EVERGREEN LAND MARK PVT. LTD.

v.

JOHN TINSON & COMPANY PVT. LTD. & ANR.

(Civil Appeal No. 2783 of 2022)

APRIL 19, 2022.

[M. R. SHAH AND B. V. NAGARATHNA, JJ.]

Arbitration and Conciliation Act, 1996: ss.17, 37(2)(b) – Appellant was lessee in the premises of respondent no.1 and 2 and was running a Restaurant and Bar in the said premises – Lease agreement terminated by the owners, as a consequence of which, dispute arose and the same referred for arbitration – During pendency of dispute, owners made applications seeking deposit of rental amount – Lessee sought to invoke the force majeure clause in light of outbreak of Covid-19 pandemic – Arbitral Tribunal allowed the application of the owners in exercise of the power u/s.17 of the Act – High Court upheld the same – On appeal, held: Applicability of the force majeure principle contained in clause 29 is yet to be considered by the Arbitral Tribunal – Therefore, no order could have been passed by the Tribunal by way of interim measure on the applications filed u/s.17 of the Arbitration Act since there was serious dispute with respect to the liability of the rental amounts to be paid – As the applicability of force majeure principle (clause 29) is yet to be considered at least, for the period during the complete closure, it would not be justified to direct the lessee to deposit the rental amount for the said period of complete closure by way of an interim measure, pending final adjudication – Contract, principle of – Force majeure principle.

Partly allowing the appeal, the Court

HELD: 1. The dispute is with respect to the rental amount for the period between March, 2020 to December, 2021, for which the Arbitral Tribunal has directed the appellant to deposit while passing the order by way of an interim measure on the applications under Section 17 of the Arbitration Act. The liability to pay the lease rental for the period between March, 2020 to December, 2021 is seriously disputed by the appellant by invoking the force majeure principle contained in clause 29 of the lease agreement.

It is the case on behalf of the appellant that for a substantial period there was a total closure due to lockdown and for the remaining period the appellant was allowed with 50% capacity and therefore, the force majeure principle contained in clause 29 shall be applicable. When the same was submitted before the Arbitral Tribunal, no opinion, not even a prima facie opinion on the aforesaid aspect was given by the Arbitral Tribunal. Therefore, applicability of the force majeure principle contained in clause 29 is yet to be considered by the Arbitral Tribunal. Therefore, no order could have been passed by the Tribunal by way of interim measure on the applications filed under Section 17 of the Arbitration Act in a case where there is a serious dispute with respect to the liability of the rental amounts to be paid, which is yet to be adjudicated upon and/or considered by the Arbitral Tribunal. Thus, no such order for deposit by way of an interim measure on applications under Section 17 of the Arbitration Act could have been passed by the Tribunal. However, at the same time, the aforesaid can be considered only for the period of complete closure due to lockdown. As per the available record, there was complete closure for the period between 22.03.2020 to 09.09.2020; for the period between 19.04.2021 to 28.06.2021 and for the period between 11.01.2022 to 27.01.2022 and for the remaining period the appellant was allowed to run the Restro/ Bar with 50% capacity. The appellant will therefore have to deposit the entire rental amount except the period for which there was complete closure due to lockdown. As the applicability of force majeure principle (clause 29) is yet to be considered at least, for the period during the complete closure, it would not be justified to direct the appellant to deposit the rental amount for the said period of complete closure by way of an interim measure, pending final adjudication. [Para 6][885-F-H; 886-A-F]

Raman Tech. Process Engg. Co. & Anr. v. Solanki Traders **(2008) 2 SCC 302: [2007] 12 SCR 409;** *Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.* **(2007) 7 SCC 125 : [2007] 8 SCR 213 – referred to.**

Case Law Reference

[2007] 12 SCR 409	**referred to**	**Para 3.1**
[2007] 8 SCR 213	**referred to**	**Para 3.1**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2783 of 2022.

From the Judgment and Order dated 10.02.2022 of the High Court of Delhi at New Delhi in Arb. A(Comm.) No. 9 of 2022.

Ms. Aastha Mehta, Ms. Swati Setia, Rinku Garg, Nishant Rao, Advs. for the appellant.

Ms. Shyel Trehan, Raghav Anand, Ms. Liz Mathew, Advs. for the respondents.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with impugned judgment and order dated 10.02.2022 passed by the High Court of Delhi at New Delhi in ARB.A. (Comm.) No.9/2022 under Section 37(2)(b) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act"), by which the High Court has dismissed the said appeal in which the appellant herein challenged order dated 05.01.2022 passed by the Arbitral Tribunal in two applications filed by respondent No. 1 and 2 herein under Section 17 of the Arbitration Act, seeking deposit of the rental amount for the period between March, 2020 and December, 2021, the appellant herein – lessee has preferred the present appeal.

2. The dispute is with respect to two separate premises owned by respondent No. 1 and 2 herein which were given on lease to the appellant, who is running a Restaurant and Bar in the premises in question. The lease agreement came to be terminated by respondent No. 1 and 2 – original owners. The dispute with respect to the termination of lease agreement is the subject matter before the Arbitral Tribunal. Before the Arbitral Tribunal, respondent No. 1 and 2 filed two separate applications under Section 17 of the Arbitration Act seeking deposit of the rental amount due and payable for the period between March, 2020 to December, 2021. By way of an interim measure, in exercise of powers under Section 17 of the Act, the Arbitrator vide order/orders dated 05.01.2022 directed the appellant to deposit 100% of rental amount due

A and payable of the period between March, 2020 to December, 2021. At this stage, it is required to be noted that before the Arbitral Tribunal, it was the case on behalf of the appellant that due to the Covid-19 Pandemic, there was a lockdown declared by the Government and therefore, there was a complete closure/partial closure and therefore, invoking clause 29 (*Force Majeure*) of the lease deed, the appellant disputed the liability to B pay the rental amount for the period during which there was a lockdown/ complete closure/partial closure. Despite the above submissions, the Arbitral Tribunal directed the appellant to deposit the rental amount from March, 2020 onwardsand up to December, 2021. The Arbitral Tribunal also passed an order that amount so deposited shall be kept in fixed C deposit accounts. The operative portion of the order contained in para 43 is as under: -

> "43.(a) The Respondent shall compute the arrears towards rent separately in respect of each premises under lease at the agreed rate - Rs. 10,35,000/- per month (subject to applicable taxes) for the period from 01.05.2018 to 30.04.2021 and Rs. 11,90,250/- from D 01.05.2021 onwards in respect of leased premises of JTCPL and Rs. 2,39,390/- per month (inclusive of GST) in respect of leased premises of BIET - for the period of default and pendency of the matter thus far, i.e. from March 2020 onwards for and up to December 2021, adjusting the amounts already paid (as per E declarations made before this tribunal), deducting the TDS as per law, and communicate the same to the respective Claimants within a week of this order.
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> (b) The amounts of money equivalent to the arrears computed as above shall be deposited by the Respondent in Fixed Deposit (FD) F accounts - separately in relation to the respective Claimants - in a public sector Bank, initially for a period of six months with provision of auto-credit of Interest and periodical auto-renewal within four weeks of this order."

2.1 Feeling aggrieved and dissatisfied with the order passed by G the Arbitral Tribunal by way of an interim arrangement in exercise of powers under Section 17 of the Arbitration Act, the appellant preferred an appeal before the High Court under Section 37(2)(b) of the Arbitration Act. By the impugned judgment and order, the High Court has dismissed the said appeal and has confirmed the interim order passed by the Arbitral Tribunal passed in exercise of powers under Section 17 of the Arbitration H Act. Hence, the present appeal.

3. Ms. Aastha Mehta, learned counsel appearing on behalf of the appellant has vehemently contended that in the present case, both, Arbitral Tribunal as well as the High Court have not at all considered the submissions on behalf of the appellant on clause 29 of the agreement and the aspect of *force majeure* as prayed on behalf of the appellant. It is submitted by Ms. Mehta that even the Arbitral Tribunal has specifically observed in para 39 of the order that at this stage, the Arbitral Tribunal is not deciding anything on the import and effect of the *force majeure* clause (No. 29) contained in the lease deed. It is contended that therefore when the liability to pay the rentals during the lockdown period while applying the *force majeure* clause is seriously disputed by the appellant – lessee, such an order to deposit 100% rental amount by way of an interim measure under Section 17 of the Arbitration Act, ought not to have been passed by the Arbitral Tribunal.

3.1 It is further submitted by Ms. Mehta that even the learned Arbitral Tribunal has also observed that there is no evidence showing that the appellant is disposing of any part of its property much less removing itself or its assets out of India so as to create a possibility of frustrating the monetary award that may be passed in favour of the claimants upon conclusion of arbitration proceedings within the scope of Order XXXVIII of CPC. It is submitted that therefore, in absence of such evidence the impugned order which can be said to be akin to Order XXXVIII Rule 5 could not have been passed unless the conditions while invoking powers under Order XXXVIII Rule 5 are satisfied. Reliance is placed on the decision of this Court in the case of **Raman Tech. & Process Engg. Co. & Anr. Vs. Solanki Traders; (2008) 2 SCC 302**. While relying upon the decision of this Court in the case of **Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals (P) Ltd.; (2007) 7 SCC 125,** it is urged by Ms. Mehta, learned counsel appearing on behalf of the appellant that as held by this Court,even while passing an order under Section 9 of the Arbitration Act, the court has to bear in mind and consider principles applicable for exercise of general power to grant an interim injunction under Order XXXIX of CPC.

3.2 It is contended by Ms. Mehta, learned counsel appearing on behalf of the appellant that apart from the fact that there was a complete closure due to complete lockdown for the period between 22.03.2020 to 09.09.2020 and thereafter for the period between 19.04.2021 to 28.06.2021 and the period between 11.01.2022 to 27.01.2022 due to the

pandemic, for the remaining period the appellant was allowed to run the Restro/Bar with only 50% capacity and that too, from 12:00 noon to 10:00 pm. It is submitted that therefore, clause 29 of the agreement (*force majeure* clause*)* shall be applicable. It is submitted that the appellant could not use the rented premises for the aforesaid period either fully and/or partially due to Act of God and which was beyond the control of the appellant. It is submitted that therefore, the *force majeure* clause contained in clause 29 of the agreement shall be applicable. It is urged that whether in the facts and circumstances of the case, the principle of *force majeure* contained in clause 29 is applicable or not is yet to be considered by the Arbitral Tribunal at the time of the final adjudication and therefore, the Arbitral Tribunal has committed an error in directing the appellant to pay the full rental amount for the aforesaid period, by way of interim measure.

3.3 Ms. Mehta, learned counsel appearing on behalf of the appellant has also submitted that it is not that the appellant has not paid any amount at all and/or that the intention of the appellant is to defraud the landlords. It is contended that the dispute raised by the appellant is a bonafide dispute. It is pointed out that undisputedly during the pendency of the arbitration proceedings, the appellant itself had paid a substantial amount towards rentals of the two rented premises. That an amount of Rs. 87,64,133.76/- has been paid towards rentals for the period from October, 2020 to March, 2021 and July, 2021 to December, 2021. The appellant had also incurred other over head expenses, TDS dues, electricity and water charges. That even during the lockdown period, the appellant paid wages to its employees. Therefore, it will be too harsh on the appellant to pay the entire rental amount for the period between March, 2020 to December, 2021, as per the order passed by the learned Arbitral Tribunal confirmed by the High Court is the submission of the learned counsel for the appellant.

4. The present appeal is opposed by Ms. Shyel Trehan, learned counsel appearing on behalf of the respondents. It is contended that in the facts and circumstances of the case no error has been committed by the learned Arbitral Tribunal in directing the appellant to deposit the entire amount which is admittedly due and payable by the appellant. It is pointed out that on one hand, the appellant has continued to remain in possession of the leased properties and at the same time, he is not paying the rental amount. It is submitted that therefore, the learned Tribunal has rightly

passed an order by way of an interim measure directing the appellant to deposit the rental amount due and payable under the lease agreement.

4.1 According to learned counsel for the respondents neither the principles applicable under Order XXXVIII Rule 5 nor Order XXXIX Rule 1 are appliable in case of a direction issued by way of an interim measure, as in the instant case, directing the lessee to deposit the rental amount due and payable while the lessee is continued to be in possession.

4.2 It is further submitted that in the present case the principles of *force majeure* would not apply as the appellant – lessee continued to remain in possession of the leased premises. It is submitted that none of the decisions relied upon by the counsel appearing on behalf of the appellant, is applicable.

4.3 It is pointed out that as rightly observed by the High Court, the business of the appellant may have been impacted due to the outbreak of Covid-19 pandemic but that may not absolve the appellant from its contractual obligations to pay the lease rent. It is submitted that so long the appellant continues to occupy the premises, the liability of the appellant to pay the rental amount continues. It is urged that no error has been committed by the Arbitral Tribunal by directing the appellant to deposit the rental amount for the period between March, 2020 and December, 2021 and the same is rightly confirmed by the High Court.

5. We have heard learned counsel appearing on behalf of the respective parties at length.

6. At the outset, it is required to be noted that the dispute is with respect to the rental amount for the period between March, 2020 to December, 2021, for which the Arbitral Tribunal has directed the appellant to deposit while passing the order by way of an interim measure on the applications under Section 17 of the Arbitration Act. The liability to pay the lease rental for the period between March, 2020 to December, 2021 is seriously disputed by the appellant by invoking the *force majeure* principle contained in clause 29 of the lease agreement. It is the case on behalf of the appellant that for a substantial period there was a total closure due to lockdown and for the remaining period the appellant was allowed with 50% capacity and therefore, the *force majeure* principle contained in clause 29 shall be applicable. When the same was submitted before the Arbitral Tribunal, no opinion, even a prima facie opinion on the aforesaid aspect was given by the Arbitral Tribunal. In para 39, it is

A observed that "it would not be fair at this stage of the proceedings, where evidence is yet to be adduced by the parties in support their rival contentions on the issues that arise, to record any definitive opinion on the import and effect of the *force majeure* clause (clause no.29) contained in the lease deed". Therefore, applicability of the *force majeure* principle contained in clause 29 is yet to be considered by the Arbitral Tribunal at the time of final adjudication. Hence, the liability to pay the rentals for the period during lockdown is yet to be adjudicated upon and considered by the Tribunal. Therefore, no order could have been passed by the Tribunal by way of interim measure on the applications filed under Section 17 of the Arbitration Act in a case where there is a serious dispute with respect to the liability of the rental amounts to be paid, which is yet to be adjudicated upon and/or considered by the Arbitral Tribunal. Thus, no such order for deposit by way of an interim measure on applications under Section 17 of the Arbitration Act could have been passed by the Tribunal. However, at the same time, the aforesaid can be considered only for the period of complete closure due to lockdown. As per the available record, there was complete closure for the period between 22.03.2020 to 09.09.2020; for the period between 19.04.2021 to 28.06.2021 and for the period between 11.01.2022 to 27.01.2022 and for the remaining period the appellant was allowed to run the Restro/Bar with 50% capacity. The appellant will therefore have to deposit the entire rental amount except the period for which there was complete closure due to lockdown. As the applicability of *force majeure* principle (clause 29) is yet to be considered at least, for the period during the complete closure, it would not be justified to direct the appellant to deposit the rental amount for the said period of complete closure by way of an interim measure, pending final adjudication.

7. In view of the above and for the reasons stated above, the present appeal succeeds in part. The order passed by the Arbitral Tribunal passed in applications under Section 17 of the Arbitration Act, directing the appellant to deposit the entire rental amount for the period between March, 2020 to December, 2021, confirmed by the High Court by the impugned judgment and order, is modified and it is directed that the appellant to deposit the entire rental amount for the period other than the period during which there was complete lockdown i.e., 22.03.2020 to 09.09.2020 and for the period between 19.04.2021 to 28.06.2021. However, non-deposit of the rental amount for the aforesaid period during which there was a complete closure/lockdown shall be subject to the

ultimate outcome of the Arbitration Proceedings and the Arbitral Tribunal shall have to adjudicate and consider the principle of *force majeure* contained in clause 29 as contended on behalf of the appellant in accordance with law and on its own merits. All contentions which may be available to either party are kept open to be considered by the learned Arbitral Tribunal. The learned Tribunal to adjudicate and consider the aforesaid issue in accordance with law and on its own merits uninfluenced by the present order and observations by this Court in the present order shall be treated to be confined to while deciding the applications under Section 17 of the Arbitration Act and the interim measure order in exercise of powers under Section 17 of the Arbitration Act only, and the same shall not have any bearing on the final adjudication on the liability to pay the rentals even for the aforesaid period. The balance amount as per the present order shall be deposited by the appellant as observed by the learned Arbitral Tribunal in para 43(b) of interim order. The learned Tribunal to conclude the arbitration proceedings at the earliest preferably within a period of nine months, subject to the co-operation of both the parties. With this the present appeal is partly allowed to the aforesaid extent. There shall be no order as to costs.

Devika Gujral
(Assisted by : Mahendra Yadav, LCRA)

Appeal partly allowed.