

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

% Date of Reserve: 10th October, 2022
Date of Decision: 15th December, 2022

+ **OMP(I)(COMM.)189/2022, IA 9576/2022, IA 9577/2022, IA 9578/2022**

**M/S SEGROW BIO TECHNICS INDIA
PRIVATE LIMITED**

..... Petitioner

Through: Vaibhav Gaggar, Taurab Ali Kazmi,
Yash Badkur, Utkarsh Singh, Shivani
Sethi, Akash Chatterjee, and Dev
Karan Singh, Advocates.

versus

**M/S AFFORDABLE INFRASTRUCTURE AND HOUSING
PROJECTS PRIVATE LIMITED**

..... Respondent

Through: Sameer Jain, Himesh Thakur and
Tanya Mittal, Advocates.

**CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA**

J U D G E M E N T

1. A petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") has been filed by the petitioner seeking interim measures for directing the respondent to secure the outstanding rents.
2. The facts in brief are that the petitioner is the owner of the building bearing Industrial Plot No.445, Phase-V, Udyog Vihar, Gurugram, Haryana

and has leased out ground to fourth floor vide Lease Deed dated 28th September, 2017 and the liability to pay rent was to commence from 15th November, 2017. There was a lock-in period of three years. Subsequently Addendum Lease Deed was executed on 07th December, 2017 under which, the rent commencement date was extended till 10th January, 2018. Simultaneously, the possession of the Lease Deed was handed over to the respondent. The monthly rent of the premises was:

- (i) Rs.32,10,000/- for the first three years w.e.f 15th November, 2017,*
- (ii) Rs.36,91,500/- for the second three-year term w.e.f 15th November, 2020;*
- (iii) Rs.42,45,225/- for the third-three year term w.e.f 15th November, 2023; and*
- (iv) Rs.48,42,009/- for the fourth-three year term w.e.f 15th November, 2026.*

3. The petitioner has claimed that the complete payment of rent has not been received from April, 2020 till March, 2021 and again from January, 2022 to May, 2022, despite the premises having been further sub-leased by the respondent. The amount due under the Lease Deed till May, 2022 is Rs.3,45,63,515/- along with interest of Rs.58,18,234/- calculated @ 12% per annum.

4. The petitioner has further stated that the front portion of the fifth floor was also leased out to the respondent vide Lease Deed dated 22nd May, 2019 at a monthly rent of Rs.4,60,000/- for the first two years w.e.f 01st June, 2019, Rs.5,06,000/- for the second two year w.e.f 01st June, 2021, Rs.5,56,600/- for the fifth year w.e.f 01st June, 2023. The respondent,

however, has failed to make any payment towards the rent since the date of taking possession on 22nd May, 2019. A total sum of Rs.6,50,36,268/- is due and payable till May, 2022 towards rent along with interest @ 12% per annum, which the respondent has failed to pay despite continuous follow up.

5. The petitioner has sent two Legal Notices dated 16th February, 2022 pertaining to non-payment of rent in respect of the two Lease Deeds. The respondent has replied vide letter dated 12th May, 2022 and has given its own concocted version of the terms of the Lease Deeds and has claimed that the petitioner owes them sums of money towards maintenance charges in respect of the fifth floor Lease Deed. No payments have been made by the respondent towards rent for the tenanted premises on the fifth floor on the pretext that the petitioner had failed to procure the Occupancy Certificate (OC) within the prescribed timeline in accordance with recital B in the Lease Deed which provided that the OC was to be obtained within thirty days plus a grace period of fifteen days from the date of execution of the Lease Agreement. It is asserted that the respondent has not only been in possession of the suit premises irrespective of the OC Certificate but has even sub-leased the same which amounts to waiver of the performance of Recital B by conduct by the respondent. Reliance has been placed on M/s Motilal Padampat Sugar Mills Co. (P.) Ltd. vs. State Of Uttar Pradesh And Ors., 1979 SCR (2) 641 and Kalpraj Dharamshi and Ors. vs. Kotak Investment Advisors Ltd. and Ors., (2021) 10 SCC 401.

6. It is claimed that the respondent had occupied the fifth floor despite being aware that the OC had not been obtained and thus, he is now estopped from claiming that he is not liable to pay any rent. Reference has also been made to Ramdev Food Products (P) Ltd. v. Arvindbhai Rambhai Patel.

(2006) 8 SCC 726, wherein the Supreme Court had observed that if a person alters its position with respect to fulfilling his obligation, such person after alteration cannot revert to its previous legal position.

7. It is further asserted that respondent has failed to mention in their reply dated 12th May, 2022 that they have been recovering rent from their sub-tenants from the date of Lease Deed No.2 in respect of fifth floor. The petitioner vide email dated 22nd March, 2019 had mentioned to the respondent that if they would receive any rent from the sub-lessee, then the rent liability under the Lease Deed must be discharged. The respondent is liable for unjust enrichment in regard to non-payment of the rent.

8. It is claimed that the respondent is liable to pay the complete rent due for the leased out property on the fifth floor. In regard to Lease Deed 1 in respect of ground to fourth floor, it is submitted that the complete rent has not been paid, but only part payment has been made since April, 2020 despite regular follow up.

9. The petitioner has placed reliance on **Baby Arya vs. Delhi Vidyut Board**, AIR 2002 Delhi 50 of this Court to argue that a person is entitled to interim protection only if the other party is in breach of the terms of the Agreement and it militates against equity, fair play or natural justice. The respondent is clearly in breach of its obligations to pay the rental dues and, therefore, the petitioner is entitled to interim protection for securing its financial sums due under the Lease Deeds. Reliance has also been placed on **Vishal Retail vs. Kataria Automobiles**, 2010 (3) Arb LR255 (Gujarat), wherein similar facts were considered and by way of some security measures the interim relief application was allowed and was directed to execute solvent security in the sum of Rs.2.5 crores. It was held that the

interim orders in the facts and circumstances of the case that were made out as equitable and fair play, required some protection to be given to the rights of the respondent or else the arbitration proceedings shall become nugatory.

10. In **Nepa Limited vs. Manoj Kumar Agrawal**, AIR 1999 MP 57 it was held that it is necessary to safeguard and preserve the subject matter of the Contractor and directed that the Company should preserve the contracted quantity of Coal Ash after due measurement and keep the security amount safe in the nationalized bank.

11. It was submitted that on account of conduct of the respondent in defaulting in making payment of the rent, the respondent be asked to secure the outstanding amounts.

12. The **respondent has contested the application** and has taken a plea in its Reply that the present petition is pre-mature as even after lapse of three months from the date of filing of the present petition, the petitioner has failed to invoke arbitration under Section 21 of the Act or to make pleadings to establish existence of a manifest intention to take recourse to an arbitral proceeding within reasonable time as is held in **M/s Sundarum Finance Ltd. v. M/s NEPC India Ltd.** AIR (1999) SC 565. Furthermore, the respondent denied the existence of any dispute of any nature between the parties and challenged the maintainability of the present petition. In order to get an interim relief, the petitioner is required to make out a *prima facie* case and the interim orders cannot be made mechanically in exercise of powers under Order XXXVIII Rule 5 CPC which is a drastic and extra ordinary power.

13. It is asserted that *no prima facie* case is made out by the petitioner. Neither has it been able to establish the existence of disputed facts nor any

material/ evidence has been placed on record to establish the case in favour of the petitioner. There is no exceptional case set out. The balance of convenience also does not lie in favour of the petitioner and the petition is liable to be dismissed.

14. **On merits**, it has been explained that in April, 2020 due to the COVID-19 Pandemic the world came to a halt. In order to combat and safeguard the public, Government all across the world as well as the courts of the nation imposed several guidelines which emphasized on social distancing and Nationwide curfews. Pursuant to this unfortunate development, many of the sub-tenants of the respondent failed to make due payments. Because of this financial constraint, the respondent approached the petitioner seeking waiver of monthly rental payment by invoking Clause 14 of the Agreement providing for *Force Majeure* and sought suspension of rent and subsequently sought waiver in terms of email dated 16th April, 2022.

15. It is claimed that the waiver request of the respondent was responded to by Mr. Gokul Patnaik, representative of the petitioner who agreed to receive payments of proportionate rentals in accordance with the rental amounts received by the respondent from its sub-tenants. The respondent vide email dated 18th April, 2020 informed the petitioner that the respondent was still assessing the situation and was in the process of settlement talks with its sub-tenants to reach a win-win situation. The respondent assured that he would get back to the petitioner with clarity and transparency of the details of sub-tenants along with their rent structure. Thereafter, since the rentals were not coming from the sub-tenants, the parties agreed that the payment of proportionate rent by the petitioner shall be suspended, in light

of *Force Majeure* Clause due to COVID-19 Pandemic. However, respondent vide email dated 25th June, 2020 reassured the petitioner that they will honour their deal of proportionate rent as and when the rent was received from the sub-tenants. The respondent also shared the list of names of few sub-tenants who had already vacated the space due to COVID-19 Pandemic and informed about the major cash crunch. As the proportional rent was directly dependent upon the rent received by the respondent from its sub-tenants, it became necessary for the respondent to inform the petitioner about the complete situation.

16. The respondent vide email dated 01st July, 2020 and 23rd July, 2020 informed the petitioner about the worsening financial situation on account of COVID 19 Pandemic and that it was able to receive only 30% to 40% of rental for the month of April, 2020 with a further decline reckoned in the rent for the month of May and June, 2020. However, the respondent in view of its commitment and assurances released 30% of the proportionate share of the rent for the months of April to June, 2020. It is asserted that there is no deficit in making payment to the petitioner and nothing is due and payable in terms of the Invoices raised by the petitioner and in view of the explicit understanding between the parties.

17. In respect of the Lease Deed pertaining to the front portion of the fifth floor, it has been claimed that no rent in respect of fifth floor is being paid since the petitioner had failed to procure the OC within the prescribed timeline in accordance with recital B in the Lease Deed which provided that the OC was to be obtained within thirty days, plus a grace period of fifteen days from the date of execution of the Lease Agreement. Approximately Rs.46,19,409/- was spent by the respondent in developing the office space

for the petitioner on the fifth floor according to its instructions and specifications. Despite the amount becoming due and payable in 2019, the petitioner has been using the developed office but has failed to make any payment to the respondent. Further, as per Clause 17(2) of the Lease Deed, the petitioner was to pay the Maintenance Charges for the fifth floor that was retained by it for its own use and occupation. The Maintenance Charges are payable by the respondent since 2019.

18. It is further claimed that a sum of Rs.2,46,54,519/- has already been invested by the respondent at the behest of petitioner on its representation that the OC shall be obtained, which it has failed to do and therefore, it is not liable to pay any rent.

19. The respondent in its email dated 17th April, 2019, had informed the petitioner that out of 19 tenants in the building, 60% sub-tenancy has been terminated and remaining 40% tenants are remitting the rentals worth nickels and dimes since March, 2020 and there is ongoing litigation against the sub-tenants. There were also prolonged negotiation settlements being made with the sub-tenants who had defaulted in making payment of the rent.

20. It is stated that vide letter dated 02nd December, 2020, petitioner claimed enhanced rent for the second three year term and the balance interest free, refundable security deposit, and also sought details about the sub-tenants. The details about the sub-tenants were shared by the respondent through its letter dated 22nd January, 2021. Meetings were held between the representative of the petitioner and the respondent and the final outstanding rent in proportionate value was shared with the petitioner, who acknowledged the outstanding balance as Rs.31,13,700/- in its letter dated 31st January, 2021. The same was reiterated in the email dated 11th February,

2021. However, the petitioner sent a letter dated 09th July, 2021 making illegal demands of the outstanding rentals in respect of fifth floor Lease Deed, which is not payable by the respondent on account of not obtaining the OC. It is claimed that no amounts are outstanding or payable by the respondent and the claims made by the petitioner are without any basis and the petitioner is not entitled to any interim relief as is claimed by it.

21. **Submissions heard.**

22. It is not in dispute that the respondent was inducted as a tenant in the premises owned by the petitioner and that there are disputes in regard to payment of rent. While the respondent has denied its liability to pay the rent for the fifth floor by claiming breach of terms by the petitioner, it has claimed remission in rent in respect of tenancy of ground to fourth floor on account of Covid-19 Pandemic and has sought to invoke the *Force Majeure Clause*.

23. The respondent has taken a plea that Clause 14 of the Lease Deed provided for *Force Majeure*, which reads as under:-

"14. Force Majeure

That any act of God viz: flood, fire, earthquake, tempest or any other reason beyond the reasonable control of human being shall construe Force Majeure and if the Leased Property of any part thereof cannot be used or occupied by the Lessee for the reason of force majeure or if the leased Property or any part thereof is relinquished, sealed or rendered unfit for use and occupation by any statutory authority and/ or municipality, Lessee shall not be liable to pay any Rent or any other amount, whatsoever, to the Lessor for such period. The Lessee shall not be responsible for any loss or damage to the Leased Property resulting due to force majeure, notwithstanding anything contained herein."

24. It has been argued that on account of the complete lockdown due to the COVID 19 Pandemic, the respondent suffered huge losses as many sub-tenants left and were not able to make payment of the rent. In view of the specific clause, it was agreed between the parties that there would be reduction in payment of rent as is evidenced from the emails dated 16.04.202, 17.04.2020, 23.07.2020 the respondent therefore, agreed to payment of reduced rent during the COVID period and it has no liability to pay the rent for the intervening period as is claimed by the respondent.

25. Learned counsel for the petitioner has countered it by saying that Clause 14 providing for *Force Majeure* cannot be invoked by the petitioner for the simple reason that the business may have become onerous for the petitioner on account of COVID-19 Pandemic. It is not his case that he was unable to use his premises or had sought closure of the Lease Agreement on account of invocation of Clause 14.

26. In the present case, though the respondent has sought to invoke Clause 14 of *Force Majeure*, it is his own case that he faced extreme financial constraints because of the lockdown and had requested the respondent for a cut in the rent and it was agreed between them that the rent payable to the respondent shall be proportionate to what is received from the sub-tenants. What was the agreed rent, reduced rent and whether the entire amount has been paid in terms of subsequent agreement between the parties, are all the issues to be decided by considering the rival contentions of the parties. Moreover, the respondent has contended that the reduced rent was accepted only as an interim measure but there was no agreement that the

petitioner shall not be liable to make good the deficit rent once the situation improved.

27. In **Ramanand and Ors. Vs. Dr. Girish Soni and Anr.**, RC Revision No 447/2017 decided by this Court on 21st May, 2020, a similar question was raised. It was observed that where there is a Contract, whether there is a *Force Majeure* Clause or any other condition that could permit waiver or suspension of the agreed monthly payment, would be governed by the contractual terms.

28. The Supreme Court in **Energy Watchdog Vs. CERC & Anr.**, (2017) 14 SCC 18 had held that the express or the implied terms relating to *Force Majeure* shall be governed by Section 32 of Indian Contract Act, 1872 which provides for enforcement of Contract contingent on an event happening. Section 56 of the Indian Contract Act, 1872 deals with impossibility of performance which would apply in cases where *Force Majeure* event occurs outside the Contract. The fundamental principle would be that if a Contract contains a clause providing for waiver or suspension of Contract, only then the same can be claimed by the tenant. The *Force Majeure* Clause in the Contract could only be a contingency under Section 32 which may allow a tenant to claim the Contract to be void or surrender the premises. However, if the tenant wishes to retain the premises and there is no clause giving respite to the tenant, the rent of the monthly charges would be payable.

29. In **Raja Dhruv Dev Chand Vs. Raja Harmohinder Singh & Anr.**, AIR 1968 SC 1024, the scope of the concept of frustration as embodied in Section 56 of the Contract Act was explained. In the context of a dispute when tenant sought refund of rent which he was unable to utilize in 1947-

1948 on account of partition, the Supreme Court held that Section 56 lays down a positive role relating to frustration of contract and the Courts cannot travel outside that Section. It also held that Section 56 does not apply to Lease Agreements. It is only if a covenant under a Lease to do an act becomes impossible by reason of some event which the promiser could not prevent that the Contract becomes void as the act has become impossible or unlawful.

30. In **Hotel Leela Ventures Ltd. Vs. Airport Authority of India**, 2016 (160) DRJ 186, reference was made to **Raja Dhruv Dev Chand (supra)** and it was observed that a Contract for Lease whereunder the lessee obtains possession from the lesser, is an executed Contract and during the duration of Lease, the agreed consideration has to be paid and it hardly matters that rents have fallen in the meanwhile. A tenant cannot seek discharge merely because it turns out to be difficult or onerous for one party to perform and none can resile from the Contract for the said reason.

31. In **Ramanand (supra)**, it has been further held that the protection under Section 108 of Transfer of Property Act, 1882 can be sought by the tenant only when there is complete destruction of the property which is permanent in nature due to *Force Majeure* event. Otherwise, the benefit of this Section cannot be invoked by the lessee. Temporary non-use of premises due to lockdown cannot be construed as rendering the Lease Agreement void under Section 108 of Transfer of Property Act, 1882.

32. In **Evergreen Landmark Pvt. Ltd. Vs. John Tinsen & Company Pvt. Ltd.**, Civil Appeal No.2783/2022, Supreme Court of India considered the question of deposit of rental amount during the period between March, 2020 to December, 2021. An arbitrable dispute was raised in regard to termination

of Lease Agreement and the deposit of rent for the said period was sought under Section 17 of the Arbitration & Conciliation Act. It was observed that suspension of rent may be sought by a tenant only for the period when there was complete closure due to lockdown which was between 22nd March, 2020 to 09th September, 2020, 19th April, 2021 to 28th June, 2021 and 11th January, 2022 to 27th January, 2022. For the remaining period, the restaurants were allowed to be run with the capacity of 50%. Therefore, the rent for the remaining period except for which there was complete closure was held to be justified though a concession was sought to be given in respect of the period for which there was a complete lockdown.

33. In **Aryan Hospitality Management Services Pvt. Ltd. Vs. K.M. Dhoundiyal & Anr. Arb.(COMM) 6/2017**, the lessee had sought avoidance of payment of rent on the ground of not being provided with a water connection and for inability of the tenant to obtain the requisite permissions for running the restaurant. It was held that *Force Majeure* Clause would be applicable only if for the reasons beyond the control of the parties, they are unable to perform their obligations and in such an event the lessee would have an option to either cancel the agreement or suspend the same. In either case, lessee cannot avoid its payment obligations. If it seeks to retain the possession of the property, it is not open to the lessee to suspend its obligations only. Furthermore, if the lessee was unable to obtain necessary permissions for running the restaurant, then there is no possible justification for the lessee to continue to retain the possession of the same. In these circumstances, it was held that the tenant cannot seek avoidance of payment of rent.

34. In view of the aforementioned judgments and the disputed facts about the due amount, no Order under Section 9 of the A & C Act is merited at this stage but the parties may seek interim relief before the learned Arbitrator by moving an appropriate application.

35. In the facts in hand, there is a dispute being raised in respect of payment of part rent pertaining to the COVID period for which the liability is sought to be avoided on account of novation/ modified terms of rent payment. During the course of arguments, a joint request has been made by both the parties that since they both are making claims for the amounts under this Lease Agreement which contained an Arbitration Clause, an Arbitrator may be appointed.

36. For the aforesaid reasons, the petition is disposed of with the following directions :

- a. Keeping in consideration, the submission of the parties, that an Arbitrator be appointed to adjudicate the disputes between the parties, Hon'ble Mr. Justice R.C. Chopra, (Retired), Delhi High Court (Mobile No. 9818097777) is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.
- b. At the suggestion of learned Counsel for the parties, it is directed that the arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi.
- c. The learned Arbitrator is requested to make a declaration in terms of Section 12 of the Act prior to entering upon the reference.
- d. The remuneration of the learned Arbitrator will be computed in terms of Schedule IV of the Act, or as consented by the parties.

e. A copy of the Order be sent to learned Arbitrator, for information.

37. It is made clear that the rights and contentions of the parties are left open, including any plea raised by the parties as to the arbitrability of any particular claim made, before the learned Arbitrator.

(NEENA BANSAL KRISHNA)
JUDGE

DECEMBER 15, 2022

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