

Cinepolis India Pvt. Ltd vs Sarita Multiplexes Pvt. Ltd on 26 June, 2020

Author: C. Hari Shankar

Bench: C. Hari Shankar

\$~2 (original side)

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P(I)(COMM) 149/2020 and I.As. 4742-4743/2020

CINEPOLIS INDIA PVT. LTD. ... Petitioner
Through: Mr. Jayant K. Mehta and Mr.
Parmanand Yadav, Advs.

Versus

SARITA MULTIPLEXES PVT. LTD. ... Respondent
Through: Mr. Yogesh K. Jagia and Mr.
Amit Sood, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER

% 26.06.2020
(video-conferencing)

I.A. 4743/2020 (exemption)

1. This application, by the petitioner, seeks exemption from the requirement of filing legible/typed/certified copies of documents, duly affirmed affidavits and for depositing court fees.

2. In view of the restrictions imposed consequent on the Covid-2019 pandemic, and the administrative order dated 4th April, 2020, passed by this Court, on the administrative side, subject to the fulfilment of the above requirement, within 72 hours of resumption of normal Court work, exemption is granted for the present.

3. The application is allowed accordingly and disposed of.

O.M.P(I)(COMM) 149/2020 and I.A. 4742/2020 (ex parte ad interim measure)

1. Issue notice to the respondent.

2. Mr. Yogesh K. Jagia, learned counsel appearing for the respondent accepts notice. Let counter affidavit to the petition be filed within a period of two weeks (as requested), with an advance copy to the counsel for the petitioner, who may file rejoinder thereto, if any, within two weeks thereof.

3. It is made clear that no extension of time, for completion of pleadings, would be granted.

4. Mr. Jayant K. Mehta, learned counsel appearing for the petitioner has prayed for an ad interim order, restraining the respondent from terminating the Lease Deed, and from acting in furtherance of the termination notices dated 12 th May, 2020 and 6th June, 2020, and from alienating the premises, in which the petitioner is in occupation, to any third party, pending disposal of this petition, subject to his undertaking to deposit the lease rent, till date and till the disposal of this petition, with the Registrar General of this Court.

5. Mr. Jagia, learned counsel appearing for the respondent strenuously opposed this request.

6. Accordingly, learned counsel for the parties have been heard at length on the issue, whether this request would be allowed.

7. On a brief conspectus of the facts, may be necessary.

8. On 21st January, 2014, the respondent and M/s. Fun Multiplex Pvt. Ltd. entered into a registered lease agreement. Later, consequent on orders, dated 20th October, 2015 and 22nd December, 2015, passed by the High Court of Punjab and Haryana and 18th January, 2016, passed by the High Court of Bombay, M/s. Fun Multiplex Pvt. Ltd. merged with the petitioner, which adopted, with such merger, all rights and liabilities of M/s. Fun Multiplex Pvt. Ltd.

9. On 22nd November, 2005, the respondent had purchased the suit property, consisting of Cineplex, with respect to which lease was granted to the petitioner from M/s. Sun City Developers Private Limited (hereinafter referred to as "SCDPL"), under a registered Sale Deed.

10. It is asserted, in the petition, thus:

(i) The mall, in which the Cineplex was located, was maintained, by SCDPL till April, 2017.

(ii) In April, 2017 SCDPL handed over the maintenance of the mall to the welfare association of the owners of the shops and the cinema located in the mall.

(iii) The respondent, thereafter, appointed a maintenance agency, namely, M/s. Armaan Management Services Pvt. Ltd.

(hereinafter referred to as "the Mall Maintenance Agency") to look after the maintenance of the premises.

(iv) On 3rd June, 2019, a Memorandum of Understanding (MOU) was entered into, between the petitioner and the respondent, whereunder the petitioner expressed his intention to enter into a separate agreement with the Mall Maintenance Agency, and to extend the services of the Mall Maintenance Agency to include operation and maintenance of the chiller plant provided to the petitioner. The Mall Maintenance Agency, thereafter, started taking care of the air-conditioning plant of the petitioner's cinema exclusively and providing air-conditioning from the chiller plant operated and maintained by the Mall Maintenance Agency. Later, owing to some technical fault, the AC stopped working. It is asserted that vide MOU dated 3rd March, 2019, the respondent had agreed to fund the entire cost of purchase and installation of the new chiller plant in terms of the lease deed.

(vi) Other disturbances, in running the Cineplex, have also been highlighted in the petition, as a result of which, from time to time, the petitioner was unable to operate the Cineplex.

(vii) In January, 2020, the DCP (Licensing) informed the petitioner, the respondent and the Mall Maintenance Agency to have, ready, an updated Mall Fire and Electrical NOC, prior to issuance of a fresh Fire Safety Certificate for operation of the Cineplex. On the petitioner corresponding with the respondent in this regard, it was informed that fire NOC of the mall had not been renewed after July, 2019.

(viii) This resulted in a slew of communications between the petitioner and the respondent, regarding obtaining of a fresh fire NOC, so that an updated fire safety certificate could be issued by the licensing authority. While the respondent maintains that the responsibility of obtaining a fresh fire NOC was on the Mall Maintenance Agency, with which the petitioner had exclusively contracted, the petitioner relies on Clause 2(a) of the Lease Deed, which reads thus:

"II. LESSOR'S WARRANTIES AND COVENANTS AS FOLLOWS:

a) The Lessor will make available to the Lessee a certified true · copy of the completion certificate and other statutory certificates issued in respect of the Mall, so that the Lessee can in turn apply for its operating permits as and when required. If there are any building code violations where the violations would affect the Multiplex operations, which the Lessee intends to perform within leased area or which would prevent Lessee from obtaining and/or renewing necessary permits or approvals or which would prevent or hinder Lessee's business operations within the Multiplex, the Lessor will promptly take steps for the removal of such violations and complete the removal of such violations within a period of 30 days from the date of getting written intimation from the Lessee in this regard. If the same is not yet removed within 30 days from the date of getting written intimation from the Lessee in this regard, the Lessee may promptly get removed the same at the cost of the Lessor and the amount spent shall be deducted from the Lease Rent payable to the Lessor. Appended as Annexure "I"

is a copy of the letter dated 1st January, 2014 from the Developer to the Lessor providing the Lessor certain assurances in this regard."

11. While Mr. Jayant K. Mehta, learned counsel for the petitioner, emphasizes the import of the afore-extracted Clause II(a), Mr. Yogesh K. Jagia, learned counsel for the respondent relies on the residual portion of the said Clause, whereunder, in the event of default, by his client, to take steps for removal of violations, the petitioner could have got the violations removed and deduct the expense from the lease rent payable by the petitioner. In any event, contends Mr. Jagia, this cannot constitute a legitimate basis for the petitioner defaulting in payment of lease rent, or seeking any amnesty in that regard.

12. Consequent to the restrictions, as a result of the Covid-2019 pandemic, which has ravaged the country, the petitioner's cinema, and, indeed, the entire mall was shut down. The petitioner, in the premises, sought to invoke the "force majeure clause", being Clause XV of the Lease Deed, which (to the extent it is relevant) reads thus:

"XV. FORCE MAJEURE:

If the performance of this Lease Deed by either party is prevented, in whole or in part, by the causes beyond the control of such effected party which it could avert in spite of best endeavor and due diligence, the causes being, a) acts of God, b) riots, insurrections, war, embargoes or blockages, c) earthquake, floods, explosions, d) inevitable accidents, e) legal and governmental restrictions.

In such an eventuality, the affected party shall be excused from performing during the subsistence of the force majeure prevention provided that the occurrence of such an event and the resultant prevention is communicated to the other party as soon as practicable but not later than 15 days thereafter with sufficient details and material to facilitate a verification."

12. In view of this Clause, the petitioner pleads that during the currency of the pandemic and continuance of the force majeure, the petitioner is exempted from its requirement to pay lease rent to the respondent.

13. The respondent contends, per contra, that Clause XV of the Lease Deed does not operate to absolve the petitioner of its liability to pay lease rent, so long as it was in occupation of the Cineplex.

14. Consequent to the last order passed by this Court, written submissions of their respective arguments have been filed by the petitioner and the respondent.

15. The respondent has invoked Sections 32 and 56 of the Indian Contract Act, 1872.

16. I have heard lengthy arguments of Mr. Jayant K. Mehta, learned counsel for the petitioner and Mr. Yogesh K. Jagia, learned counsel for the respondent.

17. Mr. Mehta submits that Sections 32 and 56 of the Indian Contract Act are completely inapplicable, as the present case was not one of „impossibility or of „frustration of the contract. He has drawn my attention to the decisions in *Satyabrata Ghosh v Mugneeram Bangur*¹ and *Dhanrajmal Gobindram v Shamji Kalidas*² which have distinguished between the existence of force majeure and frustration of the contract. That the pandemic constitutes a situation of force majeure, Mr. Mehta submits, is undisputed and he relies in this context, on the recent decision of a Single bench of this court in *Halliburton Offshore Services Inc v Vedanta Ltd*³.

18. Mr. Mehta has also referred to various judgments of the Supreme Court including *Raja Dhruv Dev Chand v. Raja Harmohinder Singh*⁴, *T. Lakshmipathi v. P. Nithyananda Reddy*⁵, *Shaha Ratansi Khimji v. Kumbhar Sons Hotels P. Ltd*⁶ and *Energy Watchdog v. CERC*⁷, to point out that, in a case where there is no reciprocal obligation, on the lessor, and, therefore, the lessor's obligation, under the Lease Deed, stands exhausted on the lessor granting the property on lease, the situation that obtains, in law, is completely distinguishable. He submits that, the present case is an instance of an executory, rather than an executed contract, in which there was serious dispute regarding the fulfilment, by the respondent, of its obligations under the contract. Mr. Mehta submits that the default, on the part of the respondent, in executing its obligations under the contract, had rendered it practically impossible for him to AIR 1954 SC 44 AIR 1961 SC 1285 AIR 1968 SC 1024 (2003) 5 SCC 150 (2014) 14 SCC 1 (2017) 14 SCC 80 run his cinema, resulting in tremendous loss to the business of his client. Mr. Mehta specifically highlights the wordings of Clause XV of the Lease Deed (extracted hereinabove) to point out that, if the performance of the Lease Deed by either party was prevented by causes beyond the control of the affected party, the affected party would be excused from performing, during the subsistence of the force majeure, the contract. He, therefore, submits that, in the present case, the parties had agreed, between themselves, that, during the currency of the force majeure, there would be suspension of obligations cast, by the contract, on the parties thereto. As such, he submits that, so long as the force majeure, in the present case, continues, responsibility, of his client, to deposit lease rent, is suspended.

19. In my view, serious and disputed issues arise in this case, regarding the applicability of the force majeure clause, and the consequent liability or otherwise, of the petitioner to deposit lease rent, as well as the applicability of the various decisions, on which the respondent relies. In so far as the issue of non-performance, by the respondent, of its obligations under the Lease Deed is concerned, that would ideally form the subject matter of adjudication by the learned Arbitral Tribunal, which is yet to be constituted in the matter.

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.

C. HARI SHANKAR, J.

JUNE 26, 2020 r.bararia