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

Date of Decision: 09th September, 2021

+ **ARB. A. (COMM.) 28/2021 & I.As. 7504-05/2021 & 8939/2021**

M/S CINEPOLIS INDIA PVT. LTD. Appellant

Through: Mr. Jayant K. Mehta, Senior
Advocate with Mr. Parmanand
Yadav Advocate.

versus

M/S SARITA MULTIPLEX PVT. LTD Respondent

Through: Mr. Yogesh Jagia, Advocate.

+ **ARB. A. (COMM.) 29/2021**

M/S SARITA MULTIPLEXES PVT. LTD. Appellant

Through: Mr. Yogesh Jagia, Advocate.

versus

CINEPOLIS INDIA PVT. LTD. Respondent

Through: Mr. Jayant K. Mehta, Senior
Advocate with Mr. Parmanand
Yadav Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present cross-appeals under Section 37 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as 'the Act'*], have been filed

by the parties, being aggrieved by the Order dated 20th May 2021 of the learned Sole Arbitrator in the ongoing arbitral proceedings [*hereinafter referred to as 'Impugned Order'*], wherein certain directions were passed while adjudicating an application under Section 17 of the Act.

The Dispute

2. Briefly stated, the facts of the case are as follows:
 - 2.1. Cinepolis India Pvt. Ltd. [*hereinafter referred to as 'Cinepolis'*] entered into a Lease Deed dated 21st April 2014 [*hereinafter referred to as the 'Lease Deed'*] with the Respondent - Sarita Multiplex Pvt Ltd. [*hereinafter referred to as 'SMPL'*], in respect of a three-screen multiplex with a capacity of 800 seats, comprising 1902.10 sq. mt. of super area, [*hereinafter referred to as the 'Multiplex'*] situated in North Square Mall, constructed on Plot No. F-1, 2 & 3, Kabirdas Marg, Netaji Subhash Place, District Centre, Pitampura, New Delhi - 110034 [*hereinafter referred to as the 'Mall'*].
 - 2.2. Cinepolis, as the successor-in-interest of Fun Multiplex Pvt. Limited (the original lessee), is the Claimant in the ongoing arbitration proceedings, and SMPL is the Counter-Claimant.
 - 2.3. Under Clause III of the aforementioned ongoing Lease Deed, Cinepolis has to pay monthly rent with service tax by the 7th of every month in advance. Delay in payment of rent attracts interest @ 15% for the delayed period.
 - 2.4. On 12th March 2020, lockdown restrictions were issued by the Government of NCT of Delhi directing closure of Malls and Multiplexes in Delhi till 31st March 2020 in light of the COVID-19

pandemic. Resultantly, on 16th March 2020, Cinepolis invoked *Force Majeure* under clause XV of the Lease Deed and sought to be excused from payment of rent of the leased premises.

- 2.5. Apart from *Force Majeure*, Cinepolis also claimed suspension of payment of rent on the ground that SMPL failed to fulfil its reciprocal promise of obtaining NOC for Fire Safety Certificate of the Mall [hereinafter referred to as '*Fire NOC*']. It is stated that the Fire NOC of the Multiplex is a subset of the Fire NOC of the Mall. The same expired in 2019, and has not been renewed to date; this fact was only discovered by Cinepolis in 2020.
- 2.6. SMPL, on the other hand, seeks re-possession of the Multiplex on the ground that the Lease Deed stood terminated *vide* its notice dated 12th May, 2020 effective from 1st June, 2020 and the issue of Fire NOC raised by the respondent is contrary to the terms of Lease Deed. It also claimed arrears of rent and use and occupation charges for continuing in possession beyond termination.
- 2.7. In this background, consequent to the petitions filed by Cinepolis under section 9 of the Act, this court passed interim orders of protection in its favour and directed the payment of rent to be deposited in the court. Parties were then referred to arbitration.¹
- 2.8. During the pendency of the arbitral proceedings, parties filed applications under Section 17 of the Act. These were decided by the Impugned Order that is now assailed in the instant appeals.

¹ *Vide* order dated 01st March, 2021, this Court appointed Mr. Janak R. Aryan, Retd. Distt. Judge, New Delhi, as the Sole Arbitrator.

Cinopolis's Contentions:

3. Mr. Jayant K. Mehta, senior counsel for Cinopolis, argues as follows:

3.1. Cinopolis's challenge to the Impugned Order is limited to the dicta issued by the Tribunal, directing Cinopolis to make continuous deposit of rental payment before the Registrar General of this Court, pending culmination of arbitration proceedings. Cinopolis is not contractually liable to pay rent unless and until the Fire NOC of the mall has been obtained. It is aggrieved with the direction given by the Tribunal to deposit rentals and GST, because, while it continuously fulfils such obligations, SMPL has not been given a counterbalancing direction to speedily take any steps for renewal of the Fire NOC.

3.2. The learned Arbitrator has passed the Impugned Order in contravention to the express terms of the Lease Deed. Clauses I(a), II(a) and V of the Lease Deed demonstrate that it was SMPL's liability to provide and maintain the Fire NOC and to ensure that Cinopolis is, for the duration of the Lease, able to obtain necessary permissions for running the Multiplex. Use of the Multiplex was hindered on account of, firstly, the non-availability of the Fire NOC, resulting in non-renewal of the Fire NOC of the Multiplex, and thereafter by the Government of India on account of the lockdown imposed due to the pandemic. Today, even if the second hurdle is cleared, Cinopolis is still not liable to pay rent unless and until the Fire NOC of the Mall is obtained.

3.3. The Order is inequitable. In the absence of the Fire NOC concerning the Mall, the Multiplex cannot be utilised by Cinopolis. Therefore, it will be

grossly inequitable for Cinepolis to be directed to deposit rent. Regardless, Cinepolis has invested nearly Rs. 10 crores in the suit property. There is a security deposit of 55 lakhs with SMPL. Cinepolis, as of May 2021, has deposited a total sum of Rs. 3,01,15,260/- in compliance with the direction of this Court dated 26th June, 2020. It, thus, must be held to be entitled to suspension of the lease rental.

3.4. Despite returning clear findings in favour of Cinepolis in para 33 of the Impugned Order, the Learned Arbitrator has erroneously relied upon the direction of this Court dated 26th June, 2020 and the sole fact that Cinepolis is in occupation of the premises. It ignored that mere occupation of the Multiplex is insignificant when Cinepolis is unable to use it.

3.5. SMPL was obliged under the terms of the Lease Deed to ensure that the purpose of the lease is fulfilled. It is an admitted fact that the Mall, and consequently the Multiplex, do not have the Fire NOC. As SMPL has failed to fulfil its obligations as envisaged under the Lease Deed, the directions given by the learned Arbitrator are against the spirit of the agreement, which has been held to be binding between the parties.

3.6. Further, a writ petition has been filed against Delhi Development Authority by the welfare association of the shop owners of the Mall, (of which SMPL's owner is the President), seeking a direction for providing the Fire NOC to the Mall. This is indicative that the premises in question, as of today, cannot be utilised for their requisite purpose. Thus, Cinepolis is entitled to rely upon the *Force Majeure* clause. Further, it is clarified that the withdrawal of the *Force Majeure* notice in October/November 2020, was due fact that the Govt. of NCT of Delhi had partially lifted the restrictions on the functioning of cinema halls.

3.7. Without prejudice to the foregoing, in case the Court is inclined to secure SMPL for the rent amount, then Cinepolis should be permitted to furnish a Bank Guarantee instead of directing deposit of rent.

SMPL's contentions:

4. *Per contra*, Mr. Yogesh Jagia, counsel for SMPL, argues as follows:

4.1. There is no condition stipulated in the Lease Deed, which makes it obligatory for SMPL to arrange for the Fire NOC.

4.2. Despite repeated notice/reminders, Cinepolis defaulted for a continuous period of three months in payment of lease rent, hence, SMPL, by exercising its rights under clause III(f) of the Lease Deed, by notice dated 12th May 2020, terminated the Lease Deed. At that stage, Cinepolis had approached this Court, seeking a stay of termination under Section 9 of the Act. As evident from orders passed in the said petition, Cinepolis had voluntarily agreed to make payment of the rental amount. In these circumstances, the Court had passed an interim order directing SMPL not to terminate the Lease Deed. Therefore, Cinepolis has no ground to seek suspension of rent.

4.3. Rather, the Impugned Order should be modified by directing the release of the rent amount in favour of SMPL.

4.4. Reference is drawn to the clauses in the Lease Deed which give the right of termination to SMPL in the event rent has not been paid.

4.5. The Lease Deed is automatically terminated if the *force majeure* event continues for a period of 180 days. Rather, to avoid this automatic termination, Cinepolis had withdrawn the notice after the expiry of the period of 180 days with a certificate.

4.6. Point 4 of Annexure E of the Lease Deed [Fire Fighting] was shown to this Court, to make the inference that responsibility of initial and subsequent inspection and approval of firefighting system will rest with the developer of the mall, and thus SMPL was not responsible for the lack of NOC. Reference in this regard was also made to clauses III(f) [Lessee's Warrants and Covenants] and 4 [Maintenance] of the lease deed.

4.7. Since SMPL has several outgoings in respect of the premises in question, the Court should permit the release of the rental amount, failing which grave prejudice would be caused.

Analysis and findings:

5. The contentions of the parties have been given due consideration.

6. The parties are admittedly in the relationship of lessor and lessee, in terms of Lease Deed dated 21st October 2014. Cinepolis, by its notice dated 16th March 2020, invoked *force majeure* under clause XV of the said Deed and claimed that it is excused from payment of rent. However, subsequently *vide* notice dated 7th October 2020, the said notice was revoked retrospectively w.e.f. 1st September 2020. Thus, the *force majeure* plea is no longer being advanced by Cinepolis. In that view of the matter, the contention advanced by it before this court, seeking suspension of the rent, cannot sustain.

7. Besides, as can be seen from the documents on record, when Cinepolis defaulted in paying rent for a continuous period of three months, SMPL, exercising its rights under clause III(f) of the Lease Deed, by notice dated 12th May 2020, terminated the Lease Deed. This led to Cinepolis filing a petition before this Court under Section 9 of the Act, seeking interim

reliefs of restraining SMPL from terminating. In the said petition, on 23rd June 2020, Cinopolis without prejudice to their rights and contentions, agreed to deposit the deficient rent of the period of March to June, 2020 with the Registrar General of this Court, and also consented that the dispute could be referred to Arbitration.

8. In the subsequent hearing, this Court *vide* Order dated 26th June, 2020, worked out an interim arrangement, in the following terms:

“20. In the circumstances, I am of the considered opinion that, pending disposal of the present OMP, it would be in the fitness of things, and in the interests of justice, to permit the petitioner to deposit the lease rent, which remains to be deposited, till date and till disposal of the OMP, with the Registrar General of this Court, without prejudice to the rights and contentions of both parties. This, in my view, would not prejudice either party as were the respondent to succeed, the lease rent could be released to the respondent. The rent would be deposited by way of a crossed Demand Draft favouring the Registrar General, and would be retained in an interest bearing fixed deposit, pending further orders.

21. Given the nature of the disputes between the parties, I am also of the opinion that, were this ad interim relief not to be granted at this stage, if the respondent were to terminate the lease, it would result in frustration of entire proceedings and may also result in irreparable loss to the petitioner.

22. As such, till the next date of hearing, there shall be an ad interim stay on the respondent from terminating the Lease Deed dated 21st January, 2014 (supra), subject to the petitioner depositing, within a period of two weeks, with the Registrar General of this Court, the entire balance lease rent, required to be paid to the respondent, as well as continuing to deposit, till the disposal of this OMP, the rent payable to the respondent for the occupation of the aforesaid premises as fixed in the Lease Deed. Deposit shall be made as indicated in para 20 supra.

22. The deposit of lease rent shall, needless to say, be without prejudice to the rights and contentions of both parties to the case.

23. It is made clear that the above observations are only to

arrive at a decision regarding the prayer of the petitioner, for being permitted to deposit the lease rent with the Registrar General of this Court, and should not be treated as a view regarding the merits of either party, which would be decided when the OMP is finally heard.

24. *In order to arrive at an expeditious disposal of the OMP, list the OMP, in the category of “finals” on 23rd July, 2020. The matter should be reflected in the list on the said date.*

25. *The amount of lease rent shall be deposited within four weeks. Failure to deposit the amount of lease rent, as directed hereinabove, would result in automatic vacation of the stay order.”*

9. Subsequently, Cinepolis applied to the Court seeking modification of the orders dated 26th June, 2020 and 25th November, 2020. A request was made that the direction for deposit of rent and applicable GST be modified, by permitting Cinepolis to furnish a Bank Guarantee instead. The said request was declined *vide* order dated 01st March, 2021, wherein this Court by consent, permitted the Petitioner to apply to the Arbitral Tribunal under Section 17 of the Act, and the learned Arbitrator was requested to decide the same expeditiously. The relevant portion of the order reads as under:

“ARB. P. 251/2020

1. *The precise nature of the dispute between the parties already stands recorded in the order dated 26th June, 2020 and, as the parties are mutually agreeable to the disputes being referred to an arbitrator to be appointed by this Court, with O.M.P.(I) (COMM.) 149/2020 being decided by the learned arbitrator as an application under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”), it is not necessary for me to recapitulate the facts.*

2. *In view of the joint submission by both parties, ARB. P. 251/2020 is disposed of by appointing Mr. J. R. Aryan, a learned retired Additional District Judge (Mobile No. 9958697034) as the arbitrator, to arbitrate on the disputes between the parties. The parties may contact the learned arbitrator at the contact details*

provided hereinabove within 48 hours of receipt of a copy of the present order by the Registry of this Court.

xx ... xx ... xx

5. *ARB. P. 251/2020 stands disposed of in the aforesaid terms.*

O.M.P.(I) (COMM.) 149/2020

1. *By consent, the petitioner is permitted to file this petition before the learned arbitrator as an application under Section 17 of the 1996 Act. The learned arbitrator is requested to decide the present application as expeditiously, and if possible, within a period of four weeks from entering on reference.*

2. *The interim order dated 26th June, 2020 read with the order dated 25th November, 2020 passed by this Court, shall continue to remain in operation and parties shall abide by the orders to be passed by learned arbitrator in O.M.P.(I) (COMM.) 149/2020 treating it to be an application under Section 17 of the 1996 Act.*

3. *O.M.P.(I) (COMM.) 149/2020 stands disposed of accordingly.*

xx ... xx ... xx ”

10. In light of the foregoing, the learned Arbitrator has passed the Impugned Order in the Section 17 application, operative portion whereof, reads as follows:

“57. Having considered arguments from both sides, in view of observations made in this order, prima facie, petitioner can be said to have made out a case for confirming the ad-interim order already passed by Hon’ble Court vide order dated 22.06.2021. Counsel Mr. Mehta requested for modification of ad-interim order whereby petitioner had been directed to deposit rent every month, by granting suspension of deposit of rent for 4 to 5 months or till Fire NOC of Mall was obtained earlier and, in that situation, suspension would stand withdrawn as Fire NOC would enable petitioner to obtain Fire Safety Certificate of Multiplex for its operation. He argued that in this pandemic time, when there was tremendous economic slowdown and particularly when petitioner had already deposited a huge amount towards rent for the period even covered under force majeure, relief of suspension of rent for a small period would be a breather for struggling petitioner. Counsel

for the respondent opposed the request and stated that respondent had liabilities towards property tax, income tax etc. and was not receiving rent and thus was facing constraint in equal terms. I have given due consideration to this aspect.

58. Request for suspension of rent till Fire NOC of Mall was obtained might have worked as stimuli for respondent to work more vigorously towards obtaining Fire NOC, but fact remains that petitioner being in occupation of demised premises should pay rent, though the issue of purpose for which occupation is connected is alleged defeated due to faults in discharge of obligations of lease by the lessor and the same is going to be a strongly debated issue and particularly when rent is being deposited in court and its release shall be subject to adjudication of rights and liabilities of parties in this Arbitration, request deserves non-consideration. However, the requirement of obtaining Fire NOC of Mall must stare respondent in view of contention from petitioner that it will not be liable to pay rent till Fire NOC of Mall was obtained by the respondent as per its obligation under the lease. Similarly request of learned respondent counsel for release of rent, lying deposited in court, is declined till the rights of the parties are adjudicated in this Arbitration.

59. Petitioner makes out prima-facie case for interim order to stay termination of lease pursuant to respondent's notice dt. 12.05.2021 or its reply dt. 06.06.2021. Lease needs to be preserved in this case by interim order to allow petitioner to establish its case of breach of reciprocal promise on the part of lessor and to establish force majeure to seek suspension of rent for the force majeure period and consequences of these aspects on termination of lease. Balance of convenience lies in its favour and petitioner will suffer irreparable loss if lease for 25 years is terminated at a very initial stage. Ad interim order dated 22.06.2021 is thus confirmed and respondent is restrained from treating the lease terminated pursuant to its notice dated 12.05.2021 or its plea in reply dt. 06.06.2021 till the disputes are adjudicated and award is made in this Arbitration. Petitioner shall however continue to deposit rent of demised premises every month punctually as already directed by ad-interim order."

11. This arrangement has been directed to continue till final adjudication of the claims and counter-claims. We cannot ignore the fact that the term of the lease is agreed to be 25 years. Therefore, whether termination by SMPL

is in accordance with the contractual provisions or not, would have to be examined by the Arbitral tribunal at the stage of final adjudication. In the interregnum, since Cinepolis has been protected, and SMPL has been restrained from terminating the lease, to counter-balance the interest of SMPL, it has been directed that the rent and GST be deposited with the Registrar General of this Court. Further, since the final view on SMPL's entitlement for the rent is yet to be made, the learned Arbitrator has directed that the rental amount shall not be released to SMPL. The court finds this arrangement to be equitable, well-balanced and necessary in the given facts and circumstances of the case.

12. There is no constrain on Cinepolis to continue its occupation of the Multiplex. In fact, the Lease Deed enables it to exit from the lease, yet, it has not surrendered the possession of the leased premises. In effect, Cinepolis continues to willingly remain in the lease relationship and has also sought an injunctive order against termination of the Lease Deed. They contend that since a sizeable investment of nearly 10 crores has been in the property, it would be prudent to retain the premises. That is a commercial decision for them to take. But, as long as Cinepolis continues to be in occupation of the premises under the hope that necessary Fire NOC would follow, it is imperative that SMPL's interests should also be protected. Hence, the direction for deposit of the rent till adjudication of the claims by the arbitral tribunal is certainly fair and equitable.

13. The second contention relating to reciprocal promises is premised on SMPL's alleged failure to obtain Fire NOC of the Multiplex. Cinepolis alleges that the onus to obtain Fire NOC for the mall is on SMPL under

clause II(a) of the Lease Deed. This question is pending consideration before the Learned Arbitrator and the court thus refrains from expressing any definite view on the same. However, on a *prima facie* basis, the court does not find this to be sufficient justification for granting suspension of the Lease rent. If the reciprocal promises are not being fulfilled by SMPL, Cinepolis can exit from the Lease Deed. Electing to continue as a lessee and retaining the possession of the premises does not warrant suspension of rent in the interregnum. Thus, the appeal by Cinepolis has no merit. The view taken by the Arbitral Tribunal cannot be held to be perverse or grossly arbitrary, and thus the Court would not like to substitute the view taken by the Arbitrator with its own.

14. Likewise, the court does not find any perversity in *the prima facie* view taken by the Learned Arbitrator in preserving the Lease Deed, by finding a *prima facie* case in favour of Cinepolis and allowing it to establish its case on 'breach of reciprocal promise' and *Force Majeure* to claim suspension of rent for the *Force Majeure* period. The operative portion of the Impugned Order, as extracted above, makes it clear that the Tribunal was cognizant of the fact that there are several issues relating to the construction of the contract as well as the rights and obligations of the parties that would require further in-depth analysis of facts and contract. Whether SMPL has committed a breach by failing to furnish the Fire NOC for the running of the Multiplex, or whether that is a condition mandatory for running the cinema hall – have yet to be examined. Therefore, no direction for release of rent in favour of SMPL, or vacation of restraint from termination of Lease, can be issued at this stage.

15. The learned Arbitrator has taken the correct approach in balancing equities, pending adjudication of the disputes. Court does not find any merit in the contentions raised by either of the parties. No ground for interference is made out.

16. Needless to say, the observations made hereinabove are only for the purpose of deciding the present appeals and shall not influence the learned Arbitrator in adjudicating the disputes between the parties. The Arbitral Tribunal is requested to expedite the hearing, considering that both parties have expressed grave financial difficulty on account of the prevailing economic circumstances leading to loss of earnings.

17. Both the appeals along with pending applications are dismissed.

SEPTEMBER 9, 2021

akansha

(corrected and released on 28th September, 2021)

SANJEEV NARULA, J