

* **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.289/2022, IA 16399/2022 & IA 16400/2022**

**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"*) has been filed by the petitioner for ad-interim injunction to restrain 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. It is stated that the Lease Deed dated 28th September, 2017 read along with the addendum dated 07th December 2017 was executed between the petitioner and the respondent in respect of ground, first, second, third and fourth floor of commercial property bearing Industrial Plot No.445, Phase-V, Udyog Vihar, Gurugram, Haryana (hereinafter referred to as “*the leased premises*”). The Lease Deed dated 28th September 2017 was followed by an Addendum dated 07th December 2017 for extending the rent commencement date and enhancing the amount of Refundable Security Deposit by INR 2.5 Crores deposited with the Lessor. Clause 4 of the Lease Deed provided for the lock-in period of three years from 15th November, 2017 subject to lessor complying with the conditions as specified in Schedule I of the Lease. Clause 7 provided for rental and escalation. Clause 8 provided for payment and interest. Clause 12 dealt with the termination and Clause 14 with *Force Majeure*.

3. It is submitted that the petitioner duly paid all monthly rentals by way of post dated cheques till November, 2022. However, in April, 2020 due to COVID-19 Pandemic, the real estate industry across the world stood adversely impacted. This adverse impact was further worsened when more and more Companies started adopting alternate working strategies such as Work from Home. Pursuant to this unfortunate development, many of the petitioner’s sub-tenants in the suit premises failed to duly make payment to the petitioner invoking their *Force Majeure* clauses and started vacating the tenanted premises.

4. Subsequently, in view of COVID-19, the petitioner also invoked Force Majeure under Clause 14, but despite being eligible for 100% exemption, the parties mutually came to an understanding and petitioner

started making payment of part rentals while the Force Majeure continued. It is asserted that respondent's representative by way of email dated 17th April, 2020 acknowledge the waiver request of the respondent and suggested to receive payments of proportionate rentals in accordance with the rental amounts received by the petitioner from its sub-tenants. The same was subject to the petitioner sharing a detailed structure of inflow of payment received by it from its sub-tenants. In order to ensure complete transparency the petitioner shared the details of the inflow of rental received from the sub-tenants, but since the petitioner itself was at the stage of negotiation with the sub tenants, the same could not be done immediately. This was informed by the petitioner to the respondent vide email dated 18th April, 2020 that he was still assessing the situation and was in the process of settlement with the sub-tenants. Despite this uncertainty the petitioner vide its email dated 25th June, 2020 assured to the respondent to honour the deal of proportionate rent as and when received from its sub-tenants.

5. The petitioner has claimed that in view of invocation of Clause 14 i.e. *Force Majeure* Clause, the petitioner is not obligated to make payment as per proportionate rent to the respondent. The Agreement between petitioner and respondent was completely independent of the relationship between the petitioner and the sub-tenants. It is claimed that the respondent was always kept in loop and intimated about the further worsening in this situation due to the Pandemic and the sub-tenants backing out of their commitments for releasing the rent amount. The petitioner informed that it could receive only 30% to 40% of the rentals for the month of April 2020 and reckoned further decline in the rent amount for months of May and June, 2020. It is further asserted that the petitioner had made payment in accordance with the

Invoices raised by the respondent and the advance rent stands paid till November, 2022, which has been duly accepted by the respondent.

6. It is claimed that in complete disregard to the terms of the Lease Deed, the respondent vide letter dated 25th September, 2020 illegally sought release of full rental amount starting from September, 2020. This demand was illegal. The respondent also sought payment for preceding month starting from March, 2020, illegally against which the parties had already come to an Agreement for release of proportionate rent.

7. The petitioner responded vide email dated 28th September, 2020 denying the contents of the letter of the respondent and reminded it about invocation of Clause *Force Majeure*. The petitioner vide email dated 17th April, 2020 further informed the respondent that since March, 2020 out of 19 sub-tenants, 60% of sub-tenancy has been terminated and remaining 40% sub-tenants remitted rental worth nickels and dimes and litigation is on going against many tenants who have terminated the Agreements due to Pandemic or are unable to pay. It is claimed that despite being aware of the financial difficulties being faced by the respondent on account of disrupted inflow of rentals from the sub-tenants, the respondent once again demanded full payment against the Lease Deed. The petitioner again informed the respondent that the situation has still not stabilized and also gave details of the premises that were occupied by the sub-tenants and also about the ongoing litigation with some of the sub-tenants for wrongful termination.

8. The respondent vide letter dated 2nd December, 2020 made a reference to the expiry of first three year term and sought enhancement of rent to Rs.36,91,500/- for the next three year term and balance interest free refundable security deposit in accordance with the enhanced amount. He

also sought details of the sub-tenants. The petitioner again shared another detailed report regarding sub-tenants vide its letter dated 22nd January, 2021. Pursuant to the meeting between the representatives of the parties, the petitioner shared the final and agreed upon outstanding rental amount in accordance with proportionate value with the respondent vide letter dated 28th January, 2021 which has been subsequently paid by the petitioner. The respondent vide its letter dated 31st January, 2021 has confirmed and acknowledged the outstanding balance as Rs.31,13,700/- to make good against all the outstanding payments which has been reiterated in email dated 11th February, 2021.

9. It is stated that in order to arm twist and to extort money from the petitioner, a Section 9 petition has been filed on 31st May, 2022 against the petitioner seeking security of the outstanding amount along with the interest in the sum of Rs.4,03,81,749/-. However, the claims made in the said petition are *malafide*. It is submitted that the Termination Notice dated 27th September, 2022 is without any basis. The petitioner has already given post dated cheques for the next five months till November, 2022 to ensure timely payment in terms of the Lease Deed, which have been duly accepted by the respondent on 27th June, 2022.

10. The basis for termination is in Clause 12 of the Lease Deed which provides that in case of failure of the petitioner to make payment for two consecutive months, the respondent shall have an option to terminate the Lease Deed by serving a written Notice of fifteen days on the petitioner to pay the outstanding dues. However, the petitioner has claimed that he has never defaulted in making payment of the rents, let alone for two consecutive months. The waived rent amount has been paid since March,

2020 and there is no shortfall as is alleged in the Termination Notice. It is claimed that the petitioner has a *prima facie* case in his favour and the respondent may be restrained from acting on his Termination Notice.

11. It is asserted that the respondent had written to all the sub-tenants of the petitioner stating that the petitioner will 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. Hence, the petitioner has sought immediate relief for injunction against the Termination Notice as well as to restrain the respondent from making any direct communication or otherwise with the sub-tenants of the petitioner.

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 as the respondent was restrained from creating and 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.

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 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 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 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.

19. The Respondent has relied upon the following Judgements:

20. In *National Highway Authority of India Vs. Panipat Jalandhar, NH-I Tollway Pvt. Ltd.*, FAO(OS) (COMM) 55/2021 dated 13th April 2021 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 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, OPM 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. The case of the parties is that a Lease Deed 28th September, 2017 read along with the addendum dated 07th December 2017 was executed in respect of ground, first, second, third and fourth floor of the leased premises with the lock-in period of three years. It is claimed that the Termination Notice dated 27th September, 2022 has been served upon the petitioner illegally and there cannot be any termination of the Lease Agreement. It is his grievance that pursuant to the Lease Agreement, he has sub let the property further and such illegal termination would cause him great prejudice.

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 28th September, 2019 was executed in respect of ground, first, second, third and fourth floor of the leased premises for twelve years commencing from 15th November, 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 well settled. It is a Contract and in case there is illegal termination, the petitioner has its own remedy to follow under the law. There cannot be any interim protection or direction for restraining the respondent from acting on the

illegal and baseless termination of the Notice. Moreover, the Lock-in period of three years has already expired. The petitioner is at liberty to follow his remedies under the law in case of illegal termination.

Restraint against Termination Notice:

33. 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.

34. 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.

35. 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.

36. Admittedly, the only assertion on payment of the outstanding rent amount made by the petitioner is by referring to post dated cheques issued till November, 2022. However, the respondent by way of Termination Notice alleged that an outstanding balance of INR 4,45,10,049/ (Indian Rupees Four Crores, Forty Five Lakhs, Ten Thousand and Forty Nine Only) is due to be paid by the petitioner. The defences taken by the petitioner with respect to this amount is that it was waived by the respondent during the COVID-19 Pandemic and further the petitioner took the defence of *force majeure*. In contrast, the petitioner 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.

37. 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.

38. However, neither equity lies with the petitioner nor a *prima facie* case has been 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 defence taken by the petitioner of waiver of the outstanding rent amount or *force majeure* 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.

39. There cannot be any interim protection or direction for restraining the respondent from acting on the termination Notice.

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

41. 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 and 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.

42. The other prayer is made that the respondent must desist from making any direct communication with the sub-tenants.

43. It is not in dispute that the leased premises has been sub-let by the petitioner in accordance with the terms of the Lease Deed after having made huge investments to make it suitable for further sub-letting. The Termination Notice may have been given and the tenancy may have been terminated, however, 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 learned Arbitrator.

44. 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.
45. 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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