

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

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

+ **OMP (I) (COMM.) NO.288/2022, IA 16397/2022 & IA 16398/2022**

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

..... Petitioner

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

versus

M/S SEGROW BIO TECHNICS INDIA PRIVATE LIMITED

..... Respondent

Through: Vaibhav Gaggar, Taurab Ali Kazmi,
Yash Badkur, Utkarsh Singh, Shivani
Sethi, Akash Chatterjee, and Dev
Karan Singh, 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"*) for seeking ad-interim injunction against the respondent from acting upon the Termination Notice dated 27th September, 2022 and to desist from making any direct communication with the petitioner's sub-tenants.

2. The petitioner executed a Lease Deed dated 22nd May, 2019 with the respondent for the commercial property in respect of the front portion of the fifth floor of Industrial Plot No.445, Phase-V, Udyog Vihar, Gurugram, Haryana, (hereinafter referred to as “*the leased premises*”). The petitioner’s business model involved leasing out commercial properties on long term lease permitting further sub-lease of the property to prospective sub-tenants at a higher rental by refurbishing the property and providing fully customized commercial space as per the specifications and requirements of its clients/ sub-tenants.

3. It is submitted that the respondent is the absolute owner of the leased property and after rounds and negotiations and discussions, the parties entered into the Lease for a period of five years commencing from 01st June, 2019. The lock-in period was of five years from the rent commencement date, renewable on mutually agreed terms. Accordingly, the lease premises were given to the petitioner, who undertook heavy expenditure in refurbishing the leased premises. A total sum of Rs.2,46,54,519/- has been invested by the petitioner on the representations of the respondent.

4. One of the mandatory preconditions under the Lease Deed was for the respondent to obtain an Occupation Certificate (OC) within thirty days plus grace period of 15 days from the execution of the Lease Agreement. However, the OC has not been procured putting the petitioner under high risk due to the Indemnification Clause contained in the sub-leases executed by it with the sub-tenants.

5. It is asserted that the payment obligation of the petitioner was subject to the fulfilment of the obligations by the respondent. Since it failed to

procure OC, it was not entitled to raise invoices nor were they ever raised in respect of fifth floor.

6. Furthermore, the respondent had taken a portion of leased premises to be used by it for its own office space. The petitioner has claimed that it has invested about Rs.46,19,409/- in developing the office space of the respondent on the fifth floor despite for which it was under an obligation to make payment *dehors* the payment obligations of the petitioner under the Lease Deed. However, the respondent never paid any rent/ maintenance charges for the usage of office space for its personal use which was developed by the petitioner.

7. Despite the mutual agreement, respondent vide Letter dated 25th September, 2020 illegally demanded payment of rent from February, 2019 even though the rent commencement date was 01st June, 2019 as per the Lease Deed. Furthermore, the demand was made by the respondent at a belated stage of almost one year after the execution of the Lease Deed and the said letter was totally misplaced. The Notice further averred that obtaining the OC was not material as the petitioner had allegedly occupied the fifth floor premises. The respondent also threatened to approach the sub-tenants directly in case of non compliance of the Notice.

8. The petitioner replied to the respondent in July, 2021 and reiterated that the liability to pay the rent shall not commence in view of recital B of Lease Deed providing that OC and Property Tax Receipt were the mandatory preconditions to initiate rentals under the Lease Deed. Also the Maintenance Charges payable by the respondent had not been paid since 2019.

9. The petitioner received a Letter dated 15th September, 2021 from the respondent informing that the Property Tax has been paid and the OC obtained. However, no OC was ever shared with the petitioner.

10. It is asserted that the respondent served upon the petitioner a Termination Notice dated 27th September, 2022 and gave a fifteen day Notice ending on 11th October, 2022 for terminating the tenancy and also claimed alleged outstanding balance of Rs.2,78,18,229/- inclusive of 12% interest for arrears of rent from May, 2019 to September, 2022. Enhanced interest free refundable deposit inclusive of interest @ 12% per annum in the sum of Rs.1,38,000/- had also been sought. It is asserted that the petitioner has not defaulted in payment of its monthly obligations as it never accrued on account of breach of terms of the Lease Deed by the respondent.

11. It is claimed by the petitioner that the respondent has written to all the sub-tenants of the petitioner stating that the petitioner would no more be entitled to provide them with the property on sub-lease. This horrendous act of tortuous interference in petitioner's peaceful trade and occupation by the respondent has severally affected the reputation and relationship of the petitioner with his sub-tenants. There is a massive panic amongst the sub-tenants after having received this unsolicited communication from the respondent.

12. It is submitted that Clause 22 of the Lease Deed contains resolution of disputes through arbitration. A prayer is, therefore, made that the *ex-parte* ad-interim injunction may be granted for restraining the respondent from acting on the illegal and baseless Termination Notice and from making any direct communication or otherwise with the sub-tenants of the petitioner; to restrain the respondent from executing any arrangement in the like nature

with third party in respect of the leased premises during the pendency of the present petition and/ or the arbitration proceedings before the learned Arbitrator.

13. Learned **counsel for the petitioner has argued** that since it has not defaulted in performance of its part of the Contract, the respondent cannot terminate the Contract or cause him losses by illegally communicating with its sub tenants. For this the petitioner has relied upon **DLF Home Developers Limited vs. Shipra Estate Limited and Ors.** (2022) 286 DLT 100, wherein it was observed that a party cannot terminate the Contract so long as the other party is willing to perform its obligations. The Contract cannot be considered as determinable as it would in equity be liable to be enforced against a party that fails to perform the same. Almost all Contracts can be terminated by a party, if the other party fails to perform its obligations. Such a Contract cannot be stated to be determinable solely because it can be terminated by a party if the other party is in breach of the obligations. The party who is not in default would in equity be entitled to seek performance of that Contract. In such cases, it cannot be an answer to a non-defaulting party's claim that the other party could avoid the Contract of the party seeking specific performance and the same is not specifically enforceable. Thus, the question whether the Contract is in its nature determinable must be answered by ascertaining whether the party against whom it is sought to be enforced would otherwise have a right to terminate or determine the Contract even though the other party is ready and willing to perform the Contract and is not in default.

14. In **Intercontinental Hotels Group India Pvt. Ltd. Vs. Shiva Satya Hotels Pvt. Ltd.**, 2013 SCC OnLine Guj 8678, the Gujarat High Court

observed that the expression “*in its nature determinable*” as used in Section 14(1)(C) [renumbered as clause (d) of Section 14(1) as substituted by Act 18 of 2018 with effect from 1.10.2018] of Specific Relief Act, 1963 and held that whether an Agreement is in its nature determinable, would require one to address the question whether it is possible to issue an order of specific performance and enforce that order.

15. In **DLF Home Developers Limited (supra)** interim relief was sought in respect of the property which was the subject matter of Agreement to Sell, the interim protection was given and the respondent was restrained from creating any third party interests in the suit property. However, the facts at hand do not relate to any immovable property by way of an Agreement to Sell, but is only in respect of tenancy and the recovery of rent and therefore, this judgment is distinguishable on facts.

16. In **T.O. Abraham vs. Jose Thomas.**, 2017 SCC OnLine Ker 19872, the Kerala High Court defined what is meant by determinable Contract. It was observed that for a Contract to become determinable it has to be shown by defendant that its clauses and terms are such that it would become possible for either of the parties to determine and terminate it without assigning any reason. The word ‘inherently determinable’ as used in Section 14(1)(C) of Specific Relief Act makes it unambiguously clear that the Contract can be terminated by the party on their own will without any further reason and without showing any cause would be the ones that are inherently determinable. However, if the Agreement is shown to be determinable at a happening of an event or on the occurrence of a certain exigency then it is ineluctable that only on the happening of such event or exigency alone that the Contract can be determined.

17. The determinable Contract was further explained in N.H. & Co. vs. S.M.E. Pvt. Ltd. 2020 (5) Mh.L.J. 173, wherein it was observed that when a Contract contemplates unilateral right in a party to a Contract to determine it without assigning any reason or for that matter without any reason, it is a determinable Contract. However, where it is determinable only in the event of the other party to the Contract committing breach of the Agreement, its determination depends upon such eventuality which may or may not occur and the Contract is clearly not determinable.

18. In KSL & Industries Ltd. Vs. National Textiles Corporation Ltd. in OMP. 581/2010 decided on 14.08.2012 this Court held that the scope of inquiry under Section 9 is limited to the examination of the issue raised by the parties only at a *prima facie* stage. The issues of fact or law are not to be determined finally as they fall within the jurisdiction of the Arbitral Tribunal, the interpretation of the terms of the Contract/ MOU and also the determination of its scope would be within the domain of the Arbitral Tribunal. While dealing with the application under Section 9 of the Act, same principles as applicable to Order XXXIX Rule 1 and 2 shall be applicable.

19. The Respondent has relied upon the following Judgments:

20. In National Highway Authority of India Vs. Panipat Jalandhar, NH-I Tollway Pvt. Ltd., FAO(OS) (COMM) 55/2021 dated 13th April 2021, it was observed that, a notice of termination of **concessionaire** agreement was issued by NHAI. It was held that since the **concessionaire** agreement was a determinable Contract under the provisions of Section 14(1)(c) of the Specific Relief Act, no injunction could have been issued for howsoever

short a duration and there cannot be any direction for keeping the Termination Notice in abeyance.

21. Similar observations were made in **Indian Oil Corporation Ltd. Vs. Amritsar Gas Service & Ors.**, (1991) 1 SCC 533 and **Jindal Steel and Power Pvt. Ltd. Vs. M/s. Sap India Pvt. Ltd.**, 2015 SCC OnLine Delhi 10067.

22. Similarly, in **R.P.S. Education Society (Regd.) Vs. DDA.**, OMP 538/2008, decided on 02nd September, 2009 by this Court, it was held that under Section 9 of the Arbitration & Conciliation Act, the Court can pass an interim order to preserve the subject matter of a dispute which is considered necessary till the adjudication of the dispute. However, no order under Section 9 can be made by the Court directing specific performance of the Contract, the breach of which is alleged by the petitioner. Where a Contract is terminable and can be foreclosed, the interim relief under Section 9 cannot be granted for the specific performance of Contract as has been held in the case of **Excel Generators Pvt. Ltd. Vs. IJM Corporation**, OMP No.241/09 decided on 13th May, 2009 by this Court.

23. Similar observations have been made in **Bharat Catering Corporation Vs. Indian Railways Catering & Tourism Corporation Limited**, 164 (2009) DLT 530.

24. Likewise, in **Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.**, (2007) 7 SCC 125, it was held that there cannot be any restraint order by way of interim injunction to stay the Termination Notice.

25. **Submissions heard.**

26. At the outset it may be stated that this is a petition under Section 9 of the Act wherein the scope of enquiry is limited to grant of interim relief.

27. In **KSL & Industries Ltd. Vs. National Textiles Corporation Ltd.** in OMP. 581/2010 decided on 14.08.2012 this Court explained that the scope of inquiry under Section 9 is limited to *prima facie* examination of the issue raised by the parties. The issues of fact or law are not to be determined finally as they fall within the jurisdiction of the Arbitral Tribunal. The interpretation of the terms of the Contract/ MOU and also the determination of its scope would also be within the domain of the Arbitral Tribunal. While dealing with the application under Section 9 of the Act, same principles as applicable to Order XXXIX Rule 1 and 2 shall be applicable.

28. This Court thus, needs to determine if a *prima facie* case is made out by the petitioner in his favour. The case of the parties is that a Lease Deed dated 22nd May, 2019 was executed in respect of fifth floor of the leased premises for five years commencing from 01st June, 2019 with the lock-in period of five years. It is the grievance of the petitioner that pursuant to the Lease Agreement, it has sub-let the property further and such illegal termination vide Termination Notice dated 27th September, 2022 would cause it great prejudice and there cannot be any termination of the Lease Agreement.

Lease Agreement: Whether Determinable:

29. The first aspect for consideration is whether the Lease Agreement between the parties is determinable. The Kerala High Court in **T.O. Abraham vs. Jose Thomas** 2017 SCC OnLine Ker 19872, defined what is meant by determinable Contract. It was observed that for a Contract to become determinable, it has to be shown by defendant that its clauses and terms are such that it would become possible for either of the parties to determine and terminate it without assigning any reason. The word

‘inherently determinable’ as used in Section 14(1)(C) of Specific Relief Act makes it unambiguously clear that the Contract can be terminated party on their own will without any further reason and without showing any cause would be the ones that are inherently determinable. However, if the Agreement is shown to be determinable at a happening of an event or on the occurrence of a certain exigency then it is ineluctable that only on the happening of such event or exigency alone that the Contract can be determined.

30. The determinable Contract was further explained in N.H. & Co. vs. S.M.E. Pvt. Ltd. 2020 (5) Mh.L.J. 173, wherein it was observed that when a Contract contemplates unilateral right in a party to a Contract to determine it without assigning any reason or for that matter without any reason, it is a determinable Contract. However, where it is determinable only in the event of other party to the Contract committing breach of the Agreement, its determination depends upon such eventuality which may or may not occur and the Contract is clearly not determinable.

31. In Intercontinental Hotels Group India Pvt. Ltd. Vs. Shiva Satya Hotels Pvt. Ltd., 2013 SCC OnLine Guj 8678, the Gujarat High Court observed that the expression “*in its nature determinable*” as used in Section 14 (1) (C) [renumbered as clause (d) of Section 14(1) as substituted by Act 18 of 2018 with effect from 1.10.2018] of Specific Relief Act, 1963 would require one to address the question whether it is possible to issue an order of specific performance and enforce that order.

32. The law in regard to termination of the Lease Agreement is thus, well settled. A Contract is inherently determinable unless there is a Clause in the Lease Agreement providing for termination of the Agreement on the

happening of an event as is explained in the judgements above. The Contract would be non-determinable except on the happening of that event.

33. In the present case the Petitioner undertook huge expenditure by creating an infra-structure to augment the utility of the premises to be able to further sub-let it to the tenants and for this reason the Lock-in period of five years was envisioned in the Lease Agreement. However, this controversy of whether the respondent could have terminated the Lease vides Termination Notice dated 27th September, 2022 despite the Lock-in period needs to be adjudicated.

Restraint against Termination Notice:

34. What needs to be further considered is whether the respondent can be restrained from acting on the Termination Notice. In **National Highway Authority of India Vs. Panipat Jalandhar, NH-I Tollway Pvt. Ltd (Supra)**, a notice of termination of **concessionaire** agreement was issued by NHAI. It was held that since the **concessionaire** agreement was a determinable Contract under the provisions of Section 14(1) (c) of the Specific Relief Act, no injunction could have been issued for howsoever short a duration and there cannot be any direction for keeping the Termination Notice in abeyance.

35. Similarly, in **R.P.S. Education Society (Regd.) Vs. DDA** OMP 538/2008, decided on 02nd September, 2009 by this Court, it was held that under Section 9 of the Arbitration & Conciliation Act, the Court can pass an interim order to preserve the subject matter of dispute which is considered necessary till the adjudication of the dispute. However, no order under Section 9 can be made by the Court directing specific performance of the Contract, the breach of which is alleged by the petitioner. Where a Contract

is terminable and can be foreclosed, the interim relief under Section 9 cannot be granted for the specific performance of Contract as has been held in the case of Excel Generators Pvt. Ltd. Vs. IJM Corporation, OMP No.241/09 decided on 13th May, 2009 by this Court.

36. Similar observations have been made in Bharat Catering Corporation Vs. Indian Railways Catering & Tourism Corporation Limited, 164 (2009) DLT 530; Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd. (2007) 7 SCC 125; Indian Oil Corporation Ltd. Vs. Amritsar Gas Service & Ors., (1991) 1 SCC 533 and Jindal Steel and Power Pvt. Ltd. Vs. M/s. Sap India Pvt. Ltd. 2015 SCC Online Delhi 10067 that there cannot be any restraint order by way of interim injunction to stay the Termination Notice.

37. In the facts in hand, it is not disputed on behalf of the petitioner that no rent has been paid in respect of the leased premises till date. The specious ground taken for non-payment is that in terms of the Lease Deed, the respondent was supposed to provide the Occupation Certificate, which it has failed to do and no copy of the same has been provided till date.

38. The other reasons given for non-payment of rent is that certain portion of the leased premises had been taken by the respondent for his own use as its Office for which he was under an obligation to make the payment, but he has failed to do. Also the Maintenance Charges have not been paid by the respondent.

39. Admittedly, no rent has been paid by the respondent while he has taken the possession and has sub-let the property in terms of the Lease Deed and is making its own profit. None of the stated grounds deprived him from using the premises rented to him.

40. The law as stated above mandates against grant of stay against Termination Notice in respect of the Contracts which are determinable. The petitioner has relied upon *DLF Home Developers Limited vs. Shipra Estate Limited and Ors.* (2022) 286 DLT 100, wherein it was observed that a party cannot terminate the Contract so long as the other party is willing to perform its obligations. The Contract cannot be considered as determinable as it would in equity be liable to be enforced against a party that fails to perform the same. Almost all Contracts can be terminated by a party, if the other party fails to perform its obligations. Such a Contract cannot be stated to be determinable solely because it can be terminated by a party if the other party is in breach of the obligations. The party who is not in default would in equity be entitled to seek performance of that Contract. In such cases, it cannot be an answer to a non-defaulting party's claim that the other party could avoid the Contract of the party seeking specific performance and the same is not specifically enforceable. Thus, the question whether the Contract is in its nature determinable must be answered by ascertaining whether the party against whom it is sought to be enforced would otherwise have a right to terminate or determine the Contract even though the other party is ready and willing to perform the Contract and is not in default.

41. However, neither equity lies with the petitioner nor is a *prima facie* case made out by the petitioner who despite having occupied the rented premises since the commencement of the tenancy, has failed to pay the rent. The delay if any, in getting the "OC" or non-payment of Maintenance Charges or of Office space occupied by the respondent, may give a right to the petitioner to adjust or claim the charges payable by the respondent, but definitely the petitioner could not have denied the respondent the due rent

despite the premises being used by the petitioner. Further, the petitioner itself has admitted that it has now come to know from the letter dated 15th September, 2021 that the Occupancy Certificate had been obtained by the respondent.

42. Therefore there cannot be any interim protection or direction for restraining the respondent from acting on the termination Notice.

43. The petitioner is at liberty to follow his remedies under the law in case of illegal termination.

44. In **DLF Home Developers Limited (supra)** interim relief was sought in respect of the property which was the subject matter of an Agreement to Sell, the interim protection was given and the respondent was restrained from creating any third party interest in the suit property. However, the facts in hand do not relate to any immovable property by way of Agreement to Sell but is only in respect of tenancy and the recovery of rent and therefore, this judgment is distinguishable on facts.

45. The other prayer that has been made on behalf of the petitioner is that the respondent is illegally communicating with his sub-tenants making allegations of termination of the Lease Agreement and thereby creating unnecessary panic and loss of business to the petitioner.

46. Though the tenancy of the petitioner may have been terminated, but the same has been challenged and the equity and *prima facie* case lies in favour of the petitioner whose business cannot be disrupted in this manner by the respondent by corresponding unnecessarily with the sub-tenants. In the circumstances the respondent is restrained from communicating with the sub-tenants henceforth till the filing of an appropriate application for interim relief before the Arbitrator.

47. The petitioner has, however, claimed that the respondent has forfeited its right of forfeiture under Section 112(G) of Transfer of Property Act, 1882. It is also asserted that the rent stands paid.

48. No prima facie case is made out in favour of the petitioner and no relief as sought can be granted. The petition under Section 9 is hereby dismissed.

49. 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 mutually consented by the parties and the Arbitrator.
- e. A copy of this Order be sent by the registry to the learned Arbitrator for information.

50. The parties may seek interim relief before the Ld. Arbitrator by moving an appropriate application. 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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