

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

% **Date of decision: 12th January, 2021.**

+ **FAO(OS) (COMM) 183/2020 & CM APPL. 35085/2020 (for placing on record additional facts and for filing additional documents along with the appeal).**

LUXE PASSION PRIVATE LIMITED

..... Appellant

Through: Mr. Sameer Jain, and Mr. Himesh Thakur, Advs.

versus

FREEDOM ROOST

..... Respondent

Through: Mr. Tarun Rana, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MR. JUSTICE SANJEEV NARULA

[VIA VIDEO CONFERENCING]

RAJIV SAHAI ENDLAW, J.

1. This appeal, under Section 37 of the Arbitration and Conciliation Act, 1996 read with Section 13 of the Commercial Courts Act, 2015, *inter alia* impugns the order dated 29th December, 2020 of the Commercial Court/Additional District Judge-04 (ADJ) (West), Tis Hazari Courts, Delhi, of dismissal of OMP(I)(COMM) No.195/2020 under Section 9 of the Arbitration Act preferred by the appellant seeking interim measure of restraining the respondent from accessing the premises of the appellant at A-16, 29 & 30, Mayapuri Industrial Area, Phase-I, New Delhi and of directing the respondent not to use the licenses/approvals obtained by the respondent in the name of the appellant and further, of directing the respondent to vacate the subject premises in view of termination of the lease and the agreement, on or before 31st December, 2020.

2. The appeal came up first before the Vacation Bench of this Court on 31st December, 2020, when notice thereof was ordered to be issued. The appeal thereafter was adjourned from time to time and came up last before us on 7th January, 2021, when though we heard the counsels but being of the *prima facie* opinion that the impugned order of the Commercial Court/ADJ of dismissal of the Section 9 application of the appellant was liable to be set aside, the matter was adjourned to today to enable the parties to explore the possibility of amicable settlement.

3. However no settlement has been possible and we have today again given opportunity to the counsel for the respondent to address us on why the appeal should not be allowed.

4. The appellant filed the petition aforesaid under Section 9, seeking interim measures, pleading (i) that the appellant is engaged in the business of sale, maintenance and repair of motorcycles along with other ancillary services relating to parts and accessories; (ii) that the appellant, in or around 2018 was interested in opening a cafe/bar/lounge to compliment it's Harley Davidson dealership and showroom in the subject premises, in the name and style of "Red Fort Harley Davidson"; (iii) that accordingly, the appellant entered into an Operations & Maintenance Agreement dated 1st September, 2018 (O&M Agreement) with the respondent, granting rights to the respondent to run and operate a cafeteria in a portion of the subject premises at A-16, 29 & 30, Mayapuri Industrial Area, Phase-I, New Delhi and for complimenting the business being carried on by the appellant therein; (iv) that the appellant had taken the aforesaid premises on rent under a Lease Deed dated 16th May, 2016, from Universal Engineering

Corporation; (v) that the O&M Agreement entered into by the appellant with the respondent, was made co-terminus with the lease of the appellant of the said premises; (vi) that the respondent was in breach of the various terms and conditions of the O&M Agreement (however the need to herein elaborate the pleas with respect thereto is not felt); (vii) that the appellant, due to breaches by the respondent of the O&M Agreement, vide Notice dated 10th December, 2020 terminated the O&M Agreement with the respondent; (viii) that the appellant, due to disruption of its business of Harley Davidson dealership and showroom, has also agreed to vacate the said premises and had got sent a Notice dated 1st July, 2020 to the landlord Universal Engineering Corporation, of the intent of the appellant to vacate the premises; (ix) that the appellant has deposited a sum of Rs.75 lakh as security with its landlord Universal Engineering Corporation and as per the terms of the lease deed, on failure of the appellant to vacate the premises by 31st December, 2020, i.e the date on which the appellant had noticed the landlord Universal Engineering Corporation of its intent to vacate the premises, the said security deposit of Rs.75 lakh shall be forfeited; and, (x) that the O&M Agreement between the appellant and the respondent contains an arbitration clause.

5. Notice of the aforesaid application/petition under Section 9 of the Act was issued by the Commercial Court/ADJ to the respondent, which filed a reply thereto. However again, the need go to into the same is not felt for the reasons as would appear hereinafter.

6. The Commercial Court/ADJ dismissed the petition/application of the appellant under Section 9 of the Act, finding/observing/holding, (i) that in

Section 9 proceedings, it could not be adjudicated whether the termination by the appellant of the O&M Agreement with the respondent, was valid or not; (ii) that the appellant had also not filed on record any legal notice sent to the respondent, complaining of any breaches/violations of the O&M Agreement; (iii) that there were various other disputed facts which could not be decided in a Section 9 proceeding; and, (iv) that thus the appellant was not entitled to the reliefs claimed.

7. We are afraid, the impugned order of the Commercial Court/ADJ cannot stand the scrutiny of law. Merely because the Section 9 proceedings entails disputed facts does not lead to dismissal of a Section 9 application/petition. In fact in the Section 9 proceedings, there are bound to be disputed facts and which are to be adjudicated in arbitration, by the Arbitral Tribunal agreed upon by the parties. We may mention, that there is no dispute between the parties with respect to the existence and/or validity of the Arbitration Agreement and/or of the disputes as highlighted in the Section 9 application being subject of the arbitration agreement and to be adjudicated by the Arbitral Tribunal. The Court, in a Section 9 proceeding, is merely required to consider the grant/non-grant of interim measures claimed, applying the same principles as applicable to disposal of applications under Order XXXIX Rules 1&2 of the Code of Civil Procedure, 1908 (CPC). Reference in this regard may be made to ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*** (2007) 7 SCC 125 and ***Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corporation*** (2007) 6 SCC 798. The Commercial Court/ADJ, in the present case, has clearly erred in law in dismissing the Section 9 application merely reasoning that the same entailed disputed questions of fact and which were

to be adjudicated in arbitration. This reasoning makes Section 9 otiose in as much as there would rarely be a case of all facts being undisputed in a Section 9 proceeding.

8. Be that as it may, the arguments of the counsel for the respondent before us are, (i) that the O&M Agreement of the respondent with the appellant was co-terminus with the lease of the premises between the appellant and its landlord Universal Engineering Corporation; (ii) that the said lease was/is valid till the year 2025; (iii) that the claim of the appellant is of having terminated the said lease but the appellant has not placed on record the notice vide which it claims to have terminated the lease with its landlord Universal Engineering Corporation; (iv) that the respondent had taken the said objection before the Commercial Court/ADJ, but inspite thereof notice was not produced, neither before the Commercial Court/ADJ nor has been produced along with the appeal; (v) that it is not the case of the appellant that the appellant has received any response from the landlord Universal Engineering Corporation to the notice of termination or that the landlord Universal Engineering Corporation is willing to take back the possession of the premises from the appellant; (vi) that from the documents produced by the appellant it appears that there is a Addendum dated 1st July, 2019 of the Lease Deed dated 16th May, 2016 of the appellant with its landlord Universal Engineering Corporation but the said Addendum dated 1st July, 2019 also has not been produced; and, (vii) that the appellant as Annexure A-10 to this appeal has only produced the letter dated 28th September, 2020 claimed by the appellant to have been addressed to its landlord Universal Engineering Corporation and in which reference is made to the Addendum Lease Deed dated 1st July, 2019 and to the Notice dated

1st July, 2020.

9. We have however enquired from the counsel for the respondent, the right, if any of the respondent to continue to operate and manage the cafeteria from a part of the premises of the appellant under lease from Universal Engineering Corporation. It is not as if the respondent is a sub-lessee or in any other capacity has any interest in the land or immovable property forming part of the premises of the appellant under lease from Universal Engineering Corporation. Under the O&M Agreement, the respondent merely agreed to operate and manage the cafeteria set up or desired to be set up by the appellant in its Harley-Davidson showroom. Even if the appellant has illegally or wrongfully terminated the said O&M Agreement, the said agreement, by its very nature is not capable of specific performance and the only remedy of the respondent for illegal termination of the O&M Agreement would be for recovery of damages and which claim has to be made before the Arbitral Tribunal.

10. No answer has been forthcoming from the counsel for the respondent on the aforesaid aspect. No claim even of the respondent, in law being entitled to specific performance of the O&M Agreement, is made.

11. As far as the argument of the counsel for the respondent, of the appellant having not placed the notice of termination of lease or Addendum Lease Deed on record, are concerned, the same do not in our view change the legal right and status of the respondent to the premises. If the appellant, in the arbitration proceedings fails to justify the termination of the O&M Agreement, the remedy of the respondent therefor would be to claim damages from the appellant for the same.

12. We may in this context however notice that during the hearing on 7th January, 2021, we had indicated that as per the law laid down in ***Delhi Automobiles Ltd. v. Economy Sales*** (1994) 55 DLT 39 [SLP(C) No. 011893/1994 preferred whereagainst was dismissed on 5th August, 1994] and followed in ***K.L. Sethi v. S. Kishan Singh*** (2009) 159 DLT 464 [FAO (OS) No.216/2009 preferred whereagaaainst was dismissed on 25th May, 2009], ***ATV Projects India Limited v. Bharat Heavy Electricals Ltd.*** MANU/DE/0440/2009, ***Mehrasons Jewellers Pvt. Ltd. v. Municipal Corporation of Delhi*** MANU/DE/2678/2010, ***Nirupa Berry v. Goel Estate & Promoters*** Pvt. Ltd. MANU/DE/1847/2013 [FAO(OS) 379/2013 & FAO(OS) 404/2013 preferred whereagainst were dismissed on 30th October, 2013] and ***Tekla Corporation v. Survo Ghosh*** (2014) 210 DLT 666, the Court, while granting an interim order in favour of the plaintiff and against the defendant, can always impose conditions on the plaintiff. Following the said law, we had during the hearing on 7th January, 2021 proposed that while granting the interim measures sought by the appellant, the appellant can be bound to surrender possession of the entire leased premises in its possession to the landlord Universal Engineering Corporation and/or from using the ground of wanting to surrender possession of the entire leased premises to the landlord, for terminating the O&M Agreement with the respondent and/or from abusing the process of this Court and counsel for the appellant had readily agreed to the Court imposing any such conditions on the appellant and/or binding the appellant in any manner whatsoever.

13. Rather, the counsel for the appellant, on 7th January, 2021 informed that Harley Davidson Motorcycles, whose dealership/showroom the

appellant was operating from the premises and infact for which purpose alone, the subject premises were taken on rent by the appellant, has not extended the dealership of the appellant and the appellant, without the dealership of Harley Davidson Motorcycles, is not interested in retaining the premises and paying exorbitant rent therefor.

14. Though the counsel for the respondent has not argued, but we may state that it is not as if in exercise of powers under Section 9, no mandatory relief can be granted, though the relief sought in the present case is also of restraining the respondent and its agents from entering the premises. As aforesaid, the principles applicable are of Order XXXIX Rules 1&2 of the CPC and in which context as far back as in ***Dorab Cawasji Warden v. Coomi Sorab Warden*** (1990) 2 SCC 117 it was held that in appropriate facts, interim mandatory injunction can also be granted, though in that case the same was of restoration of status quo. Be that as it may, the Courts subsequently in ***Tanusree Basu v. Ishani Prasad Basu*** (2008) 4 SCC 791, ***Mohd. Mehtab Khan v. Khushnuma Ibrahim Khan*** (2013) 9 SCC 221, ***Hammad Ahmed v. Abdul Majeed*** (2019) 14 SCC 1, ***Amit Sinha v. Sumit Mittal*** 2011 SCC OnLine Del 591 (DB) and ***Simplex Infrastructures Ltd. v. National Highways Authority of India*** (2011) 177 DLT 248 (DB) have also granted mandatory injunctions/directions at the interim stage.

15. In the facts of the present case it is felt that if the interim relief sought is not granted, the liability of the appellant to pay the rent for the entire premises (we reiterate that the O&M Agreement of the appellant with the respondent is only for a small part of the larger leased premises in occupation of the appellant and which was being used for Harley Davidson

Motorcycles dealership/showroom) and the appellant will also run the risk of having its security deposited of Rs.75 lakhs forfeited. Even if the lease deed of the appellant with its landlord Universal Engineering Corporation is a registered lease deed and valid till the year 2025 and even if the landlord is not willing to premature termination thereof by the appellant, the appellant if not interested in continuing as a lessee, as represented by the appellant to the Court, the appellant to not remain liable for rent, can always surrender/offer possession to the landlord prior to the term of expiry of the registered lease deed and then the claim if any of the landlord against the appellant will only be of damages for premature termination of the lease and which damages, the landlord to be able to recover from the appellant, will have to prove. The appellant however cannot in law, offer possession of or surrender of the lease to the landlord, without vacating the entire leased premises and in portion whereof the respondent, under the O&M Agreement with the appellant, is running a cafeteria. Thus unless the interim measures as sought by the appellant are granted, the appellant will remain liable to its landlord Universal Engineering Corporation for entire rent and may also incur the risk of forfeiting the security deposit.

16. We have thus enquired from the counsel for the respondent, whether the respondent, if desires to continue operating the cafeteria till adjudication of disputes by the Arbitral Tribunal, is willing to, without prejudice to its rights and contentions, deposit Rs.75 lakhs as well as the monthly rent for the entire premises, in the Court, so that the appellant does not remain liable to its landlord Universal Engineering Corporation. This offer was in fact communicated the counsel for the respondent on 7th January, 2021 also.

17. The counsel for the respondent states that the respondent is willing to pay to the appellant in terms of the O&M Agreement only and nothing more.

18. We thus find the appellant to satisfy the ingredients of, (A) having a prima facie case inasmuch as the O&M Agreement between the appellant and the respondent is not specifically enforceable and the remedy if any of the respondent for illegal termination of the O&M Agreement by the appellant is of recovering damages only and the respondent has no right to remain in occupation of the premises and in fact has no right to the premises and the appellant can always restrain entry of the respondent; (B) suffering irreparable injury as aforesaid of being forced to pay rent of the entire premises and forfeiting its security deposit and of litigation with the landlord, if the interim measures are not granted; on the contrary, the respondent, when it agreed to operate and manage the cafeteria in the showroom of the appellant, did not choose to acquire any right in the premises which could have been enforced by the respondent and the remedy of the respondent against the illegal termination, if any of the O&M Agreement is only for damages; reference in this regard can be made to *Indian Oil Corporation Limited Vs. Amritsar Gas Service* (1991) 1 SCC 533 and *Kashyap's Vs. Bata Indian Limited* MANU/DE/1887/2013; and, (C) the balance of convenience is thus also in favour of the appellant and against the respondent.

19. We have not felt the need hereinabove to go into the question of breaches by the respondent of the O&M Agreement, as pleaded by the appellant, because the counsel for the appellant did not argue a case of

breach.

20. The appeal is thus allowed.

21. The order dated 29th December, 2020 of the Commercial Court/ADJ, of dismissal of the application/petition under Section 9 of the Arbitration Act preferred by the appellant is set aside. The application/petition of the appellant under Section 9 of the Arbitration Act is allowed and the respondent is restrained, (a) with effect from 31st January, 2021, as sought by the counsel for the respondent, to stop operating and managing the cafeteria from the subject premises; (b) from, after 31st January, 2021, entering the premises at A-16, 29 & 30, Mayapuri Industrial Area, Phase-I, New Delhi; and, (c) from after 31st January, 2021 using the licenses for operating the cafeteria in the name of the appellant, for any purpose whatsoever.

22. We make it clear that the respondent shall be entitled to remove its belongings from the premises aforesaid and the appellant shall not interfere with the same and whatever belongings, fittings/fixtures of the respondent are left in the premises after 31st January, 2021, the respondent shall only be entitled to, in the arbitration proceedings, either claim the same from the appellant or claim the monetary value thereof.

23. We also bind the appellant with its statement, to, on or before 15th February, 2021 surrender all its rights in its lease with Universal Engineering Corporation to the said landlord along with vacant peaceful physical possession of the entire premises and restrain the appellant from, after 15th February, 2021 and for a period of three years from 31st January, 2021, carrying on any activity, in any capacity whatsoever from the

aforesaid premises, neither itself nor through its shareholders/directors/agents and/or using its corporate veil and caution the appellant and its directors/shareholders through counsel that if it is found that the want of surrendering the possession of the premises to the landlord is found to have been used as a pretence or a guise to remove the respondent from the premises, the consequences in law shall follow.

24. We may make it clear that all claims of the parties against each other, including arising from this interim order, shall be subject matter of arbitration and nothing observed herein shall have any bearing on the Arbitral Award or the proceedings.

The appeal is disposed of.

RAJIV SAHAI ENDLAW, J

SANJEEV NARULA, J

JANUARY 12, 2021
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