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

Date of Decision: 29th November, 2021

+ **ARB. A. (COMM.) 69/2021 & I.A. 15170/2021**

TRIPT SINGH AND ORS.

..... Appellants

Through: Mr. Gaurav Gupta and Ms. Isha Singh,
Advocates.

versus

RAJ BUILDERS PVT LTD

..... Respondent

Through: Mr. Sagar Chawla and Mr. Rohin
Dubey, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 [*hereinafter, the 'Act'*] impugns the Order dated 29th September, 2021 passed by the learned Sole Arbitrator under Section 17 of the Act – wherein an application filed by the Respondent (Claimant thereto) – Raj Builders Pvt. Ltd. [*hereinafter, "Raj Builders"*] against the Appellants for payment of rent, has been allowed.

FACTS

2. The facts and dispute, in brief, are as follows:

2.1. Appellant Nos. 2 and 3 entered into separate Lease Deeds dated

27th October, 2019 with Raj Builders with respect to the Basement and the First Floor of 'Plot No. 27 at Community Centre, Basant Lok, Vasant Vihar, Delhi-110057' [hereinafter, "***the Property***"].

2.2. Similarly, Appellant Nos. 4, 5 & 6 entered into separate Lease Deeds dated 27th October, 2019 with respect to Mezzanine, Second and Third Floor of the Property.

2.3. Appellant No. 1 – Sri. Tript Singh is the Director and shareholder of Appellant Nos. 2 to 6 and is a *pro forma* party to the present petition. All Appellants shall hereinafter collectively be referred to as "***Lessees***".

2.4. The Lessees contend that owing to the outbreak of the COVID-19 Pandemic and the consequent imposition of a complete lockdown in Delhi, they were not able to make payments towards rent for the leased premises. In such circumstances, *vide* separate letters dated 15th April, 2020, they terminated their respective Lease Deeds [hereinafter, "***Termination Letters***"] and vacated the Property. However, Raj Builders refused to accept the possession of the same.

2.5. On the other hand, Raj Builders contends that the Lessees have defaulted in making payments of rent and have accumulated arrears. Further, it is contended that by virtue of the lock-in period defined under the Lease Deeds, Lessees are liable to pay rent notwithstanding termination. To that effect, Raj Builders has claimed damages towards arrears of rent to the tune of Rs. 11,24,54,000/- – which includes damages towards the lock-in period to the tune of Rs. 96,38,400/- from the Lessees collectively.

2.6. Pending adjudication of claims, Raj Builders filed an application under Section 17 of the Act and *inter alia* sought directions against the

Lessees to jointly and severally pay the admitted debt of Rs. 42,65,364/- as on 31st March, 2021 [towards arrears of rent, after adjusting security deposit of Rs. 21,00,000/- and an amount of Rs. 1,00,000/- which was paid on 18th March, 2021]. The amount of debt was towards arrears of rent for: (i) the months of February, 2020 through April, 2020 for all five floors; and (ii) the months from May, 2020 through March, 2021 for the first floor and basement.

2.7. The learned Arbitrator *vide* the impugned Order dated 29th September, 2021 allowed the application to a limited extent and directed the lessees to pay rent for the period they were in possession *i.e.*, (i) the Mezzanine, Second and Third Floors up to 5th March, 2021; and (ii) the First Floor and Basement up to 31st March, 2021, barring the payments already made. The lockdown period from 23rd March, 2020 to 16th May, 2020 was excluded by the learned Arbitrator.

CONTENTIONS OF THE PARTIES

FOR THE LESSEES

3. Aggrieved with the afore-noted directions, Mr. Gaurav Gupta, counsel for the Lessees, contends as follows:

3.1. The application of Raj Builders and the consequent relief granted by the learned Arbitrator are beyond the purview of Section 17 of the Act, under which, the Tribunal could only pass an Order for securing the amount in dispute and could not direct one party to pay the disputed amount to the other as an interim relief.

3.2. The impugned Order amounts to allowing a final relief in the guise of interim relief which is not permissible.

3.3. There is no provision under the Act for seeking payment before making of the award. In order to succeed, Raj Builders has to establish a case under Order XXXVIII, Rule 5 to the Code of Civil Procedure, 1908 [*hereinafter*, “**CPC**”]. However, Raj Builders’s application under Section 17 did not contain any of the ingredient(s) envisaged in the said provision, and therefore, no relief(s) could be granted to that effect.

3.4. The Tribunal failed to consider that the Lessees had terminated their respective Lease Deeds *vide* termination notices referred above. In furtherance of such termination, the Property was vacated. Raj Builders, being in absolute control and possession of the Ground Floor of the building – which is well connected with the other floors, had complete knowledge of this fact and yet did not accept the possession.

3.5. The Tribunal has erred by not appreciating the judgment of the Division Bench of this Court in the case of ***Associated Journals Ltd. v. ICRA Ltd.***¹

3.6. The Tribunal ought to have appreciated that the Lessees were forced to close their business. They also informed Raj Builders that they would vacate three out of five floors. However, Raj Builders refused to accept possession of the same. Therefore, they cannot claim rent for the remaining period.

FOR RAJ BUILDERS

4. *Per contra*, Mr. Sagar Chawla, counsel for Raj Builders, contends that the jurisdiction of this Court to grant orders in landlord-tenant disputes has

¹ 2012 SCC Online Del 1524.

been well-settled in view of the decision of the Division Bench of this Court in **Ramanand & Ors v. Dr Girish Soni & Anr.**,² where it has been held that under Section 9 of the Act, directions for payment of rent can be issued, having regard to the provisions of Order XXXIX, Rule 10 read with Order XV-A of the CPC.

ANALYSIS

5. In the instant case, the Lease Deeds provided for a lock-in period of two years. The actual vacant physical possession of the Mezzanine, Second and Third Floor was handed over by the Lessees to Raj Builders on 5th March, 2021 and the Basement and First Floor were handed over on 31st March, 2021. This fact is undisputed, as is evident from the orders passed by this Court in the petition under Section 9 of the Act. Now, when the Arbitrator was considering the relief of payment of arrears of rent, in light of the admitted position, he relied upon Order XXXIX, Rule 10 read with Order XV-A of the CPC and ordered the Lessees to make good the admitted rent – till the date of handing over of the actual vacant physical possession. The aforesaid directions have been issued keeping the other disputed issues pending for adjudication at a later stage. This becomes apparent from the observations made in paragraph 31 of the impugned order, which reads as follows:

“31. The only other ground urged by Learned counsel for the respondent is that allowing this application would amount to passing an award as the subject matter of the interim application and the final relief claimant is the same. I find no merit in this submission for the reason that during the course of hearing the Learned counsel for the claimant had very fairly submitted that he is not claiming any interim amount for the lock in period at this stage nor interest as per the table filed and extracted in this order. The Tribunal is not inclined to pass any order at this stage with regard to payment of interest on delayed payments. The tribunal is also not

² 2020 SCC Online Delhi 635.

inclined to pass any order with regard to payment of rent during the lockdown period i.e. 23.03.2020 to 15.05.2020 in view of the notification of the government. All the above 3 issues are kept open to be decided at the final stage. Thus, it cannot be said that the relief sought in the present application and the final award would be the same.”
[Emphasis supplied]

6. The liability of the Lessees, if any, to make the payment during the lockdown period from 23rd March, 2020 to 16th May, 2020 has been excluded. Besides, no directions have been issued for the payment of the unexpired lock-in period or the interest thereon, as noted in paragraph 31 of the impugned Arbitral Order. In effect, all three issues *i.e.*, the liability to pay the rent for: (i) the unexpired lock-in period; (ii) rent during the lockdown period *viz.* 23rd March, 2020 to 16th May, 2020; and (iii) interest on delayed payments – have been kept open, to be decided at the final stage.

7. Thus, the direction to pay arrears on the basis of last admitted rent is only for such period the Lessees were in actual possession of the Property *viz.* for the Mezzanine, Second and Third Floors up to 5th March, 2021 and for the First Floor and Basement up to 31st March, 2021. Therefore, the short question that arises for consideration is whether Raj Builders had made out a case for invoking Order XXXVIII, Rule 10 read with Order XV-A of CPC. On this issue, as noted above, parties are not at variance on the factum of execution of the Lease Deeds, the last paid rent and the date of handing over of actual possession. The only contention that merits the consideration of this Court is whether the communication dated 15th April, 2020, issued by the Lessees amounts to the surrender of possession and absolves them of their liability to pay such rent. On this issue, considerable reliance has been placed on the judgment of this Court in *Associated Journals Ltd.* (*supra*).

8. The aforesaid judgment is distinguishable on facts. In the said case, the lessee insisted that it was no longer interested in continuing with the lease and informed the appellant therein that it had moved out to another premises. When seven days expired after the lease was determined, the lessee therein asked the appellant to take vacant possession of the tenanted property. On such facts, the Court held as under:

“Vacation of a leased property by the lessee together with a notice to the lessor to take delivery of the possession would sufficiently discharge the lessee of any further obligation to pay the rent and any impediment put by the lessor in the matter of delivery of possession would amount to possession being delivered and it shall be deemed for all purposes that as soon as the property was vacated and possession offered, constructive possession would be with the lessor. Even if the lessor has any claim, by way of damage to the property or otherwise, the right of lessor is not to decline to receive possession and then insist that further lease rental had accrued each month.”

9. However, in the instant case, the letter dated 15th April, 2020, is only *qua* termination of lease, as is apparent from the tenor of the letter, the operative portion whereof reads as under:

“[...] In light of the above and the current grave circumstances in the country, we are within our right to invoke the force majeure clause. Accordingly, we shall not be able to make Payments of the lease rental, from March, 2020 until the lockdown restrictions are completely lifted by the concerned Government authorities (the “Rent Free Period”).

The COVID-19 pandemic has disrupted the functioning of the store and has already caused immense loss and injury to the Company. Therefore, we request you to waive the lease rental payable by us to you for this aforementioned Rent-Free Period, and the same will not be construed to be a breach of the Lease Agreement. We request you to consider the complications (including, without limitation, the financial problems) faced by us during these grave and difficult times and provide the aforementioned waiver of the lease rental.

Kindly treat this as our formal notice in respect of invocation of the force majeure event as required under the Lease Agreement. We look forward to your full cooperation in this regard and continue to maintain our long-standing business relationship.”

10. The aforesaid communication cannot discharge Lessees’ obligation to

pay rent. Raj Builders have argued that possession was never delivered and they were, in fact, constrained to file a suit for recovery of possession. In light of the same, the learned Arbitrator has also observed as under:

“The Respondent has failed to place any law on the subject that by terminating the tenancy, the onus automatically falls on a landlord to come and take physical possession of the property.”

11. The learned Arbitrator has also taken into consideration the communication dated 15th April, 2020 and also noted that there are no other documents to show that the Lessees ever called upon Raj Builders to accept physical possession of the building in question. Further, Raj Builders’ notice dated 14th July, 2020 calling upon Lessees to handover physical possession of the entire building has also been taken note of. Relevant observations and *prima facie* findings of the Tribunal on this issue, read as follows:

“30. This submission of the learned counsel for the respondent that by terminating the tenancy the onus to take possession is on the landlord is without any force. The respondent has failed to place any law on the subject that by terminating the tenancy the onus automatically falls on a landlord to come and take physical possession of the property. This submission of the learned counsel for the respondent also fails for the reason that after the communication of 15 April 2020 there is no document placed on record to show that the respondent ever called upon the claimant to except physical possession of the building in question. It may be noted that in response to the communication of 15 April 2020 the claimant by email dated 11 June 2020 informed the respondent that in view of clause 2 of the lease agreement, the lease agreement could not have been terminated during the initial period of 2 years that is the lock in period. Further by a legal notice dated 14 July 2020 the claimant called upon the respondent to hand over physical possession of the entire building to the claimant. Postal receipts and tracking reports have been placed on record to show that the legal notice was received by the respondents. No reply has been placed on record to show that the legal notice was either acknowledged or the respondent refuted the claim of the claimant with regard to the possession. In case the intention of the respondent was bona fide to hand over the possession then respondent would have fixed the time and date for handing over possession. No such communication has been placed on record on the contrary the claimant called upon the respondent by a legal notice to hand over possession but no reply was given to the legal notice. In case according to the respondent the respondent had already handed over possession the respondent would have informed the claimant of the same. Accordingly, the only conclusion which can be drawn is that the possession was handed over on the two dates that is March 5th and March 31st, 2021.”

12. There is no perversity in the above observations. Next, as regards the scope of the jurisdiction of the Tribunal under Section 17 of the Act, the Court is of the opinion that Section 17 expressly provides that while the arbitral tribunal is exercising power thereunder, it shall have the same power as it has in relation to any proceedings before it and which in the opinion of the Court would include the powers under Order XXXIX Rule 10 and under Order XV-A of the CPC. A division bench of this court, in the case of ***Value Source Mercantile Ltd. v. Span Mechnotronix Ltd.***,³ rendered in the context of Section 9 of the Act which has a *para materia* provision, has taken the same view as well.

13. The Court also does not find merit in the contention of the Lessees that such a direction could not have been issued unless Raj Builders satisfied the test of Order XXXVIII Rule 5 CPC to secure the amount in dispute. The directions of the Tribunal are akin to exercise of power under Order XXXIX Rule 10 and under Order XV-A of the CPC, and thus, reliance on Order XXXVIII Rule 5 was not necessary. Equally, the contention that a final relief has been granted at an interim stage is also misplaced. Order XXXIX Rule 10 of the CPC empowers the Arbitrator to direct deposit/payment of admitted amounts. Besides, as the only defence to avoid payment was found to be contrary to law, the arbitrator could issue directions under Order XV-A of the CPC. The merits of the claims of parties as noted in the last paragraph of the impugned order would be adjudicated at the final stage. Thus, the afore-noted conclusion drawn by the Tribunal on the basis of the material on record is completely justified and the Court finds no ground to interfere with the same.

³ MANU/DE/1318/2014.

14. In view of the above, there is no merit in the present petition and the same is dismissed along with pending application.

SANJEEV NARULA, J

NOVEMBER 29, 2021

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(corrected and released on 11th December, 2021)

