

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

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Date of decision: 28th May, 2014

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FAO(OS) No.141/2014

M/S VALUE SOURCE MERCANTILE LTD. Appellant
Through: Mr. Saurabh Seth with Mr. S.
Chakraborty, Advs.

Versus

M/S SPAN MECHNOTRONIX LTD. Respondent
Through: Mr. Darpan Wadhwa with Mr. Akhil
Sachar, Advs.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 impugns the order dated 7th February, 2014 of the learned Single Judge of this Court in OMP No.1258/2013, under Section 9 of the said Act, filed by the respondent. The appeal came up for hearing on 18th March, 2014 when the counsel for the respondent appeared on advance notice and though notice of the appeal was not issued but the matter was adjourned from time to time to enable the parties to amicably settle the same. Finding the parties to be not able to settle, a direction for their appearance in person before this Court was made. We were informed that of the three Directors of the appellant, two namely Mr.

Rajiv Goyal and his wife Ms. Alka Goyal were abroad on account of illness of Mr. Rajiv Goyal. On 22nd May, 2014 Mr. Jaswinder Singh, stated to be the third Director of the appellant appeared before us. However he stated that he had ceased to be a Director and feigned ignorance of the facts. We accordingly heard the counsels on the appeal.

2. Undisputed facts are that the appellant, in or about February, 2012 took on lease from the respondent, office at B-1 & B-2 Basement *ad measuring* 5030 sq. ft. on plot No.H-10, Express Arcade, Netaji Subhash Place, Delhi on rent of Rs.1,62,000/- per month and on the other terms and conditions contained in a Lease Agreement dated 25th February, 2012 signed by the parties. The appellant, after October, 2012 stopped paying the lease rentals and issued a notice dated 1st November, 2012 to the respondent for vacation of the office at B-2 only, while wanting to continue to occupy the office situated at B-1. The respondent got sent a reply dated 14th December, 2012 to the aforesaid notice *inter alia* contending that the lease was composite, of commercial units bearing No.B-1 & B-2 and the appellant could not terminate the lease of part of the premises. The appellant was thus called upon to either vacate the entire leased premises or to pay the rent due thereof.

3. Upon the appellant neither paying the rent nor vacating the leased premises, the respondent, on the basis of the arbitration clause in the Lease Deed, filed the petition under Section 9 of the Arbitration Act from which this appeal arises, seeking a direction to the appellant for payment of the dues as per the said Lease Agreement and for a direction for delivering the possession of the premises.

4. The learned Single Judge has vide impugned order dated 7th February, 2014, while granting opportunity to the appellant to file a reply to the petition, directed the appellant to make payment of arrears of rent / damages at the rate at which it was last paid and to continue to pay the same in future every month in advance. The arrears were directed to be paid within two weeks.

5. We may record that during the pendency of this appeal, the appellant, on 25th March, 2014, has vacated the entire premises and delivered possession thereof to the respondent. Now only the question of payment of the amounts due to the respondent remains.

6. The contention of the counsel for the appellant is that no such direction for payment could be issued under Section 9 of the Arbitration Act.

7. We asked the counsel for the appellant as to what is the defence of the appellant to the claim of the respondent. We further asked the counsel for the

appellant whether the appellant, having taken lease even if of two different units / flats but vide one transaction only, could in law have terminated the lease of one of the units / flats only i.e. of part of the premises taken on rent. On request of the counsel for the appellant to check law on the said aspect, the matter was adjourned from 16th May, 2014 to 22nd May, 2014. The counsel on 22nd May, 2014 fairly admitted that he had not found anything. His only contention was that this has to be decided before the Arbitral Tribunal and not in a Section 9 proceeding.

8. We further enquired from the counsel for the appellant as to what is the reason for the appellant for having not paid the rent at least of that part of the premises, the lease whereof was continued by the appellant even as per the notice aforesaid dated 1st November, 2012 and possession whereof was surrendered only on 25th March, 2014.

9. Again no plausible answer could be given.

10. Finding the appellant to be in defiance of the direction issued by the learned Single Judge and of which there is no stay in this appeal, the personal presence of the Director of the appellant was directed. However even that order was not complied with and Mr. Jaswinder Singh who according to the counsel is the Director denied that he is the Director of the appellant.

11. The aforesaid shows the utter dishonest conduct of the appellant. It is obvious that the appellant is abusing the cloak of a corporate identity which we suspect would be a shell company, without any asset and from which no recovery of money can be made, to avoid payment of their liabilities. Though we were inclined to ourselves take action but the counsel for the respondent informs that a separate petition in this regard has already been filed. We therefore deem it appropriate to leave this aspect for consideration in that proceeding.

12. As far as the contention of the counsel for the appellant of a direction as issued by the learned Single Judge being beyond the domain of a proceeding under Section 9 of the Arbitration Act is concerned, Section 9 is titled as “Interim measures, etc. by Court” and provides for an application to the Court for an interim measure of protection for preservation, interim custody or sale of any goods which are subject matter of Arbitration Agreement or for securing the amount in dispute in the arbitration or for detention, preservation or inspection of any property or thing which is the subject matter of dispute in arbitration or for interim injunction or appointment of a receiver or “such other interim measure of protection as may appear to the Court to be just and convenient”.

13. Section 9 of the Arbitration Act uses the expression “interim measure of protection” as distinct from the expression “temporary injunction” used in Order XXXIX Rules 1&2 of the CPC. Rather, “interim injunction” in Section 9 (ii) (d) is only one of the matters prescribed in Section 9 (ii) (a) to (e) qua which a party to an Arbitration Agreement is entitled to apply for “interim measure of protection”. Section 9(ii)(e) is a residuary power empowering the Court to issue / direct other interim measures of protection as may appear to the Court to be just & convenient. Section 9 further clarifies that the Court, when its jurisdiction is invoked thereunder “shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it”.

14. The question which thus arises is that if the dispute as aforesaid had been brought before this Court by way of a suit, whether this Court could have, during the pendency of the suit, granted the relief as has been granted in the impugned order. Order XXXIX Rule 10 of the CPC empowers the Court to direct deposit / payment of admitted amounts. The appellant, as aforesaid does not controvert that it continued to be the tenant of office unit B-1 and had not terminated the tenancy with respect thereto. There is thus an admission by the appellant of the liability for rent at least of office unit B-1. The appellant, if had been a defendant in a suit, could have thus been directed by an interim order in

the suit to make such payment to the respondent. Order XV-A added to the CPC as applicable to Delhi and which was added, as held by us in judgment dated 15th May, 2014 in FAO(OS)597/2013 titled ***Raghubir Rai Vs. Prem Lata***, to empower the Court to direct payment during the pendency of the suit at a rate other than admitted rate also, empowers the Civil Court to direct payment which is apparently wrongfully disputed. The denial by the appellant of the entire rent as agreed, on the ground of having determined the tenancy of one of the two office units taken on rent, is clearly vexatious, as in law the appellant as a tenant could not determine tenancy of part of the premises taken on rent. It is not the case of the appellant that it was entitled to do so as part of terms of its tenancy. In that view of the matter, the appellant could under Order XV-A of the CPC have been directed to pay the rent of the entire premises notwithstanding having given notice of termination of tenancy of part thereof. We are therefore satisfied that the impugned order satisfies the test of being in exercise of the same power for making orders as the Court has for the purpose of a Civil Suit and is thus within the ambit of Section 9 of the Arbitration Act.

15. Mention may however be made of the judgment of the Division Bench of this Court in ***Ratnagiri Gas and Power Pvt. Ltd. vs Joint Venture Of Whesoe Oil & Gas Ltd.*** 199 (2013) DLT 212 where in appeal, the directions given by

the learned Single Judge in exercise of powers under Section 9 of the Arbitration Act for some payments, were set aside and while doing so it was *inter alia* observed that Order XXXIX Rule 10 specifically clothes the Court with the power to direct a litigant to deposit the amounts and no such power is conferred upon the Court under Section 9 of the Arbitration Act. Reference was also made to Section 19 of the Arbitration Act to hold that the provisions of the CPC are not applicable. The said observations however came to be made after the Court held that the direction issued by the Single Judge for payment was not only beyond the ambit of the reliefs claimed in the petition under Section 9 but also beyond the disputes between the parties. Also, it was not noticed that Section 9 expressly provides that the Court while exercising power thereunder shall have the same power as it has in relation to any proceedings before it and which in our opinion as aforesaid would include the powers under Order XXXIX Rule 10 and under Order XV-A of the CPC. Moreover, Section 19, to which reference was made is with respect to the powers of the Arbitral Tribunal and not of the Court exercising jurisdiction under Section 9. We are therefore of the view that the said observations are obiter. We may also mention that SLP (Civil) No.5757/2013 preferred thereagainst is pending consideration. In fact another Division Bench of this Court in *Simplex Infrastructures Ltd. Vs.*

National Highways Authority of India 177 (2011) DLT 248, in exercise of powers under Section 9, passed an order directing payment of certain monies, the payment whereof was considered to be just and due.

16. We also find the Division Bench of the High Courts of Andhra Pradesh & Madras in *SPA Agencies (India) Pvt. Ltd. Vs. Harish Rawtani* MANU/AP/0460/2009 & *Gammon India Ltd. Vs. IVRCL Infrastructures & Projects Ltd.* MANU/TN/0518/2005 respectively and a learned Single Judge of the High Court of Bombay in *Heritage Lifestyles & Developers Pvt. Ltd. Vs. Amarvilla Cooperative Housing Society Ltd.* MANU/MH/0380/2011 to have taken the same view as we have taken.

17. There is thus no merit in the appeal which is dismissed with costs of Rs.25,000/- payable by the appellant to the respondent within six weeks of today.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

May 28, 2014

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