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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 25th July, 2018

+ O.M.P.(I)(COMM.) 250/2018

SONA CORPORATION INDIA PVT.LTD Petitioner

**Through: Mr.A.K. Singla, Sr. Adv. with
Mr.Rahul Shukla, Adv.**

versus

BRIGHTPOINT INDIA PVT. LTD. & ANR.... Respondents

**Through: Mr.Sudhir Kumar and
Ms.Ashna Abrol, 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 *inter-alia* praying for the following reliefs:

“(i) Restrain the Respondent No. 1 from acting in terms of the Notice dated 30.04.2018 illegally terminating the Lease Deed dated 18.06.2013;

(ii) Direct the Respondent No. 1 to pay the Petitioner Rs.74,34,000/-, being the lease rent for the months of March to May, 2018 due under the registered Lease Deed dated 18.06.2013 along with interest at the rate of 21% p.a. from due date, i.e. 07.03.2018;

(iii) Direct the Respondent No. 1 to pay the Lease

Rent amounts payable on the 7th day of the first month of every quarter as per the Rent Invoices raised by Petitioner in terms of the Lease Deed dated 18.06.2013;

(iv) Appoint a Local Commissioner and direct inspection, forthwith, of the entire premises at G-9, Block B-1, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi- 110044, including the Leased property, and the common areas mentioned in the Lease Deed;

(v) Direct the Respondent No. 1 to comply strictly with the conditions in the Lease Deed dated 18.06.2013;”

2. The petitioner had entered into a Lease Deed dated 18.06.2013 with the respondents whereunder it had granted a lease of the fully constructed Ground and First Floor of the property bearing no.G-9, Block-I, Mohan Co-operative Industrial Estate, Mathura Road, New Delhi-110044 to the respondents along with common amenities and common area as described in Schedule-I, Schedule-II and Schedule-III to the Lease Deed. The lease was for a period of 9 years with effect from 18.06.2013. Clause 3(a) of the Lease deed provides for the lease rent to be paid by the respondents to the petitioner during the lease period and is reproduced hereinbelow:

“3 LEASE RENT, ESCALATION AND INTEREST FREE REFUNDABLE SECURITY DEPOSIT

a) LEASE RENT

i. The Lessee shall pay to the Lessor a lumpsum of Rs.17,50,000/- (Rupees Seventeen Lacs and Fifty Thousand Only) per month as rent ("Lease Rent"). The Lease Rent shall be paid, in advance, on quarterly basis on or before the 7th calendar day of

the first month of every quarter ("Due Date"). In the event of delay in payment of Lease Rent in full and in advance upto 7th day of the English calendar month of the respective quarter as stipulated above, the Lessee shall be liable to pay interest at the rate of 21% per annum, on the Lease Rent past due, from the Due Date. However, in case the quarterly Lease Rent is not paid by Due Date, the Lessor shall issue a demand notice, after the expiry of seven (7) days from the Due Date, in writing to the Lessee and the Lessee shall pay the Lease Rent within ninety (90) days of receipt of such notice along with interest to the Lessor. In case of failure on part of the Lessee in payment of Lease Rent within ninety (90) days of receipt of such notice, the same shall be constituted as a breach of the terms of this Lease Deed and the Lessor shall be entitled to terminate the Lease Deed and also to recover the outstanding Lease Rent along with interest calculated at the rate of 21% per annum over the delayed period. The above period of ninety (90) days shall be read as thirty (30) days in case of any subsequent default when a demand notice as above is already issued once.

The aforesaid Lease Rent is in respect of the leasing of the Leased Property, the Common Amenities and the Common Areas by the Lessor to the Lessee.

***ii. ESCALATION** - The Lease Rent escalation in respect of the Leased Property, the Common Amenities and the Common Area shall be @ 20% of the last paid Lease Rent and shall be effective after the expiry of every 3 (three) years from the Lease Commencement Date. For the sake of clarity, following shall be the Lease Rent during different periods:*

<i>Period</i>	<i>Lease Rent Per Month (Rs.)</i>
<i>18th June, 2013 to 17th June, 2016</i>	<i>17,50,000/-</i>

18 th June 2016 to 17 th June , 2019	21,00,000/-
18 th June, 2019 to 17 th June, 2022	25,20,000/-

3. The respondents were also to deposit with the petitioner an Interest Free Refundable Security Deposit (IFRSD) in terms of Clause 3(b) of the Lease Deed, which is reproduced hereinbelow:

“b) INTEREST FREE REFUNDABLE SECURITY DEPOSIT (“IFRSD”) – *The Lessee has paid to the Lessor interest free refundable security deposit equivalent to 10 (ten) months of Lease Rent aggregating to Rs.1,75,00,000/- (Rupees One Crore and seventy Five Lacs Only) ("IFRSD") on the Lease Commencement Date vide cheque no. 229945 dated 20-05-2013 drawn on The Royal Bank of Scotland N.V., Hansalaya Building, 15, Barakhamba Road, New Delhi-110001, the receipt which the Lessor hereby acknowledges. There shall be escalation @ 20% on the earlier IFRSD after the expiry of every 3 (three) years from the Lease Commencement Date and the additional IFRSD shall be paid within a period of 10 (ten) days from the expiry of the respective period of 3 (three) years. For the sake of clarity, following shall be the IFRSD during different periods:*

<i>Period</i>	<i>IFRSD (Rs.)</i>	<i>Additional IFRSD(Rs.)</i>
18 th June, 2013 to 17 th June, 2016	1,75,00,000/-	-
18 th June 2016 to 17 th June , 2019	2,10,00,000/-	35,00,000/-
18 th June, 2019 to 17 th June, 2022	2,52,00,000/-	42,00,000/-

In case the Lessee fails to pay the additional IFRSD within the above stipulated time lines, the same would constitute a breach of this Lease Deed and would entitle the Lessor to terminate the Lease Deed after giving three (3) months written notice to the Lessee to make the payment of the additional IFRSD.”

4. The respondents, vide their notice dated 30.04.2018 terminated the Lease Deed informing the petitioner that they would be vacating the premises on 29.10.2018. The respondents further made a request to the petitioner to adjust the IFRSD against the monthly rent payable for the period 01.03.2018 to 29.10.2018. There is a dispute between the parties as to whether the respondents could have issued such notice of termination or not, however, the learned senior counsel for the petitioner, for the present petition, confines his prayers only to prayer no. (ii) and (iii) made in the petition.

5. Learned counsel for the respondents submits that in terms of Clause 8 of the Lease Deed the respondents are entitled to seek adjustment of the IFRSD against the quarterly lease rent till the date of vacation. Clause 8 of the Lease Deed is reproduced hereinbelow:

“8. REFUND OF THE IFRSD

On termination/expiry of this Lease Deed and simultaneous to handover of peaceful and vacant possession of the Leased Property, the Common Amenities and the Common Areas, the Lessor shall refund, in full and by way of a demand draft, IFRSD, subject to deductions of any unpaid Lease Rent, if any, or other charges, due and payable under this Lease Deed to the Lessee. However, in case the IFRSD is not refunded by the Lessor to the Lessee on

the handover of peaceful and vacant possession of the Leased Property, the Common Amenities and the Common Areas, the Lessee shall be entitled, without prejudice to any other rights that it may have in this regard, to continue to be in the possession of the Leased Property, the Common Amenities and the Common Areas without any obligation to make any payment of Lease Rent till such time the IFRSD is not refunded by the Lessor to the Lessee as per the terms of this Lease Deed.”

6. A reading of the above clause, in my opinion, does not support the contention of the respondents. This clause, in fact, confers a right on the petitioner to adjust any unpaid lease rent against IFRSD but does not confer any reciprocal right in favour of the respondents to seek such adjustment as a matter of right. In terms of Clause 3(a) of the Lease Deed reproduced hereinabove read with Clause 2(c) of the Lease Deed, the obligation of the respondents as lessee, to pay lease rent continues even during the notice period. Clause 2(c) of the Lease Deed is reproduced hereinbelow:

*“2(c) **NOTICE PERIOD** - This Lease Deed can be terminated only by the Lessee, after the expiry of the Lock-in Period, by serving 6(six) months advance notice herein after referred to as "**Notice Period**". However, the Lessee can serve the abovementioned notice anytime after the expiry of 2 years and 6 months from the Rent Commencement Date. As a matter of clarity, the Lessee shall be liable to pay the Lease Rent during the Notice Period. Subject to Clauses 3 and 13.a(iv) below, the Lessor shall not have any right to terminate this Lease Deed until the expiry of the Lease Period.”*

7. Learned counsel for the respondents has further placed reliance on Clause 13(iv) of the Lease Deed to submit that even where the lessee fails to rectify/remedy any illegal activity being conducted from the lease premises, the petitioner has only been conferred a right to terminate the Lease Deed but at the same time has to refund the IFRSD to the respondents/lessees. Clause 13(a)(iv) is reproduced hereinbelow:-

“13. TERMINATION OF THE LEASE DEED

a) In addition to the termination rights available to each Party elsewhere under this Lease Deed, the Lease Deed shall be terminated under all or any of the following events:

(i)xxxxxx

(ii)xxxxxx

(iii)xxxxx

iv. In case the Lessee carries out any illegal activities from the Leased Property, the Common Amenities and the Common Areas, the Lessee shall rectify/remedy the same. In case the Lessee fails to do so, in that event the Lessor shall be entitled to terminate/forfeit the Lease Deed immediately. In such event the Lessor would have the right to re-enter the Leased Property, the Common Amenities and the Common Areas.

in which cases, the Lessor shall refund the IFRSD to the Lessee on simultaneous hand over of the possession of the Leased Property, the Common Amenities and the Common Areas to the Lessor and in accordance with Clause 8 of this Lease Deed.”

8. I do not see any relevance of this Clause to the submissions made by the counsel for the respondents. It does not in any manner absolve the respondents as lessees to pay the agreed lease rent during

the period of the lease till its termination in accordance with the Agreement.

9. Learned counsel for the respondents has further relied upon Clause 14 of the Lease Deed which is reproduced hereinbelow:-

“14. DAMAGE OR DESTRUCTION.

Notwithstanding anything to the contrary contained under this Lease Deed, if the Leased Property, the Common Amenities and the Common Areas or any part thereof shall at any time during the Lease Period be destroyed or damaged by fire, earthquake, defective construction or any other reason whatsoever not attributable to the Lessee so as to be unfit for habitation or the Said Use, the Lessee shall have the option to terminate the Lease Deed and hand over the possession (in its then current state) thereof to the Lessor or to continue in the Leased Property. However, in case the Lessee opts to continue in the Leased Property, then the Lease Rent and other charges, if any payable under the Lease Deed for the period of three months or till the Leased Property, the Common Amenities and the Common Areas are restored back to its normal condition, whichever is earlier, shall not be payable by the Lessee to the Lessor. As a matter of clarity, such restoration of the Leased Property, the Common Amenities and the Common Areas shall be at the sole cost, risk and expense of the Lessor. However, if the Leased Property, the Common Amenities and the Common Areas are not restored back to its normal condition at the end of said three months period and notwithstanding anything to the contrary contained under this Lease Deed, the Lessee shall have unfettered right to forthwith terminate this Lease Deed.

In the event of any damage to the Leased Property, the Common Amenities and the Common Areas due

to the fault of the Lessee, the Lessee undertakes to repair and restore the Leased Property, the Common Amenities and the Common Areas in its original state and condition at its own cost, expense and risk.”

10. The above Clause again, in fact, confers the right in favour of the petitioner to seek restoration of the leased premises incase the same are damaged due to fault of the lessee. I again do not see any relevance of this Clause to the claim made by the petitioner for the lease rent during the notice period.

11. Learned counsel for the respondents further submits that even after adjustment of the lease rents for the period from 01.03.2018 till 29.10.2018, the petitioner would have in its possession a sum of Rs.11,76,000/- as IFRSD which would be sufficient to secure the petitioner on any claims for damages in terms of the Lease Deed. In my opinion, once it is held that the respondents are not entitled to seek adjustment of the lease rentals against IFRSD, there is no reason to denude the petitioner of its security as agreed between the parties in terms of the Lease Deed and the respondents cannot claim the same as a matter of right.

12. In ***Permanand Verma & Anr v. Vimal Chand Jain***, 1995 SCC OnLine Del 326, this Court held as under:-

“6. In view of the aforesaid decisions of this Court I am of the view that the amount which was placed by the tenant with the landlord as security deposit is not liable for adjustment particularly at the stage when notice claiming arrears of rent is served by the landlord on the tenant or the eviction petition on account of nonpayment of rent is filed. Same will be the situation qua an order under Section 15(1) of the Act passed

against such a tenant. The purpose of a security deposit is totally different. The same is generally meant to secure the landlord against various defaults of the tenant at the time of final determination of the lease. Such defaults may include damage to the property, arrears of rent, arrears on account of electricity or water charges, telephone bills etc. etc. Therefore, the security deposit is not liable to be adjusted at interim stages as in the present case when notice of demanding arrears was issued, unless there is a stipulation between the parties to the contrary.”

13. In ***Supertrack Hotels Pvt. Ltd. v. Friends Motels Pvt. Ltd.***, 2017 SCC OnLine Del 11662, the Division Bench of this Court has observed as under in relation to the power of the Court under Section 9 of the Act:-

*“15. Section 9 of the Act empowers the Court to issue an interim measure of protection securing the amount in dispute in the arbitration as also such other interim measures of protection as may appear to the Court to be just and convenient. Section 9 specifically provides that “Court shall have the same power for making orders as it has for the purpose, and in relation to, any proceedings before it.” Thus, though it is correct that Arbitral Tribunal shall not be bound by the CPC i.e. Code of Civil Procedure, 1908, as held by the Supreme Court in *Arvind Construction Company Pvt. Ltd. v. Kalinga Mining Corporation & Ors.*, (2007) 6 SCC 798, general rules that govern and guide the Court while considering grant of an interim injunction are attracted even while dealing with an application under Section 9 of the Act.*

*16. In *Ajay Singh* (supra) it has been held that Section 9 grants wide power to the Court in fashioning an appropriate interim order. Thus, it is correct that in exercise of such power, the Court*

should be guided by known principles, equally, the Court should not find itself unduly bound by the text of Section 9 of the Act rather it is to follow the underlying principles.

17. Order XV-A of CPC, applicable to Delhi, provides that in any suit of a owner/lessor for eviction of an unauthorized occupant/lessee or for the recovery of rent and future mesne profit from him, the Court may direct the defendant to deposit such amount on account of arrears, upto date of the order and thereafter continue to deposit in each succeeding month the rent claimed in the suit. Similarly, Order XXXIX Rule 10 of CPC empowers the Court to order payment of money which the other party admits to be due. As stated, that though the said provisions have not been expressly mentioned in Section 9 of the Act, the principles thereof would certainly apply to such proceedings. These provisions are in the nature of interim protection which can be passed by the Courts.

18. Supreme Court in the case of Pt.Rishikesh v. Salma Begum (Smt.) (1995) 4 SCC 718, while upholding the validity of the Order XV Rule 5 CPC as amended by UP Civil Laws (Reforms and Amendments), Act, 1976 observed that such provision is made to protect the landlord from hardship and to prevent unfair advantage of delaying the disposal of the suit by the tenant.

19. We are therefore of the opinion that while exercising the powers under Section 9 of the Act, the Court can certainly be guided by the principles of Order XV-A and Order XXXIX Rule 10 of CPC. The same view was expressed by another Division Bench of this Court in the case of Value Source Mercantile Ltd. (supra). The relevant portion of the said judgment reads:

“13. Section 9 of the Arbitration Act uses the expression “interim measure of protection” as

distinct from the expression “temporary injunction” used in Order XXXIX Rules 1&2 of the CPC. Rather, “interim injunction” in Section 9 (ii) (d) is only one of the matters prescribed in Section 9 (ii) (a) to (e) qua which a party to an Arbitration Agreement is entitled to apply for “interim measure of protection”. Section 9(ii)(e) is a residuary power empowering the Court to issue / direct other interim measures of protection as may appear to the Court to be just & convenient. Section 9 further clarifies that the Court, when its jurisdiction is invoked thereunder “shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it”.

14. The question which thus arises is that if the dispute as aforesaid had been brought before this Court by way of a suit, whether this Court could have, during the pendency of the suit, granted the relief as has been granted in the impugned order. Order XXXIX Rule 10 of the CPC empowers the Court to direct deposit / payment of admitted amounts. The appellant, as aforesaid does not controvert that it continued to be the tenant of office unit B-1 and had not terminated the tenancy with respect thereto. There is thus an admission by the appellant of the liability for rent at least of office unit B-1. The appellant, if had been a defendant in a suit, could have thus been directed by an interim order in the suit to make such payment to the respondent. Order XV-A added to the CPC as applicable to Delhi and which was added, as held by us in judgment dated 15th May, 2014 in FAO(OS)597/2013 titled Raghbir Rai Vs. Prem Lata, to empower the Court to direct payment during the pendency of the suit at a

rate other than admitted rate also, empowers the Civil Court to direct payment which is apparently wrongfully disputed. The denial by the appellant of the entire rent as agreed, on the ground of having determined the tenancy of one of the two office units taken on rent, is clearly vexatious, as in law the appellant as a tenant could not determine tenancy of part of the premises taken on rent. It is not the case of the appellant that it was entitled to do so as part of terms of its tenancy. In that view of the matter, the appellant could under Order XV-A of the CPC have been directed to pay the rent of the entire premises notwithstanding having given notice of termination of tenancy of part thereof. We are therefore satisfied that the impugned order satisfies the test of being in exercise of the same power for making orders as the Court has for the purpose of a Civil Suit and is thus within the ambit of Section 9 of the Arbitration Act.”

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22. In view of the above, we do not agree with the submission of Learned Senior Counsel for the appellant that under Section 9 of the Act, this Court is not empowered to order the payment of money, when justified as an interim measure of protection.”

14. In view of the above the respondents are directed to pay quarterly lease rents to the petitioner for the period commencing from 01.03.2018 till the date of their occupation of the leased premises. The arrears of the rent shall be paid within a period of three weeks from today. Future payment shall be made strictly in compliance with

the lease deed. The interim order shall continue till the Arbitral Tribunal considers the same on an appropriate application filed by either party seeking modification / variation of the said order.

15. The learned senior counsel for the petitioner submits that the petitioner has invoked the Arbitration Agreement between the parties vide its notice dated 25.05.2018. He submits that an Arbitrator be also appointed by this Court. The learned counsel for the respondents, however, submits that he has no instructions from the respondents in this regard.

16. The observations made hereinabove are prima facie in nature and would not prejudice either party before the Arbitral Tribunal, which shall consider the disputes between the parties remaining uninfluenced by any observations made in this order.

NAVIN CHAWLA, J

JULY 25, 2018/Arya