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

% *Judgment pronounced on: June 13, 2014*

\+ **Arb. A. No.14/2014**

SURESH SHAH ..... Appellant
Through Mr.Maninder Singh, Sr.Adv. with Mr.Vikas Dhawan, Mr.Devdutt Kamat & Mr.S.Panda, Advs.

versus

M/S TATA CONSULTANCY SERVICES LTD ..... Respondent
Through Mr.Suhail Dutt, Sr.Adv. with Ms.Ekta Kapil, Mr.Munindra Dvivedi, Ms.Divya Bhalla & Ms.Preeti Yadav, Advs.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The appellant has filed the present appeal against the order dated 16th April, 2014 passed by the learned Arbitrator in the application filed by the appellant under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") in the arbitration proceedings bearing case reference No.DAC/522/01-14 pending between the parties.

2. Brief facts for the purpose of deciding the present appeal are that the property bearing No.154-B, Block-A, Sector 63, Gautam Budh Nagar, Noida ("the said property") was allotted and leased by Noida Authority to AARDEE Fashions Pvt. Ltd. which was transferred to Ms.Pooja Arora who subsequently transferred the said property to

Sun Light Buildcon Pvt. Ltd. (SBPL) with the permission from the Noida Authority. Vide a sub-lease deed dated 29th September, 2007, SBPL leased the said property to the respondent (TCS) with the prior permission from the Noida Authority. Vide a letter of Attornment dated 19th April, 2011, SBPL transferred all the rights and liabilities under the sub-lease deed to the appellant except for the amendments contained in the said letter of attonrment.

3. The appellant filed a petition under Section 9 of the Act, *inter alia*, seeking direction against the respondent to furnish a bank guarantee to secure the outstanding rent based on the 'area' and rent agreed under the sub-lease-deed and on the issue of protection in respect of stamp duty, as according to the appellant, the respondent failed to pay the lease rental for a period of 9 months from April to December, 2013, by raising the disputes that the sub-leased area is not 1.75 lakh sq. ft. but it is 1.35 lakhs sq. ft. as indicated in the Occupancy Certificate and secondly, it is for the lessor/appellant to pay stamp duty liability, being demanded by authorities.

4. In the petition under Section 9 of the Act, the appellant sought following reliefs against the respondent:

> "(a) Direction to pay Rs.12,34,47,210/- as arrears of rent from quarter April-July, 2013 to the quarter October-December, 2013 with interest thereon at 12% per annum from the due date till date of realization;
>
> (b) Direction to pay rent in terms of clause 7(a) of the sub-lease deed dated 29.9.2007 during continuation of the lease;
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> (c) Direction to respondent to settle/pay the liability arising on account of stamp duty, interest and penalty in

respect of the Deed of Sub-lease dated 29.9.2007, demanded by NOIDA as per its final notice dated 12.2.2013; and

(d) A declaration that liability for payment of stamp duty as demanded by NOIDA by notice dated 12.2.2013 in respect of Deed of Sub-lease dated 29.9.2007 as amended, is solely on the respondent."

5. By order dated 20th December, 2013, the Court disposed of the Section 9 petition with certain agreed directions, which *inter alia* included the following:

> "(i) The respondent will furnish a bank guarantee, favouring the Registrar General of this Court qua the outstanding lease rent (based inter alia on the provisions of the lease deed which would include the rate and the area indicated therein).
>
> (ii) The lease rent for the period January, 2014 and thereafter, shall be paid by the respondent for an area equivalent to 1,35,000 sq. ft. in accordance with the provisions of the lease obtaining between the parties.
>
> (iii) The petition (under Section 9) shall be placed before the learned arbitrator, who will treat the same as an application under Section 17 of the Act."

6. The application filed by the appellant for interim measures i.e. the petition filed under Section 9 of the Act before this Court treated as an application under Section 17 of the Act in the arbitration proceedings was heard on 22nd February, 2014. The appellant filed another application dated 1st April, 2014 stating that the sub-lease in its favour has been terminated by the respondent as per notice of termination dated 31st March, 2014 on the expiry of six months from 1st April, 2014. By the said application, the appellant requested the

Arbitral Tribunal to take the said notice of termination on record and also consider the subsequent developments and the submissions made in the said application while deciding the application for interim measures. The said subsequent application was heard on 5th April, 2014. During the said hearing, the appellant submitted that the second application may be treated as its written submissions in regard to the application for interim measures. The said request was accepted and respondent was permitted to file its written submission by 15th April, 2014.

7. The Section 17 application of the appellant stood disposed of on 16th April, 2014 by the learned Arbitrator.

The relevant prayers sought by the appellant in the arbitration proceeding i.e. prayers (b) and (d) made in the interim application were disposed of by the learned Arbitrator. The details given in para 18 to 23 of the impugned order are reproduced as follows:

> "18) Prayer (d) is for an interim direction to respondent to deposit before Court (now Arbitral Tribunal) the entire amount as demanded by the Stamp Authorities as stamp duty payable on the Deed of Sub-lease dated 29th September, 2007, along with interest. The case of the claimant is that the claim of Stamp Authorities/NOIDA for payment of stamp duty on the Deed of Sub-lease is not valid or legal; and that alternatively, even if the claim made by the Stamp Authority/NOIDA is valid and enforceable, it is the respondent who is liable to pay the same under the terms agreed. Both parties have also stated that the demand for the said amount has been stayed by the High Court in a case filed by the lessee of some other premises in the same area. It is not the case of the claimant that it has been directed to pay the stamp duty or that it has made such payment. The apprehension of the claimant is that if respondent

vacates the leased premises without paying the stamp duty amount, NOIDA may not grant permission to re-let the premises unless the stamp duty amount is deposited by the claimant. This interim prayer is the subject matter of main prayer No.(d) and (e) and requires adjudication by examining the evidence. In the circumstances, this is not a fit case to grant the direction sought as an interim relief, even before adjudicating and determining who is liable for such payment. This interim prayer is therefore rejected.

19) It is needless to state at this stage that irrespective of who is legally liable (if stamp duty is due), it is the duty of both claimant and respondent to resist and contest diligently the claim for stamp duty to ensure that an unnecessary burden is not created on the person who may be ultimately held liable under the award that may be passed.

20) Prayer (b) has two parts. The first part of interim prayer (b) seeks a direction restraining the respondent from committing breach of the terms of Deed of Sub-lease, in regard to payment of rent. Every person who enters into a contract, is expected to perform it. If he commits breach, the consequences for such breach as provided under the contract and/or law, will follow. Therefore, whenever there is a breach, the aggrieved party is entitled to seek the remedies open in law as a consequence of such breach. Therefore, a prayer for an order restraining the other party to the contract from committing breach of the terms of a contract is misconceived. In this case, the object of the prayer is to ensure that the rents accruing in future are paid. If the lessee fails to pay the rent, the remedy is not to seek an injunction/direction restraining the tenant from committing breach of the term relating to payment of rent in the lease deed, but to take action for recovery of the arrears or terminate the lease and recover possession as a consequence of such breach. In this case, the claimant does not want the lease deed to be terminated by the

sub-lessee. Nor is the claimant is interested in terminating the lease. Therefore, the claimant can only claim the rents and damages/interest on the delayed payments in accordance with law. There is already such a prayer in claim statement [that is main prayers (b) and (c) and in this application (interim prayer (c)]. Hence the first part of prayer (b) is rejected.

21) What remains for consideration is interim prayer (c) and second part of interim prayer (b). The second part of prayer (b) is for a direction to respondent to pay Rs.11,27,17,134/- towards outstanding rents up to date with interest at 12% per annum from the date when such payment became due till date of payment. Prayer (c) is for a direction to respondent to make payment of rent in future every month in terms of the Deed of Sub-lease. The effect of these prayers is to seek payment of the arrears of rent in terms of the deed of sub-lease and continue to pay future rent in terms of the deed of sub-lease.

22) The respondent does not deny its liability to pay the rent during the period of its occupation. It is disputing the quantum of rent payable on the ground that the claimant has illegally collected a higher rent by misrepresenting the area of the leased premises to be 1,75,000 sq. ft. It is contending that if rent is calculated for the actual area (1,35,352 sq. ft.), it has paid rents in excess and claimant itself should refund the excess, even after adjustment of the rent for the period between April, 2013 to December, 2013.

23) These two interim prayers are in effect reiteration of main prayers (a) and (b) in the claim petition. The parties themselves had arrived at a broad understanding in regard to these interim prayers by agreeing before the High Court that (a) the respondent will furnish a bank guarantee in regard to the outstanding lease rent; and (b) the respondent will pay from January, 2014 rent calculated for an area of 1,35,000 sq. ft. in accordance

with the provisions of the deed of sub-lease. The High Court, made an order in terms of the said consensus between the parties by directing the respondent – (i) to furnish bank guarantee of Rs.10 crores, towards the disputed arrears, and (ii) to pay rent calculated on 1,35,000 sq. ft. from January, 2014. The said order, was intended to continue during the pendency of the arbitration proceedings or until the application for interim measures (that is, the petition under Section 9 of the Act converted into application under Section 17 of the Act) was disposed of by the Arbitrator. The High Court also directed that the Arbitrator will be at liberty to pass appropriate orders after hearing the parties. It is not in dispute that the interim directions issued by this Court in the proceedings under Section 9 of the Act will operate even during the course of arbitration."

8. The main grievance of the appellant in the present appeal is that the interim reliefs prayed for by the appellant have become necessary as the respondent has now proceeded to terminate the sub-Lease Deed by issuing termination notice dated 31st March, 2014 and is in the process of walking out in September, 2014 without paying the agreed rent or discharging the stamp duty liability owned towards the authorities. The appellant has to undergo the exercise of finding a new tenant and it is thus necessary to secure a permission from the Noida Authority for letting out to a new tenant, which permission may not be granted on account of pendency of demand and non-discharge of liability by the respondent regarding the stamp duty in relation to appellant's premises. Therefore, it is difficult for the appellant to locate a new tenant. The learned Arbitrator has not secured the said liability towards the stamp duty of approx. Rs.8.27 crores, along with the liability of interest @ 18% thereon starting from

8th August, 2012 (as of now approx. Rs.3.25 crores), i.e. a total sum of Rs.11.50 crores, which is payable to the Stamp Duty Authorities of the State of U.P., by the respondent.

9. Mr.Maninder Singh, learned Senior counsel appearing on behalf of appellant, has referred few provisions of the sub-Lease Deed, i.e. Clause 16 which specifically records that it substitutes every other previous document of this transaction and Clause 4 provides that in addition to rent, the respondent shall also pay all taxes, duties (which includes stamp duty), levies, etc. It is submitted by the learned Senior counsel that the sub-lease was originally for 9 years, with a lock-in period of 6 years (until October, 2013). The lease rental for 1.75 lakh sq. ft. has been paid by respondent upto 31st March, 2013, without any demur or protest. The respondent had also made available an amount of Rs.5.67 crores equivalent to six months rental on the entire leased area of 1.75 lakhs sq. ft. as security deposit, which was to be refunded to the respondent against return of possession of the said property after adjusting any outstanding dues.

10. On the issue of payment of rental as per sub-lease deed, Mr.Maninder Singh, learned Senior counsel argued that it is a settled position in law that if a contract entered into between two parties is acted upon and is worked out, it would neither be permissible nor open to any party under the said contract to question/challenge any of the term/condition incorporated therein. Such a prohibition/estoppel is a principle of public policy so as to ensure the sanctity of the written contract. If the Courts were to permit challenge to any concluded contract which has also been worked out and acted

upon by the parties, not only there would be utter chaos, there would be no possibility of extending/securing the sanctity of contracts in any civilized society. The Court would, in such circumstances, prohibit at the threshold itself any ill-conceived attempt on the part of a party to any such contract to question/challenge any of the term/condition incorporated in any such contract. The respondent ought not have allowed to raise the baseless/ impermissible allegation of fraud or mistake – only with a view to attempt to wriggle out of its clear obligations and liabilities under the unequivocal and unambiguous terms of a registered lease agreement and to pay rent on the stipulated area of 1,75,000 sq. ft. The reliance of the respondent upon the Occupancy Certificate is ex facie misplaced and a dishonest attempt to wriggle out of its contractual obligations in as much as the completion certificate does not in any manner indicate the super built up or chargeable area, that was the term agreed between the parties for purposes of rental payment. The Plan annexed with the occupancy certificate specifically uses the term "super built-up area", there was an apparent and utter failure on part of the respondent to demonstrate the same.

11. As the respondent themselves had admitted that even based on the completion certificate, the chargeable super area was 1,62,500 sq. ft. in their correspondence though, the respondent had admittedly paid the rent for past more than 5 years on entire 1.75 lakhs sq. ft. of area, without any demur or protest. In breach of orders dated 20th December, 2013 of this Court, (which have even been continued by the learned Arbitrator wide his order dated 16th April, 2014), the respondent has not made any payment even in

respect of the directed 1.35 lakh sq. ft. of area for the quarter starting from 1st April, 2014 to 30th June, 2014. Therefore, it is unlikely that the Respondent will make payment for balance one quarter from 1st July, 2014 to 30th September, 2014 before vacating the said property on 30th September, 2014.

12. Learned counsel has referred the following decisions in support of his submissions:-

(i) In ***Shyam Telelink vs. Union of India***, (2010) 10 SCC 165, the Apex Court has categorically held that once a party of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract.

(ii) The Supreme Court in the case of ***Adhunik Steels Ltd. vs. Orissa Manganese and Minerals Pvt. Ltd.***, (2007) 7 SCC 125, in para 11 held as under:

> "11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver

since the Section itself brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

(iii) In the case of ***Lalea Trading Limited vs. Anantraj Projects Pvt. Ltd.***, 198 (2013) DLT 339, this Court has held that Order XXXVIII, Rule 5 will not restrict the scope of powers of grant interim relief under the Act while securing the 'amount in dispute'.

13. It is submitted by the appellant that postponement of the reliefs under Section 17 application till final adjudication makes the very purpose of Section 17 application a great hardship which has occurred to the appellant despite of settled law. The interim reliefs sought before the learned Arbitrator merely prayed for securing certain amounts and did not contain any prayer for final adjudication of the same. Therefore, it was erroneous on the part of the learned Arbitrator to decline the grant of relief on the reason mainly that the

interim relief cannot be granted as the same is auxiliary to the main relief.

14. Even after the order passed in Section 9 petition on 20th December, 2013, the respondent paid rent for one quarter (from 1st January, 2014 to 31st March, 2014) on 1.35 lakh sq. ft. area and not for 1.75 lakhs sq. ft. of chargeable super area mentioned in sub-Lease Deed. In view of above, the learned Arbitrator would have decided the issue as an interim measure on the admitted position of the matter at least in respect of chargeable super area under the sub-lease, and to secure the interest of the appellant.

15. The learned Arbitrator with regard to the said stamp duty liability has not secured by the impugned order despite of the fact that the sub-lease deed does not provide any clause that the lessor would pay the stamp duty. Therefore, as per Section 29 of Stamp Act, the respondent was liable to pay stamp duty, unless otherwise mentioned in lease contract. It is also submitted that the Clause 8(q) of sub-Lease Deed cited by the respondent was not all relevant, since this sub-clause, as also the entire main clause (8) deals only with obligations of the respondent/lessee (and not those of the lessor). The said sub-clause 8(q) merely stipulates that an obligation on the respondent shall provide necessary information/ documents/assistance to enable the appellant to arrange the stamp duty exemption under the STPI scheme of Government of India. Whereas, the stamp duty exemption has been arranged by the appellant in favour of the respondent under the Industrial and Services Sector Investment Policy, 2005 of UP Government (and not under STPI Scheme of Government of India). Moreover, this clause

8(q) had become superfluous, as stamp duty exemption had already been obtained on the date of execution of sub-lease deed.

The learned Arbitrator ought to have secured the interest of the appellant till the time respondent discharged the stamp duty liability owned by it towards the authorities, the appellant would not be allowed by Noida authority to further lease the said property to another tenant after the respondent vacates it on 30th September, 2014.

16. Lastly, as per the appellant, the factual position is that even after adjusting the rent amounting to Rs.3.15 crores approx. paid by respondent in January, 2014 and after appropriating security of 5.65 crores towards rent payable on of chargeable super area of 1.75 lakhs sq. ft., as provided in sub-lease deed, the respondent would still be liable to pay the lease rentals for the period starting from 1st October, 2013 and until 30th September, 2014 (i.e. for an approx. period of one year). The unpaid and residual amount of rentals would come to approx. Rs.15.75 crores and in addition to as submitted above, the liability towards the stamp duty, which is to be paid by the respondent, is to the tune of approx. Rs.11.50 crores (Rs.8.27 crores as originally demanded + 3.25 crores towards interest @ 18% as mentioned in the demand). As against the total liability owned by the respondent to the tune of approx. Rs.27.25 crores (i.e. Rs.11.50 crores towards stamp duty + Rs.15.75 crores on account of rent), on the day of vacating the premises on 30th September, 2014, the appellant has been only secured to the extent of Rs.10 crores under the bank guarantee provided by the respondent pursuant to directions of this Court dated 20th December,

2013. It is stated that at the interim stage, the amount on account of rent and encumbrance on said property to the tune of Rs.17.25 crores which remains unsecured, be secured.

17. The prayer is made in the present appeal that the appropriate orders be passed by this Court, so as to ensure that on the date of decision by the learned Arbitrator, the appellant is not left in lurch for recovery of the amounts due.

18. By impugned order dated 16th April, 2014, the learned Arbitrator observed that the matter is likely to be concluded shortly. The matter is now listed for evidence on 7th, 8th and 9th August, 2014.

19. The list of disputes as agreed between the parties are as follows:

a. What is the 'chargeable sub-lease area' of the leased premises for which rent is payable by the respondent to claimant?
b. Whether respondent is stopped from disputing the 'chargeable sub-lease area' specified in the deed of sub-lease dated 29th September, 2007 read with amended to sub-lease deed dated 21st October, 2008?
c. Whether either party is guilty of any fraud or misrepresentation in regard to the area to be charged for rent?
d. Whether any provision of the contract is vitiated by mistake?
e. Whether the area of 1,35,342 sq. ft. shown in the occupancy certificate is the 'chargeable sub-lease area'?

f. Whether claimant is entitled to Rs.12,34,47,210/- as arrears of rent from April – June 2013 to October – December 2013 as also the rent (Part) from 1st January, 2014?

g. Assuming the demand by the stamp authorities/Noida for payment of stamp duty on the deed of sub-lease dated 29th September, 2007, is valid and payable, who is liable to bear and pay the same – whether the respondent as the tenant or claimant as the landlord?

h. Whether respondent is entitled to Rs.15,07,73,138/- from claimant, by way of refund of excess rent paid by the respondent?

i. What is the rate of rent and other charges payable during the reminder of the leased period?

j. Whether the party who is found liable to pay any amount to the other party, is liable to pay interest on the amount due to the other party and if so, at what rate and for what period?

k. Who is liable to bear the costs and how much.

20. Mr.Suhail Dutt, learned Senior counsel appearing on behalf of the respondent, has argued that the filing of an appeal by appellant is totally unnecessary and wastage of the time of the Court. Issues in matters are already framed. All the disputes between the parties are likely to be decided in the next couple of months. The learned sole Arbitrator has already fixed the date of evidence of the parties. As far as paying the stamp-duty is concerned, he argues that it is liability of the appellant as per terms and conditions of the sub lease deed. The said issue on merit has to be determined by the learned sole

Arbitrator. Even otherwise, interim orders are passed by the Allahabad High Court against the demand of Noida Authority, the said orders are continuing. No prejudice would be caused to the appellant if ultimately the said issue is finally decided by the learned Arbitrator. As far as paying of rental is concerned, his client is paying rent with effect from January, 2014 onward as per order dated 20th December, 2013 on the area of 1,35,000 sq. ft. The claim of the appellant is that the land rent is payable at @ 1,75,000 sq. ft. The said issue is disputed one and is determinable by the learned Arbitrator, the same cannot be finally decided in the present appeal.

21. Mr.Dutt, learned Senior counsel has also contended that the appellant is trying to seek the relief of similar nature as under provision of Order XXXVIII Rule 5 CPC in absence of any pleadings. The appellant is not entitled to seek such relief in the petition under Section 9 of the Act nor it is under the power of Court to pass an order of interim measure similar to the provisions of Order XXXVIII Rule 5 CPC, particularly, in the present appeal which is filed against the order passed under Section 17 of the Act where jurisdiction or power is limited. Even learned Arbitrator might not have possibly issued such direction which would go beyond the reference or arbitration agreement. None of the decisions referred by the appellant are applicable in the present matter as there are no prescribed pleadings and requirement of relief under Order XXXVIII Rule 5 CPC available nor any case is made out by the appellant as argued in the present appeal. The scope of interference in appeal is much narrower than that of the Court who is hearing an appeal against the order passed under Section 9 of the Act. He argued that

both issues involved in the present appeal are subjudiced before the learned Arbitrator. The respondent is well-known and reputed company who is neither trying to dispose of the whole or any part of its property nor about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. Thus, the apprehension of the appellant is without any basis who is unnecessarily creating panic. It might be because of counter-claim filed by the respondent and/or his client who has decided to vacate the tenanted premises.

22. On the aspect of stamp-duty, it is submitted by the respondent that the relief of depositing the entire amount of stamp duty as prayed by the appellant is erroneous, baseless and misconceived because of the following reasons:-

(i) As per Clause 8(q) of the sub-Lease Deed dated 29th September, 2007, a duty was caste upon the sub-lessor, i.e. the appellant to ensure the availment of Stamp Duty exemption. Thus, all the conditions which were necessary for exemption from payment of stamp duty were to be complied by the appellant alone.

(ii) The Stamp/Noida Authorities wrongly addressed various notices to the respondent alleging that certain conditions which were imperative for exemption for payment of the stamp duty were not complied with by the allottee, which is the appellant/SBPL and not the respondent, thus demanding a payment of approx. Rs.8 crores towards the payment of stamp duty.

23. Mr.Dutt, learned Senior counsel has referred the correspondence exchanged between his client and the Authority. In the written submissions, the following details are given:-

(i) A notice dated 9th August, 2012 was addressed to the respondent by the Assistant Stamp Commissioner alleging that the allottee, i.e. appellant has failed to adhere to the following:-

(a) get the approval of development plan,

(b) obtain completion certificate after completing construction on 40% part of the approved covered area, and

(c) inform completion of unit and functioning thereof.

(ii) A second notice dated 8th October, 2012 was issued by the Stamp Authorities calling for the deposit of the alleged stamp duty along with interest.

(iii) Pursuant to receipt of the aforesaid notice, the respondent vide its letter dated 29th October, 2012 categorically stated that the respondent was not the allottee of the said property and was only a sub-lessee. It was further stated that such conditions were to be fulfilled by the allottee, i.e. the appellant and not the respondent.

(iv) Subsequent thereto, the respondent in its letter dated 20th November, 2012 addressed to the IG Stamps and Registration, Government of UP requested withdrawal of the said demand notices dated 9th August, 2012 and 8th October, 2012 on the ground that the said notices have been wrongly issued to the respondent.

(v) Noida Authority addressed a notice dated 5th February, 2013 to the respondent stating therein that the respondent has not complied with the conditions as mentioned in the permission letter dated 26th July, 2007. It is pertinent to mention that the permission letter dated

26th July, 2007 was addressed and issued to the sub-lessor, i.e. appellant and not the respondent. Still all such conditions were complied with.

(vi) Another notice dated 12th February, 2013 was sent by the Noida Authority to the respondent raising a new stand and demanding stamp duty.

(vii) The respondent replied to the notice dated 5th February, 2013 vide its letter dated 15th February, 2013 stating that while all the above said conditions were applicable to the sub-lessor.

(viii) The Assistant General Manager, Noida addressed a letter dated 4th June, 2013 to the respondent stating therein that no clear instructions have been received by the Noida Authority with respect to payment of stamp duty as the issue in that respect is pending before this Court and no requisite proceedings on the notices dated 5th February, 2013 and 12th February, 2013 would be initiated till the outcome of the decision of the said proceedings.

(ix) A letter dated 25th June, 2013 was sent by Noida Authority to the respondent stating that a suit has been filed by M/s EXL India Pvt. Ltd. before the High Court of Allahabad against the notice of recovery sent by the Department in which stay has been granted on the recovery proceedings till the final decision of this Court.

(x) During the pendency of the arbitration proceedings, the Stamp/ Noida Authorities inspite of stating in its notice dated 4th June, 2013 that no action will be taken with respect to payment of stamp duty as the issue was subjudiced before the Allahabad High Court, issued the notice dated 28th April, 2014 along with internal decisions dated 19th March, 2014 and 9th April, 2014 demanding payment of stamp duty

as Patta conditions have not been adhered to. In the table where the name of the respondent appears, the violation is *"maps not sanctioned"* which was again the responsibility of the sub-lessor, i.e. the appellant and such liability by no means can be fastened on the respondent.

24. Having heard the learned Senior counsel appearing on behalf of both parties and also having gone through the issues framed in the matter, it is evident that issues framed cover all the disputes raised by both parties. If any issue in appeal is decided on merit, it would definitely affect either of the parties. It appears to me that the main contention of the appellant is that the liabilities of the respondent uptil September, 2014 are to be secured by this Court as it would be difficult for him to recover the rental and amount payable to the Authority towards stamp duty from the respondent once they vacate the tenanted premises.

25. At the time of hearing of appeal, Mr.Dutt, learned Senior counsel, does not dispute that sub Lease Deed dated 29th September, 2007 contained the specific clause that the super built up area or chargeable lease area on which rent is payable is 1,75,000 sq. ft. Counsel has also admitted that the respondent in its letter dated 1st July, 2013 has alleged that super built up or chargeable sub-leased area ought to have been 1,62,411 sq. ft. and not 1,75,000 sq. ft. as mentioned in sub Lease Deed. Counsel has also not denied that the respondent for five years had been paying rent on the basis of 1,75,000 sq. ft. area who had stopped paying the rent at that rate @ 1,75,000 sq. ft. from April, 2013. His explanation is that the rent on the basis of 1,75,000 sq. ft. is not being paid by his client in view

of certain admissions made by the appellant in the Authority at the time of obtaining Occupancy Certificate. And in view of the admissions made, it is his client who has to recover the huge amount from the appellant. In this regard, a counter-claim in the arbitration proceedings was filed for a sum of Rs.15,07,73,138/- along with interest towards refund of additional rent paid by the respondent to the appellant. The respondent is paying and undertakes to pay rental till the date of occupation of the premises on the area of 1,35,000 sq. ft.

26. In the present case, the matter is put up for evidence and is likely to be final decided within couple of months, particularly, when the learned Arbitrator has kept the matter on urgent mode. There are no pleading in the applications or any evidence is produced that the respondent is about to dispose of property and is about to remove the property from the local limits of jurisdiction of this Court. In the case of ***National Shipping Company of Saudi Arabia vs. Sentrans Industries Limited***, AIR 2004 Bom. 136, the Division Bench of Bombay High Court held as under:

> "10. Section 9, in the Act of 1996 is a substantive provision which empowers the Court to pass an interim order before or during Arbitral proceedings or any time after the making of the Arbitral Award but before it is executed under Section 36. Since we are concerned with Section 9(ii)(b), it may be noticed that it provides for an interim measure of protection for securing the amount in dispute in the Arbitration. Sort of clarification it also provides that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it. Such provision as enacted in Section 9, is a provision that enables a party to apply for interim protection if action of the other party to the Agreement providing for Arbitration is either in breach of the

terms of the Agreement or is unequitable, unfair on in breach of Natural Justice. The order under Section 9(ii)(b) is in the nature of interim protection order. In a special provisions of the nature like Section 9(ii)(b), we are afraid, exercise of power cannot be restricted by importing the provisions of Order 38, Rule 5 of the Civil Procedure Code as it is. It is true and as has been held by the Supreme Court in ITI Ltd., 2002 (5) SCC 510, that for want of specific exclusion of the Code of Civil Procedure in the Act of 1996, it cannot be inferred that the Code was not applicable but that would not mean that provisions of Code have to be read into as it is when the Court exercises its powers as prescribed in the Act of 1996. The procedural aspects provided in the Code about which the Act of 1996 is silent, needless to say, when the Court exercises its substantive power under the Act of 1996 shall be applicable but the guiding factor for exercise of power by the Court under Section 9(ii)(b) has to be whether such order deserves to be passed for justice to the cause. The provisions of Order 38, Rule 5, C.P.C. cannot be read into the said provision as it is nor can power of the Court in passing an order of interim measure under Section 9(ii)(b) be made subject to the stringent provision of Order 38, Rule 5. The power of the Court in passing the protection order to secure the amount in dispute in the Arbitration before or during Arbitral proceedings or at any time of making of the Arbitral amount but before or during Arbitral proceedings or at any time of making of the Arbitral amount but before it is enforced cannot be restricted by importing the provisions set out in Order 38 of C.P.C. but has to be exercised ex debito justitiae and in the interest of justice. The Court while considering the Application for interim protection under Section 9(ii)(b) is guided by equitable consideration and each case has to be considered in the light of its facts and circumstances. The interim protection order contemplated under Section 9(ii)(b) is granted by the Court to protect the interest of the party seeking such order until the rights are finally adjudicated by the Arbitral Tribunal and to ensure that the Award passed by Arbitral Tribunal is capable of enforcement. *Though the power given to the Court under Section* 9(ii)(b) *is very wide and is not in any way controlled*

by the provisions of the Code but such exercise of power, obviously, has to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the Arbitrator is in a position to get the fruits of such adjudication and in executing the Award. While dealing with the Application for direction to the other party to deposit the security of the amount in dispute in the Arbitration, the Court also has to keep in mind the drastic nature of such order and unless a clear case not only on the merits of the claim is made out but also the aspect that denial of such order would result in grave injustice to the party seeking such protection order in as much as in the absence of such order, the Applicant party succeeding before the Arbitral Tribunal may not be able to execute the Award. The obstructive conduct of the opposite party may be one of the relevant considerations for the Court to consider the Application under Section 9(ii)(b)*. The party seeking protection order under Section* 9(ii)(b) *ordinarily must place some material before the Court, besides the merits of the claim that order under Section* 9(ii)(b) *is eminently needed to he passed as there is likelihood or an attempt to defeat the A ward, though as indicated above, the provisions of Order 38, Rule5, C.P.C. are not required to be satisfied. The statutory discretion given to the Court under Section* 9(ii)(b) *must be exercised judicially in accordance with established legal principles and having regard only to relevant considerations.* In our view, this is the proper approach for consideration of the Application for interim relief under Section 9(ii)(b) and *we hold that the provisions of Order 38, Rule 5 of the Civil Procedure Code cannot be read as it is and imported in Section 9 of the Act of 1996. We also hold without hesitation that the Court is competent to pass an appropriate protection order of interim measure as provided under Section* 9(ii)(b) *outside the provisions of Order 38, Rule 5, Code of Civil Procedure. Each case under Section* 9(ii)(b) *of the Act of 1996 has to be considered in its own facts and circumstances and on the principles of equity, fair play and good conscience*. The power of the Court under Section 9(ii)(b) cannot be restricted to the power conferred on the Court

under Civil Procedure Code though analogous principles may be kept in mind." (Underlining added)

27. Even as of today, it is not the case of the appellant that the respondent is in any manner removing any property from the jurisdiction of the Court and/or is incapable of obeying the orders of this Court. The provisions of Order XXXVIII Rule 5 of CPC enumerate that the defendant may be called upon to furnish security for production of property at any stage of a suit, if the Court is satisfied that the defendant with intent to obstruct or delay execution of any decree that may be passed against him or that the defendant is about to dispose of whole or any part of his property from the local jurisdiction of such Court, then such Court may direct the defendant within a time to be fixed by it to furnish such security in such sum as may be specified in the order.

28. The respondent has also furnished a bank guarantee of a sum of Rs.10 crores in favour of the Registrar General of this Court in terms of the order dated 20th December, 2013 passed by this Court. Security amount of about Rs.5.67 crores is also lying with the appellant.

29. Even, as per the appellant, Rs.15.75 crores on account of rent is due as per area of 1,75,000 sq. ft. as per Sub-lease Deed.

30. Under these circumstances, I am not inclined to interfere with the impugned order on this issue of securing amount as mentioned by the appellant, though I find force in the submission of Mr.Maninder Singh, learned Senior counsel, on legal issue that if the contract entered between the parties has been acted upon by the tenant under the sub-lease deed in respect of the area mentioned in lease

deed, the tenant is liable to pay the amount unless some fraud has been committed by the owner upon the tenant on execution of document.

31. In view of deposit of amount and security amount lying with the appellant, I feel that the reasonable amount on this issue is already secured, coupled with the fact that the respondent-Company is capable to clear all amount within no time if the award is passed against them. Thus, the contention of the appellant on this issue cannot be accepted. The other reason is that the matter is likely to be decided at an early date.

32. It is settled law that normally, the Appellate Court is slow to interfere with the discretionary jurisdiction of the trial Court unless Court finds that discretion has been exercised arbitrarily, capriciously, perversely or where the Court has ignored settled principles of law. The Appellate Court may not reassess the material and seek to reach conclusion different from the one reached by the Court below. Even interference by High Court while sitting under the jurisdiction of Section 37 of the Act is not permissible on finding given by the learned Arbitrator on factual aspect.

33. As far as securing of amount towards the stamp duty is concerned, it is a disputed issue. The appellant has sought a relief for deposit of the amount demanded by the Stamp/Noida Authorities which cannot be granted in view of the order dated 29th May, 2014 wherein the Allahabad High Court has passed a restraint order against the Noida Authority from insisting upon payment of the stamp duty demand until further orders in Writ Petition No.28028 of 2014. The said writ is listed on 9th July, 2014. In the application under

Section 17 of the Act, the appellant had prayed for payment of stamp duty and the rent @ 1,75,000 sq. ft. whereas in the appeal under Section 37 of the Act, the appellant has sought his prayers by seeking the security of the stamp duty and/or payment of the same.

34. The said dispute with Noida Authority is sub-judiced and is still pending in Court and it is yet to be determined as to whether the stamp duty is payable or not to the Noida Authority. The appellant needs interim protection for the nature of amount in advance. It is the admitted position that there is no case of the appellant that the respondent is not capable to remit the said amount, in case the findings in the Award are against the respondent. Before the learned Arbitrator it is yet to be determined as to whether the said amount is payable by the appellant or the respondent. This court cannot go into the merit of this issue.

35. Thus, at this stage, the relief sought by the appellant to secure amount is not called for. The appellant, however, is at liberty to move an application for interim protection in case of change of circumstances.

36. There is no infirmity in the impugned order.

37. The appeal is therefore dismissed.

(MANMOHAN SINGH)
JUDGE

JUNE 13, 2014