned counsel for the petitioner submits that the termination notice, being within the lock-in period, could not have been effected till the respondent pays the Termination Fee as provided in the Agreement.
5. The petitioner responded to the above notice vide its reply dated 31.10.2016, however, the respondent reiterated its intent to terminate the Agreement vide its letter dated 02.11.2016.
6. The petitioner thereafter filed a suit seeking specific performance of the Agreement, however, did not press the same and in fact, did not even pray for its registration. The parties in the meantime explored the possibility of an amicable settlement and in pursuance thereof, the respondent vide its email dated 16.03.2017 offered to pay a sum of Rs.1.25 crores to the petitioner in full and final settlement of all claims of the petitioner under the Agreement. The petitioner vide its email dated 25.08.2017 accepted the said offer. However, no further response was received from the respondent, whereafter petitioner addressed follow up e-mails, to which the respondent gave a non-conclusive reply, ultimately forcing the petitioner to invoke the arbitration agreement vide its notice dated 28.11.2017.
7. The petitioner further avers that instead of replying to the said notice, the respondent has started negotiating for sale of the hotel premises to a third party, which would adversely affect the rights of the petitioner under the

Agreement as also thwart any chance of making recovery of the amount that may be awarded in favour of the petitioner in the arbitration proceedings.

8. This Court, vide its order dated 16.04.2018, while issuing the notice of the petition, had restrained the respondent from creating any third party interest or parting with the possession of the hotel property till the next date of hearing.

9. The respondent has filed its reply and the counsel had also made submissions in response to the petition. Learned counsel for the respondent does not deny the execution of the Agreement. It is the case of the respondent that the petitioner has failed to discharge its obligations under the Agreement forcing the respondent to terminate the Agreement by its notice dated 27.09.2016 as reiterated in the letter dated 02.11.2016. In my *prima facie* opinion, a reading of the above two letters does not indicate any default on the part of the petitioner as a reason for termination of the Agreement. Therefore, at this stage, it cannot be said that the respondent sought to terminate the Agreement for any default on the part of the petitioner. On the other hand, once the Agreement is duly executed, in terms of Clause 8.2.1 of the same, the respondent could have terminated the Agreement during the lock-in period of five years only upon payment of Termination Fees as provided for in the said Agreement. The same has admittedly, not been paid.

10. The respondent does not deny its email dated 16.03.2017 offering to pay a sum of Rs.1.25 crores to the petitioner as a full and final settlement of petitioner's claims towards termination of the Agreement. Therefore, at least *prima facie*, liability of the respondent stands established.

11. Learned counsel for the respondent further submits that as the hotel in question is located at Mahabalipuram, Tamil Nadu, this Court would lack territorial jurisdiction to entertain the present petition. I do not find any merit in the said submission. The Agreement in question was executed at New Delhi. Further, Clause 17.2 of the Agreement provides that the arbitration proceedings shall be conducted at New Delhi. The Supreme Court in ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited***, (2017) 7 SCC 678 has held that seat of the arbitration shall vest exclusive jurisdiction in the Court where the arbitration is to be conducted. Therefore, this Court cannot be said to lack territorial jurisdiction to adjudicate the present petition.

12. Learned counsel for the respondent submits that the petitioner had not clearly spelled out its claims in the notice dated 28.11.2017 seeking invocation of the Arbitration Agreement and therefore, the invocation is not proper. She further submits that since 28.11.2017 the petitioner has not taken any steps for constitution of the Arbitral Tribunal and therefore, is not entitled to seek relief under Section 9 of the Act.

13. I have considered the said submission of the learned counsel for the respondent. It is to be noticed that the respondent did not respond to the notice dated 28.11.2017 either in the form of denial of the averments made therein or by appointing its own nominee Arbitrator. The present petition was filed by the petitioner on 23.03.2018, which cannot be said to be after an unreasonable delay. In any case, the onus of the appointment of the Arbitral Tribunal cannot be cast solely on the petitioner. The interest of the respondent is adequately protected by Section 9(2) of the Act which now provides for an outer time limit for the Interim Order to operate and within

which time the party seeking such interim protection has to ensure the constitution of the Arbitral Tribunal.

14. Learned counsel for the respondent further submitted that the order being sought by the petitioner is in the nature of an attachment before judgment, being governed by Order 38 Rule 5 of the Code of Civil Procedure. In this regard she places reliance on the judgment of this Court in ***Mala Kumar Engineers Pvt. Ltd. v. B.Seenaiah and Co.(Projects)***, 2005(1) ARBLR 264 Delhi.

15. Though, there can be no denial of the proposition being urged by the learned counsel for the respondent as held by this court in the above referred judgment, in the present case, as there is no denial of the email dated 16.03.2017 and the learned counsel for the respondent is not in a position to deny that the respondent is in the process of selling its property, that is the hotel premises, in my opinion, at this stage the petitioner has not only been able to make out a strong *prima facie* case in its favour based on the terms of the Agreement as also the email dated 16.03.2017, but also would suffer grave irreparable injury in case it is not granted an interim order of protection.

16. In ***Ajay Singh and Anr v. Kal Airways Private Limited and Ors.***, 2017 SCC OnLine Del 8934, this Court held that Section 9 of the Act grants wide powers to the Courts in fashioning an appropriate interim order and the Court should not find itself unduly bound by the text of provisions of Order XXXVIII and XXXIX of the Code of Civil Procedure, 1908 rather, it is to follow the underlying principles.

17. Learned counsel for the respondent submits that the hotel premises is valued much higher than Rs.1.25 crores that was offered by the respondent

to the petitioner in its email dated 16.03.2017. Taking into consideration this statement and balancing the equity, the respondent is directed to deposit a sum of Rs.1.25 crores in the Registry of this Court within four weeks from today, which shall be invested in the form of a fixed deposit. During this period of four weeks, Interim Order dated 16.04.2018 shall remain in operation. In case the respondent does not make the above deposit, the Interim Order dated 16.04.2018 shall continue to operate, however, the petitioner must take steps for constitution of the Arbitral Tribunal as the present Interim Order being passed shall remain in operation only for the period as prescribed in Section 9(2) of the Act. The Arbitral Tribunal upon its constitution would be free to pass such other and further orders on an application being made by either party in this regard under Section 17 of the Act. The Arbitral Tribunal shall also adjudicate such application and disputes between the parties remaining uninfluenced by any observation made in the present order.

18. The petition is disposed of in the above terms, with no order as to cost.

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NAVIN CHAWLA, J

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