

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Original Side)

APO 97 of 2021
With
AP 257 of 2021

Reserved on: 18.11.2022
Pronounced on: 12.12.2022

Bimla Devi Jaiswal

...Appellant

-Vs-

M/s. Indus Towers Limited

...Respondent

Present:-

Mr. S.N. Mitra, Sr. Advocate
Mr. Atish Ghosh,
Mr. Arindam Chandra,
Ms. Sumana Biswas, Advocates
... for the appellant

Mr. Shaunak Ghosh,
Mr. Rajib Mullick,
Ms. Sreyasi Maity, Advocates
... for the respondent

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE

Prakash Shrivastava, CJ:

1. By this appeal under section 37 of the Arbitration and Conciliation Act, 1996 appellant has challenged the order of the Trial Court dated 19th of July, 2021 whereby AP 257 of 2021, an application filed under Section 9 of the Act has been dismissed.

2. Appellant had filed the application under Section 9 of the Act with the plea that the appellant had exclusive roof right of the premises No. 243/2M, Acharya Prafulla Chandra Raod, Kolkata and that the predecessors in interest of the appellant being Smt. Duija Devi Shaw had entered into an agreement on 19th of January, 2001 with the respondent for installation of the mobile tower on the roof of the said premises and Rs. 18,000/- was agreed towards the monthly license fee and service charges, in addition to the security deposit of Rs. 64,000/-. The supplementary agreement was executed co-terminus with the principal agreement. In the application under Section 9 of the Act, the appellant had alleged that the respondent had not paid rent from 2018 till date, therefore, a prayer was made to direct the respondent to deposit a sum of Rs. 12,88,877.28/- as arrear rent, Rs. 83,270.16/- towards occupational charges every month from the month of January, 2021 till date. The prayer was opposed by the respondent and learned Trial Court by the impugned order has rejected the application.

3. Learned Counsel for the appellant submits that there exists an arbitration agreement and that the respondent has not paid the rent and the occupational charges though he is using the terrace as per the agreement. He has further submitted that for the agreement period, the respondent is liable to pay the arrear of rent and for the period subsequent to the expiry of agreement he is liable to pay the occupational charges and that at least for the occupational charges appellant cannot be made to wait till the passing of the award in arbitral proceedings.

4. Per contra, learned Counsel for the respondent has submitted that there was obstruction by the residents association as the appellant

has no exclusive roof right, therefore, respondent is now paying rent to the residents association. He has disputed existence of the arbitration agreement and has submitted that suit is still pending and if the appellant succeeds in the suit, the respondent will pay the amount to the appellant. He has also submitted that respondent was obstructed from use of the roof and that there was an order of status quo passed in the suit due to which appellant had no exclusive right but this order was not disclosed to the respondent and it is not a case for interference in appeal against the order of the Trial Court.

5. We have heard the learned Counsel for the parties and perused the record.

6. Hon'ble Supreme Court in the matter of **Wander Ltd. and Another vs. Antox India P. Ltd.** reported in **1990 (Supp) SCC 727**, in the matter of **Shridevi and Another vs. Muralidhar and Another** reported in **(2007) 14 SCC 721**, in the matter of **Skyline Education Institute (India) Private Limited vs. S.L Vaswani and Another** reported in **(2010) 2 SCC 142** has settled that Division Bench hearing the appeal against the exercise of the discretion by the Single Judge should not interfere with the exercise of discretion of the Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercise arbitrarily, or capriciously or perversely or where the Court had ignored the settled position of law regulating grant or refusal of interlocutory injunctions. Such appeals are said to be appeal on principle.

7. Having examined the order of the learned Trial Court in the light of the aforesaid limited scope of interference, we find that learned Trial Court has assigned due and cogent reasons for rejecting the

application under Section 9 of the Act. Learned Trial Court has noted that the appellant had mainly claimed the relief in the nature of monetary compensation on account of license fee till 31st of December, 2020. Considering the exchange of letters, it has been noted that rent in respect of mobile tower had continued to remain obstructed. Letter of the petitioner's lawyer dated 14th of November, 2018 has been taken note of wherein it has been recorded that the petitioner did not have access to the roof of the premises. In the said background, learned Trial Court has found that the matter related to payment of arrear of rent or occupational charges is a matter which can be sorted out in arbitration and no interim order of protection is called for.

8. Undisputedly, the arbitration agreement has expired on 30th of December, 2020. The averments in the application under Section 9 reveal that the appellant has claimed the rent for the agreement period from May, 2018 till December, 2020, but no notice demanding the rent for that period was issued within a reasonable time. The pleadings clearly reveal that a belated notice was subsequently issued. The letter of the respondent dated 3rd of September, 2018, appellant's reply dated 14.11.2018 and reply to the demand notice dated 27th of July, 2019 clearly reveal that the respondent did not have unobstructed access to the roof. Appellant also did not have the access, therefore, she had filed the Civil Suit. The order dated 22nd of November, 2018 passed in Title Suit No. 1401 of 2017 reveals the dispute between the appellant and other flat owners in respect of the roof right and by the said order the competent Court had directed the parties to maintain status quo, nature, character and access right of both parties of the suit premises. Hence, the plea of the respondent that on account of subsisting dispute the

respondent is paying rent to the other residents/residents of association comes in way of the appellant in claiming the interim relief under Section 9. In support of the plea that all the flat owners have common roof right, Counsel for the respondent has pointed out Section 3(d)(2) of the West Bengal Apartment Ownership Act, 1972. That apart, there is also an issue of existence of arbitration agreement and non-payment of the stamp duty on agreement which we are refraining from entering into because application under Section 11 of the Act is already pending and the competent Court will examine the same. The claim of the appellant relating to rent or occupational charges will duly be adjudicated in the arbitration proceedings/in the Civil Suit and if found entitled she will have remedy to recover it from the respondent. There is no plea of any financial difficulty or insolvency of the respondent in satisfying such an award or decree if passed.

9. Counsel for the appellant has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Sarup Singh Gupta vs. S. Jagdish Singh and Others** reported in (2006) 4 SCC 205, but said judgment stands on a different footing as the proposition settled therein is that mere fact that rent has been tendered and accepted after service of notice, cannot be determinative of the intention of the landlord about waiver. He has also placed reliance upon the Division Bench judgment of this Court in the matter of **Murlimal Santram & Co. vs. Bata India Limited** reported in AIR 2013 Cal 102 and the Single Bench judgment of this Court in the matter of **Green Band Apartments Private Limited and Others vs. Mint Matrix and Others** reported in 2021 SCC OnLine Cal 428 in support of his claim for payment of occupational charges, but having regard to the facts of

the present case, especially the material relating to obstruction to access the roof and plea of payment of rent to the other residents by the respondent, the benefit of the judgments cannot be granted to the appellant.

10. Thus, we find no error in the order of the learned Single Judge. No ground to interfere in this appeal is made out, which is accordingly dismissed. The respondent is entitled to receive back the amount with interest, deposited in pursuant to the order of this Court dated 16th August, 2021.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
12.12.2022

PA(SS)

(A.F.R. / N.A.F.R.)