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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION (L.) NO.51 OF 2019

Subhash Dholakia ..Petitioner
Vs.
Tejaswini Balkrishna Samvatsarkar ..Respondent

Mr.Mutahhar Khan, with Ms.Priya Thakkar i/b. M/s.Jehangir Gulabbhai & Billimoria & Daruwalla for Petitioner.
Mr.Ashish Agarkar for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 23rd JANUARY, 2019

<u>P.C.:</u>

Heard learned Counsel for the petitioner and learned Counsel for the respondent.

2. This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the ACA") whereby the petitioner has prayed for the following interim reliefs pending the arbitration proceedings:-

> "a. Pending the completion of the arbitral proceedings and 120 days thereafter, that this Hon'ble Court be pleased to restrain the Respondent, her agents, servants, employees or any persons acting through her or on her behalf from acting in furtherance of the purported termination notice dated 15th December, 2018;
> b. Pending the completion of the arbitral proceedings and 120 days thereafter, this Hon'ble Court be pleased to stay the effect and operation of the purported termination notice dated 15th December, 2018;"

3. The case of the petitioner is that an agreement was executed between the respondent as the licensor and the petitioner as a licensee dated 7 January 2017 under which the petitioner was granted rights for display of hoardings on payment of monthly compensation. The period of the licence was for 3 years with effect from 1 October 2016. The consideration clause contained in agreement reads thus:-

> "III. CONSIDERATION
>
> III.1 The Assignee shall pay a sum of Rs.11,50,000/- (Rupees Eleven Lac Fifty Thousand only) per month being the monthly compensation / fee for grant and assignment of the said rights, privileges and benefits in the following manner:-
>
> Rs.11,50,000/- (Rupees Eleven Lac Fifty Thousand only) + Service Tax (as applicable) per month shall be paid unto and in the name of 'Shivam Enterprises';
>
> The Assignee shall pay the above said sum and the amount of Service Tax @ as may be applicable from time to time on the said sum, in advance on or before the 35 (Thirty five) days of each month, after deducting tax at source (TDS). If the said monthly compensation is delayed beyond the aforesaid period, the same shall be payable subsequently with interest @ 5% p.a. The monthly-compensation/ fee will be increased 5% increment after every 2 years and same it will continue further.
>
> 3.2 It is specifically agreed between the parties hereto that in the event the Assignee fails to pay to the Assignor the above said monthly compensation amount for the period of two consecutive months, then the Assignor shall have right to terminate the present Agreement by giving 2 months notice in writing to the Assignee to make the payment with interest as stipulated hereinabove and if the same is not paid within the next fifteen days and the Assignor shall be entitled to recover and deduct said outstanding/unpaid monthly compensation from the aforesaid Bank Guarantee thereafter and adjust accordingly with a right to terminate the present Agreement without any further notice."

4. The agreement provided for the following termination clause:-

> "VIII TERMINATION
>
> 8.1 The Assignor may terminate this Agreement, if the

Assignee has not paid the monthly compensation for 02 (two) consecutive months or is in breach of any of the other terms hereof and fails to rectify the same within a period of 30 days from the date of receipt of a notice to that effect from the Assignor. This shall be the sole right of the Assignor to terminate this Agreement. In the event of such termination, the Assignor shall recover and deduct such outstanding unpaid monthly compensation amount from the Bank Guarantee and shall also recover and deduct all and any outstanding unpaid amounts of charges, costs, expenses, interests, penalties etc. levied by any authority in respect to the said site. Thereafter the Assignor shall be entitled to grant and assign its rights, title and interests with respect to the said site to any third party.

8.2 The Assignee may terminate this Agreement, if the Assignor is in breach of any of the terms hereof and fails to rectify the same within a period of 30 days from the date of receipt of a notice to that effect from the Assignee. Further, the Assignee shall have the right to terminate the Agreement by giving the Assignor one month's prior written notice stating satisfactory reasons for such termination.

8.3 It is also agreed between the parties hereto that in the event the Assignee fails to make the payment of such additional statutory charges and as a result of which any action for determination of the Contract or any penalty is imposed on the Assignor by the concerned authority then the Assignor shall be entitled to terminate the present Agreement and initiate necessary legal action / proceedings against the Assignee."

5. It appears from the record that in regard to the payment of the licence fees, there were some disputes between the parties and for the payment of outstanding licence fees, the parties had held a meeting on 9 June 2018 and arrived at the following consensus which pertain only upto the period of June 2018 :-

" Refer to our discussion on 9.6.18 at Ghatkopar Below points are concluded.

1) Total o/s as on date is 24,82,372 which include bills till for the month of May-18 & PWD, BMC & other charges.

2) Out of o/s 20,00,000 will be paid on 6.7.18 and other 4,82,372 will be paid in two parts in subsequent two months.

3) Rent bill for the month of June-18 will be raised on

5.7.18 & same will be paid after 35 days credit period i.e. on 10.8.18 i.e. 12,07,500 & GST.
4) For BMC, PSD charges for the month from June-18 will be paid on 10th of subsequent month, only difference amount;
5) GST Return will be filled by June end & ITC credit will be given to Maulik.
6) We are going to deduct TDS of 1.38 Lac in coming month same will be deducted in your coming bill payment – after giving TDS Certificate for FY 17-18.
7) Chq of 20 Lac, 2 Lac, 2Lac respectively given."

6. It appears that there were further defaults. The petitioner has annexed a ledger account for the period from 1 April 2018 to 7 February 2019 at page 50 of the paper book wherein it clearly indicates that on 3 November 2018 the petitioner paid the licence fees for the month of September 2018 and similarly on 4 December 2018 the licence fees for the month of October 2018 was paid.

7. The respondent by notice of his Advocate dated 12 November 2018 pointed out the defaults in payment of monthly compensation by the petitioner. It was recorded that the petitioner had failed to pay monthly compensation/ PWD and BMC charges from May 2018 onwards which remained outstanding. It was pointed out that the aggregate compensation outstanding as on the date of the notice stood at Rs.15,28,000/- and the PWD and BMC charges which remained outstanding were in the tune of Rs.13,57,000/- for the rent of August 2018. The respondent preferring the Clause VII(8)(1) of the agreement recorded that the petitioner had failed to make the monthly compensation

for more than two consecutive months from August 2018 and called upon the petitioner to make the outstanding payment of Rs.28,85,000/- within 15 days from the date of the said letter and on failure to make such payment, it was recorded that the said agreement dated 7 January 2017 shall be treated as terminated and the petitioner shall be obliged to vacate the site premises and hand over the vacate possession to the respondents.

8. The above notice of the respondent was not responded by the petitioner. Consequently by a notice dated 15 December 2018 of the respondent's Advocate, the respondent terminated the said agreement dated 7 January 2017.

9. Learned Counsel for the petitioner would submit that the termination is illegal and contrary to the express terms of the agreement in as much as a grace period of 35 days as contemplated under clause III (Consideration) of the agreement was required to be taken into consideration and as a matter of practice, the rent was cleared after three months. Learned Counsel for the petitioner has drawn my attention to the Minutes of the Meeting dated 9 June 2018 to submit that there was an agreement between the parties for delayed payment of rent. It is submitted that the petitioner had two months in hand from the receipt of notice dated 12 November 2018 to make the outstanding payment. My attention is also drawn to the statement of account at page 59, from

which learned Counsel for the petitioner does not dispute that for the months of November and December, outstanding amounts were of Rs.16,14,743/- and Rs.16,82,593/- respectively. It is submitted that in fact, the said amounts were recently paid on 7 January 2019 after the termination notice.

10. On the other hand, learned Counsel for the respondent has supported the impugned termination. He submits that the reliefs as prayed by the petitioner are in the nature of final reliefs and it be granted in the arbitral proceedings. He submitted that the documents as placed on record itself shows that there was clear record of the conduct of the petitioner as defaulter and thus the respondent was within its rights to terminate the agreement.

11. Having heard learned Counsel for the parties and having perused the documents on record, I am not persuaded to accept the submission as urged on behalf of the petitioner. The record indicates that there were defaults on the part of the petitioner in making the prompt payment of the licence fees. This is also fortified by the minutes of the meeting held between the parties on 9 June 2018 where the respondents agreed to accept the delayed payment. Admittedly, the minutes of the meeting dated 9 June 2018 does not in any manner alter the express terms and conditions of the contract. Clause-III of the agreement which deals with

the payment of consideration/licence fees was clear and there was obligation on the part of the petitioner to pay monthly payment of licence fees and monthly charges. It is also further evident that the obligation of the petitioner was to pay the licence fees alongwith the other charges on or before 35 days of each month, after deducting TDS as expressly undertaken by the parties. It is crystal clear that there were defaults/irregularity on the part of the petitioner in making payment of the licence fees. This is reflected also in the ledger account as annexed to the petition. The payment of licence fees appears to have been regularly delayed by the petitioner and the said amounts were not paid as per terms and conditions of the agreement.

12. Apart from the irregularity in not adhering to the payment as agreed between the parties, it needs to be noted that even the outstanding amounts as notified by the respondent by its notice dated 12 November 2018 was not cleared for the period as specified in the notice. In fact, the petitioner has not even responded to the notice. Consequently, the respondent by notice dated 15 December 2018 terminated the agreement. Admittedly, on the date of termination of the agreement, the petitioner was not in a position to show that the petitioner was not in default. The termination clause as contained in agreement is, therefore, rightly invoked by the respondents by issuing the terminating notice. Prima-facie no illegality can be attributed in the respondent terminating the

agreement, in fact it has followed the terms and conditions of the agreement.

13. Even otherwise now the contract having stood terminated in the facts and circumstances, the interim reliefs as prayed in the petition, cannot be granted, in petition under Section 9 of the ACA. The petition is devoid of merits. It is accordingly rejected. No costs.

[G.S. KULKARNI, J.]