

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/FIRST APPEAL NO. 3416 of 2021
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2021
In R/FIRST APPEAL NO. 3416 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA
and
HONOURABLE MR. JUSTICE SAMIR J. DAVE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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TIME CINEMAS AND ENTERTAINMENT PVT LTD
Versus
VENUS INFRASTRUCTURE AND DEVELOPERS PVT LTD

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Appearance:

KISHAN Y DAVE(8293) for the Appellant(s) No. 1
MR RASESH H PARIKH(3862) for the Appellant(s) No. 1
MR.HEMANG H PARIKH(2628) for the Appellant(s) No. 1
MR JIGAR M PATEL(3841) for the Defendant(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE N.V.ANJARIA
and
HONOURABLE MR. JUSTICE SAMIR J. DAVE

Date : 21/04/2022

CAV JUDGMENT
(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

By presenting this appeal under section 37 of the Arbitration and Conciliation Act, 1996 read with section 13 of the Commercial Courts

Act, 2015, the appellant seeks to challenge order dated 26th October, 2021 passed by the Commercial Court – the City Civil Court, Ahmedabad, in Commercial Civil Misc. Application No. 503 of 2021. It was an application filed by the appellant-applicant under section 9 of the Arbitration and Conciliation Act, 1996 which came to be dismissed as per the impugned order.

2. Learned advocates for the respective parties stated that the pleadings in the appeal were completed and they did not want to add or supplement the same any further.

2.1 Learned advocates for the parties relied on the copies of the documents which were on record before the Commercial Court. They were *ad idem* in respect of the contents of the said documents, which were relied on in course of hearing of the appeal. The appeal was accordingly finally heard as per the request and consent of the parties appearing through their respective learned advocates.

3. The following prayers were made by the appellant-applicant in application under section 9 of the Arbitration Act,

“pending the commencement, hearing and final disposal of the present Application as well as Arbitral proceedings, and 12 weeks after the award is passed, this Hon’ble Court be pleased to direct the Respondent to forthwith provide essential services, especially, functional Lifts, Operational Air Condition at 2nd and 3rd Floors, Functional Escalators, Common Drinking Water Facility, Common Toilets, Repairing of Water Leakages, submit Fire Safety Certificate and NOC to the applicant etc., in the Mall that is otherwise contractual obligation of Respondent so that the Applicant can enjoy peaceful possession of the leased premises as directed by this Hon’ble Court vide Order dated 31.7.2021 in Commercial CMA No. 424 of 2021 in the interest of justice.”

3.1 The appellant is a private limited company carrying on business in the name of Time Cinemas, involved in running motion pictures and

other such entertainment activities. The appellant entered into a lease agreement with the respondent, which is a company engaged in the business of leasing the real estate properties developed by it. The lease deed dated 14.4.2017 was in respect of shell space admeasuring 17,459 sq.ft carpet area on the 3rd floor of Retail Mall known as C. G. Square Mall at C.G.Road, Ahmedabad on the land bearing Final Plot Nos. 612/part, 613, 610, 612/part-I in Town Planning Scheme No. 3/6 at Kochrab, Sabarmati, Ahmedabad. Another lease deed dated 26.8.2019 was executed between the parties, whereby additional shell space adjacent to the space under the first lease deed was leased out. The period of lease was 10 years. It was agreed that the appellant would use the leased premises for the purpose of exhibiting the films. Fixtures in the leased premises to facilitate the cinema and cinema related activities were installed by the appellant, it was stated.

3.1.1 The respondent issued Notice dated 20.5.2021 asking the applicant to vacate the leased premises by 30.06.2021 on the ground of non-payment of lease rent etc.. According to the applicant, however, it had been paying the lease rent and charges for common area maintenance regularly in compliance of the conditions of the lease deeds and any lapse had not occurred. It was stated by the appellant-the applicant that non-payment of the rent from 1.4.2020 was on account of suspension of the activities due to outbreak of Covid 19 pandemic. It was stated that the State Government had issued notification to close cinemas which rendered it impossible to carry on the business.

3.2 It may be mentioned that before filling Commercial Civil Misc. Application No. 503 of 2021 resulting into the impugned order, the appellant had filed another Commercial Civil Misc. Application No. 424

of 2021 under section 9 of the Act. The prayers for interim measures in the said previous application read as under,

“(i) pending the commencement, hearing and final disposal of the Arbitral proceedings, and a few weeks after the award is passed, this Hon’ble Court be pleased to pass an order restraining the Respondent through its agents, officers, servants or any person concerned, through or under them, directly or indirectly from taking any coercive steps against the Applicant with respect to dispossession of fixtures, electrical equipment and other movable and immovable assets from the leased premises restoring to any high-handed action including forbidding Respondent from damaging the fixtures, electrical equipment and movables and immovable of Applicant and those third party assets lying in the leased premises at the instance of Applicant presently installed/lying in the leased premises;

(ii) directing the Respondent not to obstruct or create hindrance to Applicant, its servants, agents, officers and its customers from the quiet, legal and peaceful enjoyment of leased premises alongwith enabling all the essential and necessary services such as Lifts, Lights, Central Air Conditioners, Escalators, Common Washrooms etc in the said Retail Mall.”

3.2.1 In the said earlier application for interim measures, it was *inter alia* the case of the applicant that even before the execution of the lease deed dated 14.4.2017, the applicant was using the leased premises for the purpose of exhibiting the cinema and the possession of the leased premises was handed over to the applicant on 1.4.2016 and it had installed fixtures necessary to facilitate the screening of cinema and to make the cinema functional. It was stated that the fixtures and movable properties in the leased premises were owned by the third parties.

3.3 It appears that respondent by notice dated 20.5.2021 asked the applicant to vacate the leased premises on or before 30.06.2021. It was the case that notice to vacate the lease premises was an arm twisting tactics adopted by the respondent and that the applicant had been paying lease rent and charges for common area maintenance without any default

and as per the lease deeds. It was the case in that application that due to outbreak of Covid 19 pandemic, on 23.3.1990 the State Government directed all the Malls and public places to be closed due to which restrictions, the cinema could not be run and that it was occurrence kind of event of force majeure.

3.4 In the proceedings of the said Commercial Civil Misc. Application, Exh.16, the respondent filed *Purshis* dated 30.7.2021 stating thus,

"1. It is not in dispute that both the Applicant and the Respondent are ad-idem on the point that the dispute which has arisen by and between the Applicant and the Respondent in respect of lease agreement referred to in the present application is required to be adjudicated through the process of arbitration for which the provision is made in the said lease agreement.

2. The aforesaid is ex-facie evidence from the notice dated 17th June, 2021, issued by the Applicant invoking the provision for arbitration contained in the aforesaid lease agreement and the reply thereto dated 24th June, 2021.

3. However, as it is evident from the aforesaid notice and the reply, the Applicant and the Respondent are at variance on the name of the Sole Arbitrator to be appointed for adjudication of the dispute through the process of arbitration.

4. In view of the above, the respondent has already filed an application under section 11 of the Arbitration and Conciliation Act, 1996 being IIAP No. 126 of 2021 before the Hon'ble High Court of Gujarat. In respect of this application, the Hon'ble High Court has already issued notice by making the same returnable on 13th August, 2021.

5. In view of the above, it is hereby declared by the Respondent that the Respondent would not undertake any coercive step for dispossessing the Applicant from the premises in question till an appropriate order is passed by the Hon'ble High Court in the aforesaid application for the purpose of constituting an Arbitral Tribunal and thereupon, the Arbitral Tribunal becomes functional by entering upon the reference."

(highlighted here)

3.4.1 On the basis of the aforesaid *Purshis*, the Commercial Court delivered order after discussing the facts and the prayers made in the said application under section 9. In its order dated 31.7.2021, the Commercial Court *inter alia* observed that the applicant had established *prima facie* case and balance of convenience,

“...Even the applicant to demonstrate his bonafide has paid Rs. 5,00,000/- on 17.02.2021 and further Rs. 5,00,000/- on 11.3.2021 to the respondent as ad hoc payment towards rent and CAM charges. The said fact was not denied by the respondent. The applicant has invested huge amount of money in furniture, fixtures, electrical equipment and other movable and immovable assets in the leased premises valued crores of rupees, which cannot be dismantled and removed. Thus, the applicant has *prima faice* case in its favour. So far as the balance of convenience is concerned, the applicant has invested huge amount and if the applicant is not protected at this stage, then he would suffer irreparable loss in terms of money as well as goodwill and reputation. Therefore, the balance of convenience also lies in faovur of the applicant. Thus, in view of the *purshis* Exhibit-16 and the discussions made above, the applicant has successfully established the *prima facie* case, balance of convenience.”

3.4.2 The said Commercial Civil Misc. Application No. 424 of 2021 was accordingly allowed by granting the first prayer which was also the *Purshis* submitted by the respondent. The operative order was as under,

“(i) The present application is partly allowed.

(ii)The respondent is directed not to initiate any coercive action against the applicant including not to disturb the peaceful possession of the leased premises of the applicant, till 90 days, from the date of this order, to enable the applicant to approach the learned Arbitrator for adjudication of dispute between the parties.

(iii) Findings recorded in the present order are of preliminary in nature and the same shall not be binding to the parties or the learned Arbitrator in the subsequent proceedings.

(iv) Parties to bear their own costs.”

3.5 In the subsequent-the instant one-Commercial Civil Misc. Application No. 503 of 2021 resulting into the impugned order, the applicant came out with the case that though the court had protected peaceful possession of the applicant in respect of the leased premises as per the aforesaid order dated 31.7.2021, deliberate and voluntary acts were committed by the respondent to disturb the peaceful possession of the applicant of the leased premises. The applicant referred to in para Nos. 5 to 9 of the application about the mail correspondence that took place between the parties commencing from 5.9.2021 in which the lack of availability of essential services in the Mall was complained of. It was also stated that the lifts and other common facilities were not operative and that it was sought to be claimed that it was the obligation of the respondent to make it functional. It was the case that despite the requests, the respondent did not pay any heed to. The respondent replied that it was on account of technical issues that functioning of the lift services was hampered.

3.6 On 16.9.2021, the applicant had issued notice in which various services complained of to be non-functional were two customer lifts, two goods lifts, escalators, A.C.s, reduction of security guards, closure of common toilets in the Mall, non availability of drinking water facility, non-operational outdoor lights and other lights, water leakage in the cinema from terrace and the closure of 90% shops in the Mall, non-availability of fire safety services etc.. It was the stated by the applicant that by not providing those services, the respondent had violated the undertaking dated 30.4.2021 and consequentially disregarded the order dated 31.7.2021 passed by the court in earlier Commercial Civil Misc. Application No. 424 of 2021.

4. Learned advocate Mr. Rajesh Parikh for the appellant-applicant assailed the impugned order taking the court through the contents of and conditions in the lease deed. It was submitted that in the lease deed, the definition of “Common Area Maintenance” was provided to include the services to be rendered for the purpose of cleaning, housekeeping, security, general repairs and maintenance of common areas and facilities, common area electricity, maintenance of sanitary, plumbing, common equipment and installations like elevators and escalators, insurance costs, common area HVAC, electricity expenses, horticulture and also included the engagement of the manpower for the purpose of all these services. He referred to the clause No. 2.1 that lessor had given right to the lessee to use common area in the said land and building. The clause No. 8 of the lease agreement deal with the ‘Common Area Maintenance’ which was also highlighted. Clause No. 13.1 under the title of ‘Mall Standards’ was referred to and also was shown clause No. 15.1 under the title “Force Majeure” which was in respect of any event or circumstance of a combination of events and circumstances as described in Clause 15.2. Clause 15 listed different eventualities to be considered as force majeure.

4.1 It was sought to be contended that by order dated 31.7.2021 passed in Commercial Commercial Civil Misc. Application No. 424 of 2021, the court had protected the peaceful possession of the applicant in respect of the lease premises. It was, however, alleged that lift, electricity and other essential services in the Mall had become non-functional and the applicant had to address E-mail dated 5.9.2021 in that regard to the respondent. It was submitted that lift was the essential service and the respondent was under contractual obligation to keep it operational and maintain the lifts and other essential facilities in good condition, which

were non-operational since October, 2020.

4.2 The case was sought to be made out by stating that in the earlier order dated 31.7.2021 passed in Commercial Civil Misc. Application No. 424 of 2021 based on *purshish*, the court had protected for the respondent “the peaceful possession of the premises” and that due to all these facilities being non-functional, the applicant was not able to enjoy “peaceful possession” of the leased premises.

4.3 Canvassing similar contentions as were raised in reply to Commercial Civil Misc. Application 503 of 2021, it was submitted by learned senior counsel for the respondent Mr. Dhaval Dave assisted by learned advocate Mr. Jigar Patel that present was an application in repeat after disposal of Commercial Civil Misc. Application No. 424 of 2021 by order dated 31.7.2021 and that such second application with prayers for interim measures on the same lines, was not maintainable. It was contended that once the contract of lease was put an end to by termination notice dated 20.5.2021, it was not open for the respondents to place reliance on any of the provisions of the lease deed.

4.4 It was next submitted that by earlier order dated 31.7.2021, the court protected the possession of the premises to be with the respondent. It was contended that the lease rent and the common area maintenance charges were due and unpaid and that it was not possible to waive the said charges, since the concession had already been offered in payment of monthly rent. It was submitted that it was not open for the applicant to occupy the premises without paying the stipulated rent and the common charges. It was submitted that the possession of the premises of the applicant upon termination of the lease agreement was unauthorised, yet by filling *Purshis* Exh. 16, the respondent had agreed not to take

coercive steps.

4.5 It was the further contention on behalf of the respondent that it was not under the obligation to provide services to the applicant once the lease deed was terminated. About non-functioning of the lifts, it was stated that due to technical problem, the lifts were under maintenance and therefore, they were not functional. It was stated that the occupants of the Mall including the applicant did not give any contribution. It was stated that common lights were working, that the Mall was adequately guarded by the security and that all the complaints by the applicant in that respects were not well placed. It was finally contended that the applicant since no longer the lessee, cannot seek the prayers which are repeated in the instant Commercial Civil Misc. Application.

5. Having considered and the rival submissions, it is to be noticed that in Commercial Civil Misc. Application No. 503 of 2021 from which this appeal arises, the interim measures prayed for was to direct the respondent to provide essential services like lifts, escalators etc. in the Mall stating that without which the applicant was not able to enjoy the fruits of order dated 31.7.2021 passed in earlier Commercial Civil Misc. Application No. 424 of 2021. Now in the said earlier Misc. Civil Application, also filed under section 9 of the Act, prayers in two-folds were made as reproduced in paragraph No. 4 above. First was to restrain the respondent from dispossessing the applicant from the premises and the second was for direction not to obstruct in the peaceful enjoyment of the leased premises. As noted above, the respondent filed *Purshis* at Exh.16 to agree that it will not take any coercive steps against the applicant. Based on the *Purshis*, the Commercial Court passed order granting the said relief of not taking any coercive steps. The peaceful

possession of the applicant of the leased premises was thus protected. The second prayer was not granted by the said order. It has to be treated as deemed to have been rejected. The order passed was a reasoned order in which merits were also considered.

5.1 Evidently, the present application seeking interim measures is repetitive. Once the application under section 9 of the Arbitration and Conciliation Act seeking interim measures was filed with similar prayers and the same has been disposed of by granting the prayers either fully or in part, subsequent similar application making prayers on the same lines which were dealt with in the earlier proceedings, could hardly be said to be maintainable. The second application with similar prayers was not maintainable. The First Commercial Civil Misc. Application No. 424 of 2021 was dealt with by the court on merits and the interim measures pertaining in the first prayer was granted as per order dated 31.7.2021. The applicant has been in peaceful possession of the Mall premises accordingly.

5.2 While rejecting the prayers, the Commercial Court rightly highlighted the aspect that the applicant has failed to pay the rent and common area maintenance charges, which was his obligation under the lease agreement. This conduct of the applicant was rightly weighed with the Commercial Court. It was further observed by the Commercial court that the restrictions on the running of the cinema due to Covid 19 pandemic were lifted long back and that the cinema business was operational and the applicant had started earning from the lease premises.

5.3 It is trite principle laid down in **Adhunik Steels Ltd. vs. Orissa Manganese and Miners [(2017) 7 SCC 125]** that while considering the prayers for interim measures under section 9 of the Arbitration Act, 1996,

the court has to be guided by the principles governing the exercise of powers under Order 39 Rule 1, 2 of the Civil Procedure Code, 1908, and the principles analogous thereto. The equitable considerations and the aspect of conduct of the parties, as are relevant for seeking the equitable relief of injunction, are also germane in considering the grant or otherwise of interim measures under section 9. The conduct of the party becomes a relevant consideration in weighing the prayers for grant of interim measures under section 9 of the Arbitration Act, 1996.

5.4 By seeking direction against the respondent to make the facilities operational and to permit the applicant to run the cinema with all facilities, the applicant indeed in different way wanted to revive the lease agreement which is already terminated. Whether the applicant is entitled to exercise rights under the lease agreement or not is the arbitral dispute to be dealt with and decided by the Arbitrator. Revival of the lease agreement could not be granted by way of interim measures. It would amount to interjecting the realm of arbitration and the dispute to be tried before the Arbitrator.

5.5 The applicant has been in peaceful possession of the premises. Granting any direction beyond the said interim protection of enjoying the peaceful possession would tantamount to granting principal relief to the applicant, which is to be decided by the Tribunal. The relief which could be granted by the Arbitrator only at the end of the arbitral proceedings, would ordinarily and in normal circumstances not be granted as an interim measure on the footing of the principle that principal relief cannot be granted at the interim stage and that grant of interim directions of the nature granting main relief is not permissible in law.

6. It may be stated at this stage that the Arbitrator has already been

appointed to resolve the disputes between the parties. It was stated that the application under section 17 of the Arbitration Act is also filed before the Tribunal. It is also not in dispute that in the arbitral proceedings also, the respondents have reiterated their stand by filling the *Purshish* that they would not take any coercive steps against the applicant till the completion of the arbitral proceedings.

7. We do not see any infirmity or illegality in the impugned order of the Commercial Court in dismissing the Commercial Civil Misc. Application No. 503 of 2021 and rejecting the prayers therein made by the applicant. Resultantly, the present appeal is dismissed.

In view of disposal of the main appeal, no orders are required to be passed in the Civil Application. It accordingly stands disposed of.

(N.V.ANJARIA, J)

(SAMIR J. DAVE, J)

C.M. JOSHI

THE HIGH COURT
OF GUJARAT

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