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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 21 OF 2025

Tulsidas Khimji Warehousing Private Limited ...Petitioner

Versus

Eknath Bansi Kale ...Respondent

Mr. Mukesh Vashi, Senior Advocate (Through V.C.) a/w Mr. Pratik Tomti i/b M.P. Vashi & Associates, for the Petitioner.
Mr. Ajay G. Khaire for the Respondent.

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE : JANUARY 27, 2025

PC :

1. This is a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 (***“the Act”***) seeking certain interlocutory reliefs in connection with disputes and differences between the parties arising out of the Warehousing Agreement dated May 1, 2023.

2. In a nutshell, the Petitioner is in possession of a warehouse as a sub-tenant of a tenant of the Bombay Port Trust, and has been providing warehousing services to multiple parties at the said premises. Pursuant to the Warehousing Agreement, the warehouse is permitted to be used by the Respondent to store his goods. In terms of the warehousing arrangement, the Petitioner had maintained control over access to the warehouse as it was not handed over freely to the Respondent. A warehouse keeper would oversee access of the Respondent in the course of the usage of the warehouse by the Respondent.

3. According to Mr. Mukesh Vashi, Learned Senior Counsel on behalf of the Petitioner, the warehouse was in fact vacated by the Respondent, who thereafter sought access for removal of CCTV Camera and other related surveillance and security infrastructure, but the Respondent took over access to the warehouse, placed his goods within the warehouse, and affixed his own lock over and above the lock of the Petitioner. In short, the Petitioner has alleged that the property has been grabbed by the Respondent. In these backdrop, it is common ground that there are two locks over accessing the premises in question, and it is in this context that this Petition under Section 9 of the Act has been filed.

4. Mr. Ajay Khaire, Learned Counsel on behalf of the Respondent has raised a fundamental preliminary objection to any relief being granted under Section 9 of the Act. His foundational premise is that the Agreement, although carrying a nomenclature of a “Warehousing Agreement” is nothing but a Leave and Licence Agreement which evidences a licence to use the physical space contended in the warehouse. Consequently, according to Learned Counsel, the subject matter of the dispute does not belong to or can never be amenable to the jurisdiction of arbitration, but would be the subject matter of jurisdiction of the Small Causes Court under the *Presidency Small Cause Courts Act, 1882*, as has been held in *Central Warehousing Corporation, Mumbai vs. FortPoint Automotive Pvt. Ltd.* by a Full Bench of this Court in Writ Petition No. 4614 of 2009.

5. According to Mr. Khaire, the jurisdiction of the Small Causes Court would oust the jurisdiction of any arbitral tribunal, and on this ground, the Petitioner should not get relief under Section 9 of the Act, since it would not be legally possible for arbitration to be conducted. Learned Counsel would submit that the Petitioner must be relegated to the Small Causes Court, without any intervention by this Court.

6. It is also seen that this Petition was filed on September 24, 2024. The Respondent filed a Suit in the Small Causes Court on September 30, 2024 invoking the Presidency Small Cause Court Act, 1882, and the Full Bench's judgment referred to above.

7. Whether or not the Warehousing Agreement merely has a nomenclatural difference from a Leave and License Agreement and whether in substance, its existence is that of a Leave and License Agreement is the issue that has been posed for determination by the Respondent. Having reviewed the facts of this case, on the face of it, it does not appear that the Warehousing Agreement inexorably points to being a Leave and License Agreement. The mechanism of usage and the framework of control in the hands of the Respondent is not akin to how a licensee would be given a free run over and control over usage of premises. It is not inexorably clear that the warehouse was simply handed over to the Respondent, with a complete and unfettered license to use the same, without any intervention by the Petitioner. The Petitioner's warehouse-keeper would oversee the

Respondent's access. It was the Petitioner's lock that would guard the premises. Had there been unfettered right to access, and had such access led to an exclusive usage of the space, it would have been possible for the Respondent to contend (even on a *prima facie* basis) that he was a licensee. However, Mr. Vashi points out that the premises were always used by multiple clients, and access was controlled by the warehouse keeper. Besides, he would argue that in the police complaint made by the Petitioner, the Respondent's pleadings in anticipatory bail proceedings would show that he had acknowledged the arrangement to be a Warehousing Agreement and not a license of premises.

8. Since the Respondent did not have absolute and unfettered right to the premises, in my opinion, the facts are distinguishable from ***Central Warehousing Corporation***. It is to enable unfettered control in the hands of the Respondent that the Respondent would fix his own lock over and above the Petitioner's lock. If the Respondent had unfettered access, he would not have had full access to the warehouse as any licensee would have it would not have had to affix his own lock on the premises.

9. Indeed, these are *prima facie* observations only to determine whether on the basis of the material on record, the contentions of the Respondent would need to be accepted to non-suit the Petitioner in these proceedings. For the aforesaid reasons, based on a review of the record, I am not convinced that at least on a *prima facie* basis the Warehousing

Agreement is inexorably a Leave and License Agreement. Indeed, it would be open to the Respondent to file an application before the relevant arbitral tribunal under Section 16 of the Act identifying the manner in which he would have the arbitral tribunal hold that the Warehousing Agreement is a Leave and License Agreement, thereby undermining the jurisdiction of the arbitral tribunal.

10. Where a party has, in exercise of its autonomy, executed an agreement with an arbitration agreement embedded, it would be apparent that an arbitration agreement is in existence. Indeed, these proceedings are not an application under Section 11 of the Act, but a Petition under Section 9 of the Act, but whether an arbitration agreement exists, is a *prima facie* question to be determined by applying the very same test. Being satisfied that there is an executed agreement, which does not inexorably lend itself to being a Leave and License Agreement, in my opinion, the Petitioner having made out a case for protection of his own property that would be the subject property in the arbitration, in my opinion, it would be appropriate that the Petitioner be granted some interim protection,

11. Therefore, it is hereby directed that the Petitioner is permitted to break open the locks affixed by the Respondent on the said warehouse premises, whether forcibly, or by making duplicate keys to open the lock affixed by the Respondent and to remove such lock control from fettering the Petitioner's access to the warehouse. The Court Receiver shall be

entitled to call on the Dongri Police Station for assistance in the course of taking possession in terms of prayer clause (d) in the Petition. The Station Officer of the said police station shall ensure that all necessary assistance is provided to the Court Receiver. The Court Receiver of this Court is hereby appointed as a Receiver of the goods stored in the warehouse. The Court Receiver shall take an inventory of the same and file an inventory report in relation to the goods of the Respondent stored in the said warehouse. At this stage, I do not believe it is necessary to discharge the Petitioner from making any payment of security fees or compensation to the Court Receiver since these are important services that the Court Receiver would render.

12. Stand over to ***February 28, 2025***, under the caption “***Final Hearing – Section 9***”. Learned Senior Counsel for the Petitioner submits that he would file an application under Section 11 of the Act within a period of three weeks from today. Should such an application be taken out, the said application along with this Petition shall be placed under the aforesaid caption on ***February 28, 2025***. On such date the the Court shall consider the report to be filed by the Court Receiver on the action taken pursuant to the directions contained in the order made today.

13. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court’s website.

[SOMASEKHAR SUNDARESAN, J.]