Pearl Hospitality & Events Pvt Ltd Vs OYO Hotels And Homes Pvt. Ltd

Original Miscellaneous Petition (I) (COMM) No. 123 Of 2020, Miscellaneous Application No. 4644 Of 2020

Court: Delhi High Court

Date of Decision: Nov. 3, 2020

Acts Referred:
Arbitration And Conciliation Act, 1996 â€" Section 5, 9, 9(1)(ii)(b), 9(3), 11(6), 17, 17(1)(ii)(b), 21, 34, 36#Indian Contract Act, 1872 â€" Section 73, 74#Companies Act, 1956 â€" Section 433#Code Of Civil Procedure, 1908 â€" Order 39, Order 38 Rule 5

Hon'ble Judges: C. Hari Shankar, J

Bench: Single Bench

Advocate: Ankit Jain, Ankur Jain, bhay Pratap Singh, Jeevan Ballav Panda, Satish Padhi, Gaurav Sharma

Final Decision: Disposed Of

Judgement

C. Hari Shankar, J

1. This petition, preferred by M/s Pearl Hospitality & Events Pvt. Ltd. under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter

referred to as Ã¢â‚¬Å“the 1996 ActÃ¢â‚¬â€‹), contains the following prayer clause:

Ã¢â‚¬Å“In the aforesaid facts and circumstances, it is most humbly and respectfully prayed that this HonÃ¢â‚¬â„¢ble Court may kindly be pleased to:-

(i) Direct the respondent to immediately handover the keys of property located at Floor 1 & 2, Plot C, Community Centre, Vivek Vihar, Phase-II,

Delhi-110095, admeasuring 15000 sq. ft. approximately (hereinafter referred to as the 'said property'), to the petitioner herein;

(ii) Direct the respondent to pay to the petitioner an amount of Rs. 90,00,000/- (Rupees Ninety Lacs only), apart from applicable taxes, being the

amount payable by the respondent to the petitioner herein for the months of December, 2019 till May, 2020, under the terms of the Management

Services Agreement dated 04.09.2019;

(iii) Direct the respondent to give Monetary Security to the extent of Rs.2,23,50,000/- to secure the amount to be Awarded, in favour of the petitioner

and against the respondent herein;

(iv) Restrain the Respondent, its Directors, Shareholders, Employees etc. from transferring , alienating or encumbering, in any manner whatsoever,

any of the assets of Respondent Company;

(v) Pass an order of attachment of the Bank Account of the Respondent No. 1 Company, to be disclosed by the Respondent No. l Company by way

of an affidavit, being in its special knowledge, for an amount of Rs.2,53,50,000/-;

(vi) Pass an ex-parte interim order in terms of prayers (i) - (v) above; and

(vii) Pass any other or further orders which may deem fit and proper in the facts and circumstances of the case.Ã¢â‚¬â€‹

Facts

2. The factual backdrop, in which the afore-extracted prayers have been made by the petitioner, may be briefly recited thus:

3. The petitioner had taken the property, located at the first and second floors, Plot-C, Community Centre, Vivek Vihar, Phase-II, Delhi-110095

(referred to, for the sake of convenience, as Ã¢â‚¬Å“the subject propertyÃ¢â‚¬) on lease from Mr. Sanjay Varshney, Mr. Raja Varshney and Mr. Jeevan

Jyoti Kwatra.

4. Pursuant thereto, the petitioner established a banquet hall in the subject property, under the name and style of Ã¢â‚¬ËœNavkaar BanquetsÃ¢â‚¬â„¢, which he

claims to have been running since 2012.

5. On 4th September, 2019, the petitioner entered into a Management Services Agreement (hereinafter referred to as Ã¢â‚¬Å“the MSAÃ¢â‚¬) with the

respondent, whereunder the respondent (who was designated as the Ã¢â‚¬Å“Service ProviderÃ¢â‚¬ in the MSA), and who claimed to have been working in

the hospitality industry for several years, undertook to run, operate and manage the aforesaid banquet hall, in the premises taken on lease by the

petitioner (who was designated, in the MSA, as the Ã¢â‚¬Å“LesseeÃ¢â‚¬â€‹).

6. The clauses of the MSA have, in the MSA, been referred to as Ã¢â‚¬Å“ArticlesÃ¢â‚¬â€‹.

7. Articles 3 and 9 of the MSA, which constitute, essentially, the main subject matter of controversy in the present case, may be reproduced thus:

Ã¢â‚¬Å“ARTICLE 3: TERM

3.1 This Agreement shall commence from Execution Date and shall be valid for a period of 9 of this Agreement. The Parties shall extend the Term of

this Agreement on mutual consent basis, in writing and to be signed by authorized representatives of both the Parties.

3.2 The Parties shall execute Handover Certificate in the format attached herewith as Schedule F Part B (""Hand over Certificate"") on the date of

execution/ handover of the Venue by the Lessee to the Service Provider. In case the Lessee fails to hand over the possession of the Venue to the

Service Provider on the Handover Date (More particularly given under Annexure F), the Handover Date, Fit-Out Completion Date and

Commencement Date denoted in Annexure F shall stand replaced by the Handover Date, Fit- Out Completion Date and Commencement Date

denoted in Handover Certificate, for the purposes of this Agreement. Accordingly, all corresponding obligations of the parties shall stand triggered

from the said dates mentioned in Handover Certificate.

3.3 The Parties shall not be entitled to terminate the Agreement during their respective Lock in Period in this regard, the Parties agree as following:

i. In the event the Lessee terminate this Agreement during the Lessee's Lock In Period for any reason other than failure of the Service Provider to

pay Benchmark Revenue for two consecutive months despite continuing to operate the Venue, the Lessee shall be liable to pay to the Service

Provider liquidated damages equivalent to the applicable benchmark Revenue (Inclusive of all taxes) for 12 months of the Lessee's Lock In Period, as

liquidated damages.

ii. In the event the Service Provider terminates this Agreement during the Service Provider's Lock In Period for any reason, other than those referred

under Article 9, then Service Provider shall be liable to pay liquidated damages to the Lessee of an amount equivalent to the applicable Benchmark

Revenue (inclusive of all taxes) for every month of the remaining period of the Service Provider Lock In Period, as liquidated damages.

iii. The Parties hereby acknowledge that the said liquidated damages are intended to be a genuine and reasonable estimate of the damages and

accordingly the same shall not be considered a penalty.Ã¢â‚¬â€‹

Ã¢â‚¬Å“ARTICLE 9: Termination And Consequences of Termination

9. 1 Termination

9.1.1 After Service Provider's Lock In Period, the Service Provider may terminate this agreement by giving 2 (two) months prior written notice to the

Lessee. The Service Provider will continue the benchmark revenue as well as utility and maintains bills during the notice period failing which the

amount will be adjusted with Service Provider's security deposit.

9.1.2 Notwithstanding Article 9.1.1, the Service Provider shall be entitled to terminate the Agreement anytime (including within the Service Provider's

Lock In Period) in the event; (a) there is a material breach of the Agreement by the Lessee or there has been a misrepresentation by the Lessee and

the Lessee fails to remedy the said beach within a period of 30 (Thirty) days from the date on which it is notified of the said breach; or (b) Lessee

fails for bankruptcy or becomes or is declared insolvent or has a receiver or manager appointed over all or substantially all of its assets; or (c) a

proposal of land acquisition in respect of any material part of or all of the Venue being effected by any governmental body; or (d) there being a dispute

or threat of a dispute concerning title of the Venue; or (e) if the lease deed or any other agreement vesting possession of the venue on the Lessee

terminates; (f) if any act or omission of the Lessee causes disruption in the business.

9.1.3 After lock in period, the Lessee may terminate this Agreement by giving 2 (two) months prior written notice to the Service Provider and Service

Provider will continue to the benchmark revenue as well as utility and maintains bills during the notice period failing which the amount will be adjusted

with Service Provider's security deposit.

9.1.4 The Lessee shall be entitled to terminate the Agreement (including within the Lessee's Lock in Period) in the event- a) the Service Provider fails

to pay the Benchmark Revenue for two (02) consecutive months despite being in operations and the Service Provider fails to remedy the said breach

within a period of 30 (thirty) days from the date on which it is notified of the said breach, b) the Service Provider found involve in any irregular activity

which may harm integrity of the venue, c) The Service Provider fails to pay utilities bill for consecutive 3 (three) months and the Service Provider fails

to remedy the said breach within a period of 15 days from 3rd bill presented, d) The Service Provider make changes to the Property that is considered

in the violation of the building by laws of the local governing authority.

9.2 Consequences of Termination/ Expiry

9.2.1 Upon the expiration or earlier termination of the Agreement, the lessee will immediately stop the use of the brand name of the Service Provider

and not do anything 9.2.1 Upon the expiration or earlier termination of the Agreement, the lessee will immediately stop the use of the brand name of

the Service Provider and not do anything in contravention with Article 11.1 and Article 11.2 in perpetuity.

9.2.2. The Service Provider shall be entitled, not obliged, to remove all furniture and fixture installed by it in the Venue/ Venues. The Service Provider

may vacate and handover the Premises on ""as is where is"" basis at its sole discretion. The expiration or termination of the Agreement shall not operate

to waive, release or otherwise relieve any Party of any liability that has accrued prior to such termination or expiration. Notwithstanding anything

contrary to the provisions of the Agreement which by their nature are intended to survive, shall survive the termination or expiry of the Agreement.Ã¢â‚¬â€‹

8. Under the MSA, the respondent was to pay, to the petitioner, a lease rental of Rs. 15 lakhs per month, exclusive of taxes, for the first year, which

was to be augmented by 5% every succeeding year.

9. The petitioner submits that the rental, as so fixed, was paid, by the respondent, during the months of September, October and November, 2019, but

that, with effect from December, 2019, the respondent discontinued payment.

10. On 25th December, 2019, the respondent addressed an e-mail, to the petitioner, which was brief and terse in equal measure, and read thus:

Ã¢â‚¬Å“Dear Mohit Ji

As informed to you earlier. We are unable to continue with Operations of your banquet. We want to vacate the same at the earliest.

Please do let us know if we have to cancel the bookings or would you want to carry the future events from January onward and serve these

customers.

Regards

Abhitej SinghÃ¢â‚¬â€‹

11. Mr. Ankit Jain, learned counsel for the petitioner, points out, correctly, that the aforesaid e-mail, dated 25th December, 2019, provided no reasons,

whatsoever, for the purported inability, on the part of the respondent, to continue with operating the banquet hall, and its consequent desire to vacate

the premises.

12. The petitioner responded, to the afore-extracted e-mail, dated 25th December, 2019, of the respondent vide reply e-mail sent on the very same

day, in which it was alleged that, though the respondent had acquired the banquet hall business of the petitioner in September, 2019, and had received

the payments related thereto, it had failed to comply with its liabilities, to which the MSA bound the respondent. In view of the intention of the

respondent, evidenced in the e-mail dated 25th December, 2019 supra, to vacate the premises and discontinue operations, the petitioner demanded,

from the respondent, compliance with Article 3.3. (ii) of the MSA by payment, equivalent to the benchmark revenue for sixteen months, along with

applicable taxes. It was also pointed out that Article 9.1.1 of the MSA required the respondent to give two monthsÃ¢â‚¬â„¢ termination notice to the

petitioner and, during the said two months period, the respondent was to bear all utility bills and expenses relating to the subject property. The

respondent was, therefore, requested to correct (its) Ã¢â‚¬Å“processÃ¢â‚¬ and obligate (its) liabilities and responsibilities towards the agreementÃ¢â‚¬ between

the petitioner and respondent.

13. With effect from 31st December, 2019, the respondent claims to have vacated the subject property, though this is disputed by the petitioner.

14. On 14th January, 2020, the petitioner addressed an e-mail to its landlord, Sanjay Varshney, and Raja Varshney, which read thus:

Ã¢â‚¬Å“Dear Sanjay ji/ Raja ji,

This is to inform you that Weddingz.in are abruptly ending there Management services contract with us and would be vacating the premises. I would

not be able to continue to run operations at your premises and would vacate it.

The further course of action would be discussed with you in short period of time.

Thanks and regards

Mohit JainÃ¢â‚¬â€‹

15. On 1st January, 2020, the petitioner addressed a second e-mail, to the respondent, stating that, as no response, to the earlier e-mail, dated 25th

December, 2019, had been received from the respondent, the notice of termination, dated 25th December, 2019, of the respondent stood invalidated,

and also amounted to a conformation that the respondent was carrying on business as usual.

16. The respondent again communicated, to the petitioner, on 15th January, 2020, by e-mail, in which it was stated thus:

Ã¢â‚¬Å“We wish to bring into your notice that you have continually committed breach of the MSA, despite our repeated requests for procuring the

requisite licenses/ approvals/ permissions/ NOCs which are still pending from your end.

Since the non procurement of licenses is a material breach under the MSA and because of the same, we are not able to continue with our operations.

We serve you this notice of termination and as communicated to you on 25th December, 2019, the MSA shall stand terminated with effect from 31st

December, 2019, as you are not able to cure the said material breach as per the terms of the MSA from the date of signing of the MSA till 31st

December, 2019.Ã¢â‚¬â€‹

Consequent on the aforesaid Ã¢â‚¬Å“terminationÃ¢â‚¬ of the MSA, with effect from 31st December, 2019 (as the e-mail purported to state) the respondent

called upon the petitioner to immediately refund all amounts payable to the respondent under the MSA, Ã¢â‚¬Å“including but not limited to the amounts

under lock in pay outs and interest free refundable security depositÃ¢â‚¬, whereupon the respondent stated that it would hand over the subject property to

the petitioner.

17. The petitioner replied, vide communication, dated 6th February, 2020, addressed through counsel, expressing undisguised chagrin at the aforestated

communications, of the respondent, whereby the respondent had expressed its inability to continue with the operations at the subject property, and its

allegations that the petitioner had breached of the MSA. Apropos the allegation that the petitioner had failed to procure necessary

licenses/approvals/permissions/NOCs, the petitioner pointed out that it had received no communication, from the respondent, at any earlier point of

time, alleging failure on the part of the petitioner, to procure any such licenses / approvals / permissions / NOC. The falsity of this allegation, it was

further submitted, was apparent from the fact that the respondent had failed to provide any particulars of the licenses / approvals /permissions /

NOCs, which the petitioner had failed to obtain. The petitioner asserted, emphatically, that it had obtained all the licenses required for the purposes of

running the aforesaid banquet hall at the subject property and that, in fact, before entering into the MSA with the respondent, the petitioner had

successfully been running the banquet hall since 2012, without any disruption whatsoever. The petitioner, therefore, alleged that, by the aforesaid

communication, it was apparent that the respondent was seeking to escape its obligations under the MSA. The petitioner invoked, yet again, Article

3.3(ii) of the MSA, whereunder the respondent, in the event of itÃ¢â‚¬â„¢s terminating the MSA within the lock-in-period of sixteen months, was required

to make payments to the petitioner, of an amount equivalent to the benchmark revenue (which was Rs. 15 lakhs per month) for the unexpired

remainder of the lock-in-period. Additionally, the petitioner called upon the respondent to pay, for the period February, 2020 till 11th January, 2021,

under the terms of the MSA, which worked out to a total Rs. 1,73,50,000/-. Interest, at the rate of 24% per annum, and damages of Rs. 50 lakhs,

were also claimed, in the said response.

18. It was also alleged that, despite several attempts by the petitioner, the respondent had refused to hand-over the subject property to the petitioner, in

the absence of a No Dues Certificate from the petitioner. Finally, the aforesaid communication, dated 6th February, 2020, invoked Article 10.1 of the

MSA, which provided for arbitration of disputes, between the petitioner and the respondent, and nominated Mr. H.S. Sharma, learned District &

Sessions Judge, (Retd.) as the petitionerÃ¢â‚¬â„¢s arbitrator, Article 10.1 of the MSA read thus:

Ã¢â‚¬Å“ARTICLE 10: DISPUTE RESOLUTION AND GOVERNING LAWS

10.1 Arbitration: All disputes arising under this Agreement shall be resolved by a sole arbitrator mutually appointed by the Parties, in accordance with

the provisions of the Arbitration and Conciliation, Act 1996. In case the parties fail to mutually appoint the sole arbitrator within 15 days from the date

on which a notice to initiate resolution of a dispute through arbitration has been raised by a Party the sole arbitrator shall be appointed by the Delhi

High Court. The seal of Arbitration shall be New Delhi and the language shall be English.Ã¢â‚¬â€‹

19. The aforesaid communication provoked a response, from the responde0nt, through counsel, dated 18th February, 2020. Para 4 of the said response

alleged, once again, that the petitioner had Ã¢â‚¬Å“failed to provide the requisite NOCs / licenses as per the AgreementÃ¢â‚¬, thereby undermining the

contents of the MSA and forcing the respondent to terminate the MSA vide termination notice dated 15th January, 2020. It was stated, in the said

communication, that the termination was effected in accordance with Article 9.1.2 of the MSA. In view thereof, the communication invoked Article

4.2 of the MSA, which reads thus:

Ã¢â‚¬Å“ARTICLE 4: MANAGEMENT FEES

4.2 The Service Provider shall deposit an interest free refundable security deposit (""IFRSD') equivalent to INR 45,00,000/- (Indian Rupees Forty Five

Lakh Only) under this Agreement. Out of the total IFRSD, the Service Provider shall deposit INR 15,00,000/- (Indian Rupees Fifteen Lakh Only)

after getting NOC from Owner, and balance amount of INR 30,00,000/ - (Indian Rupees thirty Lakh Only)when Lessee will provide Property tax

receipt and Building/ Fire Insurance. IFRSD in full shall be refunded by the Lessee to the Service Provider on expiry/ termination of this Agreement

failing which, the Service Provider shall have the right to deduct equivalent amount from Benchmark Revenue payable by the Service Provider. The

Service Provider shall have the right to continue to set- off the IFRSD amount from the Benchmark Revenue till such time the entire IFRSD is

recovered by the Service Provider in case the amount of IFRSD to be recovered is more than the monthly Benchmark Revenue. It is clarified that the

Lessee shall not be entitled to terminate this Agreement, irrespective of expiry of Lessee's Lock In Period, till full IFRSD amount is recovered by the

Service Provider. In such case IFRSD is converted into Benchmark Revenue and applicable taxes shall be borne by the service provider for the

same.Ã¢â‚¬â€‹

Invoking Article 4.2 of the MSA, the respondent called upon the petitioner to pay an amount of Rs. 45 lakhs, along with 18% interest, and legal

expenses of Rs. 20,000/-

20. On 26th February, 2020 and 13th March, 2020, the respondent claims to have addressed two communications, to the petitioner, which could not be

delivered to the petitioner, as the petitioner was found to be unavailable in the premises. It is not in dispute, therefore, that the petitioner did not, in fact,

receive the said communications.

21. The communication, dated 26th February, 2020, reiterated, yet again, the Ã¢â‚¬Å“numerous requestsÃ¢â‚¬ purportedly made by the respondent, to the

petitioner, Ã¢â‚¬Å“for providing the necessary compliance documents showing compliance to the essential terms of the MSAÃ¢â‚¬. Once again, there was no

specific reference, in the said letter, to the document, which was wanting, insofar as compliance, by the petitioner, with the terms of the MSA, was

concerned. It was, instead, reiterated that the respondent had decided to terminate the MSA with effect from 31st December, 2019, vide termination

notice, dated 18th January, 2020 (this appears to be a typographical error, as the alleged termination notice was dated 15th January, 2020).

22. The communication called upon the petitioner, therefore, to immediately disgorge, to the respondent, an amount of Rs. 9,87,63,364/-towards the

refund of the security deposit, venue booking, advance amount received by the petitioner, and lock-in pay-outs, along with interest @ 18% p.a.It was

further asserted, in the said communication, that the respondent was Ã¢â‚¬Å“always willing and readyÃ¢â‚¬â€‹ to hand over the subject property to the petitioner,

and that, it was the petitioner who had failed to take over the property. In the circumstances, the respondent Ã¢â‚¬Å“clarifiedÃ¢â‚¬ that, since it had stopped

providing services, as per the MSA, from the date of termination of the MSA, and was always ready to hand over the subject property to the

petitioner, it was not liable to pay, to the petitioner, any amount in lieu of the benchmark revenue or any other charges, after the date of termination of

the MSA, being 31st December, 2019. The communication also purported to enclose, therewith, the keys of the subject property.

23. The subsequent communication, dated 13th March, 2020 (which, too, was not delivered to the petitioner), briefly reiterated the aforesaid allegations

and purported, yet again, to enclose the keys of the subject property. The claim for Rs. 9,87,63,364/-, along with interest @ 18% p.a., was reiterated.

24. This was followed by a legal notice, dated 30th March, 2020, from the respondent (through counsel), to the petitioner, which, drew attention, inter

alia, to Article 6.1.2 of the MSA, which read thus:

Ã¢â‚¬Å“6.1.2 The Lessee has all necessary statutory and/ or regulatory permission(s), Approval(s), licenses and permits required for running and

operating the Venue and conducting its business and for providing the Services by the Service Provider.Ã¢â‚¬â€‹

The notice alleged, once again, that the petitioner had breached the MSA by failing to procure the Ã¢â‚¬Å“requisite licenses/approvals/ permissions/NOCs,

which remained pendingÃ¢â‚¬. Non-procurement of licenses, it was reiterated, constituted a material breach under the MSA, owing to which, the

respondent was unable to continue with its operations, as a result of which the respondent had been constrained to terminate the MSA vide

communication dated 25th December, 2019, followed by the communications constituting the sequelae thereto. By receiving the letter dated 23rd

January, 2020, it was alleged that the petitioner had accepted the termination of the MSA.

25. The Legal Notice, therefore, reiterated the demand of Rs. 9,87,63,364/- along with interest @ 18% p.a., and proposed the name of Mr. Arun

Kumar Arya, learned District and Sessions Judge (Retd.) as the Sole Arbitrator to adjudicate on the dispute between the petitioner and the

respondent.

26. It may be mentioned, even at this juncture, that though the petitioner, and the respondent, have communicated their preference of arbitration, to

arbitrate on the aforesaid dispute, there has been no consensus ad idem, on the issue, and no arbitrator has been appointed. As such, the present

petition is not hit by Section 9(3) of the 1996 Act.

27. The petitioner responded to the aforesaid Legal Notice, dated 30th March, 2020, vide letter (through counsel), dated 8th April, 2020. The petitioner

categorically denied having received the communications, dated 26th February, 2020 and 13th March, 2020, addressed by the respondent. Apropos the

allegation that the petitioner had failed to obtain the requisite licenses/approvals/permissions/NOCs, the petitioner pointed out, yet again, that the

communications, from the respondent, were completely silent, regarding the specifics and particulars of the licenses/approvals/permissions/NOCs,

which the petitioner had yet to procure or obtain. The petitioner reiterated, emphatically, that there had been no default on the part of the petitioner, in

obtaining any such license/approval/permission or NOC. It was also pointed out that the respondent had inspected all the documents and licenses,

before entering into the MSA. The plea of the petitioner having failed to obtain requisite licenses/approvals/permissions or NOCs, it was therefore

submitted, was merely a ruse in order to avoid the respondentÃ¢â‚¬â„¢s obligations under the MSA. This, it was submitted, was also apparent from the e-

mail, dated 25th February, 2020, which purported to terminate the MSA, not on the ground of failure, on the part of the petitioner, to obtain

licenses/approvals/ permissions/NOCs, but because the respondent expressed its inability to continue with the operations at the subject property. The

accusation of failure, on the part of the petitioner, to obtain licenses/approvals/ permissions/NOCs, was, therefore, it was alleged, merely

manufactured, by the respondent, to avoid the fulfilment of its obligations under the MSA. It was further pointed out that the petitioner had never

accepted the termination of the MSA but that, as the respondent was seeking to do so, within the lock-in period, the obligations, flowing from Article

3.3(ii) of the MSA, would bind the respondent.

28. The petitioner, therefore, reiterated its demand for payment of Rs. 15 lakhs per month, for the months of December, 2019 and January, 2020, and

for a total amount of Rs. 1,73,50,000/-, for the period February, 2020 till 11th January, 2021 along with interest and damages.

29. While the recital of the exchange of communications, between the petitioner and the respondent, through counsel or otherwise, would conclude at

this point, it is also necessary to highlight two more communications, dated 6th May, 2020 and 22nd May, 2020, between Raja Varshney and the

petitioner, and vice versa.

30. The communication, dated 6th May, 2020, which was in the nature of a Legal Notice by Raja Varshney, to the petitioner, alleged default, on the

part of the petitioner, in payment of rent to Raja Varshney to an extent of Rs. 38,02,212/-. It was further alleged, in the said Legal Notice, that certain

cheques tendered by the petitioner, to Raja Varshney, had been dishonoured by the Bank. The legal notice, therefore, called upon the petitioner to pay

an amount of Rs. 12,34,050/-being the amount covered by the aforesaid three dishonoured cheques.

31. The petitioner responded, to the aforesaid Legal Notice, dated 6th May, 2020, vide response, dated 22nd May, 2020, also addressed through

counsel. It is not necessary to refer, in detail, to the contents of the said communication, as the present lis is not concerned with the dispute between

the petitioner and its landlord. Mr. Jeevan Ballav Panda, learned counsel arguing for the respondent, however, seeks to capitalise on the following

sentence, with which para 2 of the reply of the Legal Notice, dated 22nd May, 2020, commences:

Ã¢â‚¬Å“2. The malafide intentions on the part of your clients is evident from the very fact that your entire legal notice is completely silent about the above

said fact and also the fact that my client had duly communicated about the termination of the present lease to your clients vide his e-mail dated 14-01-

2020 that he would not be able to continue or run his operations due to the fraud committed upon him by M/s. Weddingz.in (OYO Hotels and Homes

Pvt. Ltd.) on behalf of M/s. Oravel Stays Private Limited and was ready to vacate your premises.Ã¢â‚¬â€‹

32. This concludes the recital of the relevant facts.

Claim of the Petitioner

33. In the backdrop of the aforesaid facts, the petitioner has moved this Court, under Section 9 of the 1996 Act, seeking the reliefs enumerated in the

prayer clause, and reproduced in para 1 supra.

34. The petitioner has sought to make out a case of clear and undeniable liability, of the respondent, to discharge payment, to the petitioner, in terms of

Article 3.3(ii) of the MSA, as the respondent sought to terminate the MSA within the lock-in period. It is also alleged, in the petition, that the

respondent was known to be in the process of winding up its business and diverting its funds, thereby necessitating immediate relief under Section 9 of

the 1996 Act.

35. The respondent has filed a reply, to the petition, in which the respondent has taken preliminary exception to the fact that the petitioner had not

disclosed the e-mail, dated 14th January, 2020 supra, addressed by the petitioner to its landlord, which, according to the respondent, effectively

terminated the lease between the petitioner and its landlord. Once the lease between the petitioner and its landlord stood terminated, the respondent

contends that there could be no question of the respondent carrying out any of its obligations in the subject property, or of the petitioner being able to

maintain any claim for liquidated damages for the alleged lock-in period.

36. As such, the respondent contends that the petition is devoid of any sustainable cause of action.

37. The respondent further denies, entirely, the applicability of Article 3.3(ii) of the MSA, and contends that the termination of the MSA, by the

respondent, was relatable, not to Article 3.3(ii), but to Article 9.1.2 thereof. It is averred, in the reply, that Article 9.1.2 empowered the respondent to

terminate the MSA, even during the lock-in period, even in the event of material breach by the petitioner, without mulcting the respondent, thereby, of

any liability towards liquidated damages. Reliance has been placed on the non obstante

38. The reply further invokes Article 5.2.6 of the MSA, whereunder the petitioner was obliged to provide approvals for renewals of the licenses and

NOCs. It is alleged, in the reply, that the petitioner had failed to comply with the mandate of the said Article 5.2.6, as it had not provided the Approved

Building Plan of the subject property, along with Renewed Consent to Operate (hereinafter referred to as Ã¢â‚¬Å“the CTOÃ¢â‚¬) from the Delhi Pollution

Control Committee (DPCC). The reply alleges that the last CTO, made available by the petitioner, was of 29th January, 2014 vintage, which expired

of 16th December, 2018.

39. It was in these circumstances, contends the reply, that the respondent was constrained to express its inability to continue operations with the

subject property vide e-mail dated 25th December, 2019.

40. The reply also relies on the judgment of this Court in Tower Vision India Pvt. Ltd. v Procall Private Limited 2014 (183) CC 364, for the proposition

that liquidated damages could be claimed only if the petitioner established legal injury, following the alleged breach by the respondent, and the loss

suffered thereby. The mere existence of a clause, in the MSA, creating a liability to liquidated damages, it is averred, did not result in dispensation with

this requirement.

41. The reply of the respondent, filed in response to the petition, further avers that, as the claims of the petitioner are yet to be adjudicated, the

petitioner could not invoke Section 9 of the 1996 Act, in order to obtain Ã¢â‚¬Å“pre-arbitration adjudicationÃ¢â‚¬. No such imminent threat, necessitating the

exercise by this Court, of its extraordinary power, conferred on it, by Section 9 of the 1996 Act, it is contended, exists, as the respondent is one of the

best and fastest growing hospitability chains, and it is absurd to contend that the respondent had started to wind up its business.

Rival submissions

42. I have heard, in detail, the submissions advanced by Mr. Ankit Jain, learned counsel for the petitioner, and Mr. Jeevan Ballav Panda, learned

counsel for the respondent.

43. Mr. Jain, arguing for the petitioner, submits that the case squarely falls under Article 3.3(ii) of the MSA. The hand over date, he points out, was

12th September, 2019, and the lock-in period, as per Article 3.3 of the MSA, would, therefore, expire only sixteen months from the said date, i.e 11th

January, 2021. In view thereof, he submits that, as the respondent had sought to terminate the MSA during the lock-in period, for reasons not relatable

to Article 9 of the MSA, it had effectively become liable to pay, to the petitioner, liquidated damages, equivalent to the benchmark revenue (of Rs. 15

lakhs per month) covering the remainder of the lock-in period. In this context, Mr. Jain also relies on Article 3.3(iii) which specifically states that

liquidated damages, contemplated by Article 3.3(ii) was a genuine and reasonable estimate of damages, and was not in the nature of a penalty. This,

Mr. Jain submits, would comply with the mandate of Sections 73 and 74 of the Indian Contract Act, 1872, which may be reproduced thus:

Ã¢â‚¬Å“73. Compensation for loss or damage caused by breach of contract Ã¢â‚¬" When a contract has been broken, the party who suffers by such

breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally

arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of

it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract. Ã¢â‚¬" When an obligation resembling those created by

contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation

from the party in default, as if such person had contracted to discharge it and had broken his contract.

74. Compensation for breach of contract where penalty stipulated for Ã¢â‚¬" When a contract has been broken, if a sum is named in the contract

as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach

is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract

reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.Ã¢â‚¬â€‹

44. Insofar as Article 9.1.2 of the MSA Ã¢â‚¬" which the respondent seeks to invoke Ã¢â‚¬" is concerned, Mr. Jain submits that the said Article is totally

inapplicable to the facts of the present case, He asserts that there had been no material breach of the MSA, by the petitioner, which is the first pre-

requisite for Article 9.1.2 to apply.

45. Further, submits Mr. Jain, the said Article would apply only where the Lessee (i.e. the petitioner) fails to remedy the breach within thirty days

from the date on which it was notified by the Service Provider (i.e. the respondent) thereof. No such communication, notifying the petitioner of any

particular breach, of the MSA, as having been committed by it, was, Mr. Jain points out, ever issued by the respondent.

46. Apropos the e-mail, dated 25th December, 2019, whereby the respondent sought to terminate the MSA, Mr. Jain submits that the communication

was non-speaking in nature and did not set out any reasons for the decision to terminate the MSA and vacate the premises, except for stating that the

respondent was unable to work therein. There was no allegation, in the said communication, of any default, by the petitioner in compliance with the

terms of the MSA. It was only when the petitioner invoked, in its response, dated 25th December, 2020 and 1st January, 2020, Article 9.1.1 of the

MSA, that the respondent, for the first time, in its e-mail, dated 15th January, 2020, alleged that the petitioner had defaulted in obtaining the necessary

licenses/approvals/permissions and NOCs. Even while so alleging, it is pointed out that the communication was completely silent regarding the

particulars and specifics of the licenses/approvals/permissions and NOCs, which the petitioner had failed to obtain. The petitioner, he points out, drew

the attention of the respondent, repeatedly, to this fact, but that the respondent, in all its responses, merely continued to allege that the petitioner had

defaulted in obtaining the necessary licenses/approvals/permissions and NOCs, without disclosing the specifics thereof.

47. Mr. Jain points out that it was only when the matter reached this Court, for the first time, in para 3 (d) of its reply to the petitioner, that the

respondent has alleged, specifically, that the petitioner had not provided the latest sanctioned building plan of the subject property and the revised

CTO. This allegation, submits Mr. Jain, was clearly false, as has been pointed out by the petitioner, in its rejoinder to the reply filed by the respondent

to the present petition. The petitioner has also filed, with its rejoinder, the building plan of the premises, which, he submits, stands approved by the

DDA on 29th January, 2010. It has also filed the CPO, by the DPCC, issued on 26th June, 2019 Ã¢â‚¬" i.e. points out Mr. Jain, even before the MSA,

between the petitioner and respondent was entered into Ã¢â‚¬" which has expressly been made valid till 14th December, 2023.

48. Mr. Jain would, therefore, seek to contend that, while raising a bogey, in its communication to the petitioner, of the petitioner having defaulted in

obtaining necessary licenses/approvals/permissions and NOCs, merely in order to escape the liability cast on it by Article 3.3(ii) of the MSA, the

respondent, on being driven to a corner by the filing of the present petition by the petitioner, has, as a desperate measure, sought to allege default, on

the part of the petitioner, in providing the sanctioned building plan and approved CPO, both of which had, in fact, been provided by the petitioner, as

was known to the respondent all along.

49. The petitioner has also denied the assertion, of the respondent, that it had vacated the subject property on 31st December, 2019. In this context,

the petitioner has pointed out that it never received the letters dated 26th February, 2020 and 13th March, 2020, stated to have been sent by the

respondent and that it was for the first time, in its legal notice, dated 30th March, 2020, that the petitioner came to know of this averment of the

respondent.

50. Mr. Jain further submits that the reliance, by the respondent, on the e-mail dated 14th January, 2020 supra, from the petitioner to its landlord, was

completely misguided, as the said e-mail could not, in any manner be said to justify the premature termination of the MSA by the respondent. It is

pointed out, by the petitioner, that the e-mail, dated 14th January, 2020, and the alleged termination, thereby, of the lease between the petitioner and its

landlord, was never taken as a ground, by the respondent, to justify termination of the MSA in any of its communications, addressed to the petitioner,

which, rather, sought to justify such termination on the ground of failure, on the part of the petitioner, to obtain necessary licences, NOCs, permissions

and approvals. The respondent, therefore, contends Mr. Jain, has been vacillating in its stance, asserting, at one point, that the petitioner was in default

of Article 5.2.6 of the MSA, and, at another (in the affidavit filed in response to the petition), that the respondent had exited from the premises in view

of the termination of the lease between the petitioner and its landlord.

51. Moreover, points out Mr. Jain, the e-mail, dated 14th January, 2020, was merely in the nature of an intimation, by the petitioner, to its landlord, that,

as the respondent was seeking to terminate the MSA and vacate the premises, the petitioner would not be able to run operations therein and would,

therefore, vacate the subject property. Any such vacation, points out Mr. Jain, had necessarily to be preceded by handing over of the subject property,

by the respondent to the petitioner, which itself never took place.

52. Mr. Jain also sought to distinguish the decision in Tower Vision 2014 (183) CC 364 by referring to Article 3.3(iii) of the MSA, and has pointed out

that no similar clause was available in Tower Vision 2014 (183) CC 364. In view of the fact that Article 3.3(iii) of the MSA expressly stated that the

liquidated damages, payable under Article 3.3(ii) were in the nature of a genuine pre-estimate of damages, and were not in the nature of a penalty,

Mr. Jain submits that the respondent could not seek to escape its liability thereunder. That apart, Mr. Jain points out that Tower Vision 2014 (183) CC

364 was in the context of Section 433 of the Companies Act, which statutorily contemplates an undeniable debt. It would be fallacious, contends Mr.

Jain, to analogize the situation that obtained, in Tower Vision 2014 (183) CC 364, with that which obtains in the present case. Insofar as non-refund of

security deposit is concerned, Mr. Jain submits that premature termination of the MSA could not be justified on the basis thereof and relies, for the

said purpose, on the judgment of this Court in M/s General Electronics International Inc. v. M/s U.C. Jain HUFM ANU/DE/1332/2009, specifically on

para 26 of the said decision. He also relies, in this context, on para 107 of H.S. Bedi vs. NHAI 2015 (220) DLT 179.

53. Mr. Jeevan Ballav Panda, learned Counsel for the respondent, responding to the submissions of Mr. Ankit Jain, submits, at the very outset, that, as

the lease between the petitioner and its landlord stood terminated by the e-mail, dated 14th January, 2020 supra, there could be no question of the

respondent continuing to operate from the said premises, or of any liability, by the respondent towards the petitioner, after the said date. It was for this

reason, he submits, that his client vacated the subject property on 31st December, 2019. To substantiate his submission that the lease between the

petitioner, and its landlord, in fact, stood terminated, on 14th January, 2020, Mr. Jeevan Ballav Panda also relies on the opening sentence of para 2 of

the communication dated 22nd May, 2020, addressed by the petitioner (through counsel) to the respondent, extracted in para 54 supra. Even while so

submitting, Mr. Jeevan Ballav Panda admits, fairly, that there was no consensus ad idem, between the petitioner and its landlord, regarding the date of

termination of the lease between them, as the petitioner was contending that the lease stood terminated on 14th January, 2020, and the petitionerÃ¢â‚¬â„¢s

landlord was seeking to contend that it terminated only on 30th April, 2020. Even so, submits Mr. Jeevan Ballav Panda, having taken a stand, in its

communications with its landlord, that the lease between the petitioner and its landlord stood terminated on 14th January, 2020, it was not open to the

petitioner to maintain, at this point, any claim against the respondent, for any period after the said date.

54. Mr. Jeevan Ballav Panda also places emphatic reliance on Tower Vision 2014 (183) CC 364, especially on paras 24, 25 and 28 of the said decision

which, therefore, may be reproduced thus :

Ã¢â‚¬Å“24. What follows from the above is that even if there is a clause of liquidated damages, in a given case, it is for the Court to determine as to

whether it represents genuine pre-estimate of damages. In that eventuality, this provision only dispenses with the proof of Ã¢â‚¬Å“actual loss or

damageÃ¢â‚¬. However, the person claiming the liquidated damages is still to prove that the legal injury resulted because of breach and he suffered some

loss. In the process, he may also be called upon to show that he took all reasonable steps to mitigate the loss. It is only after proper enquiry into these

aspects that the Court in a given case would rule as to whether liquidated damages as prescribed in the contract are to be awarded or not. Even if

there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury

sustained by him and what is stipulated in the contract is the outer limit beyond which he cannot claim. Unless this kind of determination is done by the

Court, it does not result into Ã¢â‚¬Å“debtÃ¢â‚¬â€‹.

25. At this juncture, we would like to refer to the judgment of Bombay High Court in the case of E-City Media Private Limited a Private Limited

Company v. Sadhrta Retail Limited a Public Limited Company, [2010] 153 Comp.Cas 326 (Bom.) (rendered by Single Judge). In this case also,

winding up petition was filed on account of alleged dues stipulated in the contract in case of breach. Facts of the case disclose that the petitioner had

appointed the respondent as an exclusive agent for designated branding sites situated within the premises of a shopping mall. The petitioner had

permitted the respondent to display advertisements at the Mall, in a theatre and upon ticket jackets. The contract was to commence on 22.5.2008 and

was to conclude on 31.7.2009. This term was extended by a formal amendment till September, 2009. The agreement also provided that in the event

respondent fail to make payment for a period of one month, during the term of the agreement, the petitioner would be at liberty to terminate the

agreement with notice of seven days. In that event, respondent was obliged to make good losses and damages which may be suffered by the

petitioner. The respondent was liable to pay entire royalty/minimum guaranteed amount mentioned in the agreement with interest @ 18% per annum

on alleged breach committed by the respondent. The petitioner terminated the contract and demanded the entire amount of royalty/minimum

guaranteed amount. On the respondents failure to pay, winding up petition was filed. The Court dismissed the said petition holding that it was not

maintainable upon a claim for damages which could not be treated as debt. It was held that damages become payable only when they are crystallized

upon adjudication. Until and unless an adjudication takes place with a resultant decree for damages, there is no debt due and payable. Damages

require adjudication. Until then, the liability of a party in alleged breach of a contract does not become crystallized. In support of this view, the Court

referred to a Division Bench judgment of Karnataka High Court in Greenhills Exports (P) Ltd. v. Coffee Board, Bangalore, [2001] 106 Comp.Cas 391

(Kar) in the following words:

Ã¢â‚¬Å“Ã¢â‚¬Â¦Mr. Justice R.V. Raveendran (as the Learned Judge then was) speaking for the Division Bench formulated the propositions of law which

emerge from judgments of the Supreme Court and the High Court. The Court held as follows:

(i) A Ã¢â‚¬Å“DebtÃ¢â‚¬â€‹ is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to

pay a sum of money is the sine qua non of a debt.

Ã¢â‚¬Å“DamagesÃ¢â‚¬â‚¬ is money claimed by, or ordered to be paid to; a person as compensation for loss or injury. It merely remains a claim till adjudication

by a court and becomes a Ã¢â‚¬Å“debtÃ¢â‚¬â€‹ when a court awards it.

(ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no Ã¢â‚¬Å“existing obligationÃ¢â‚¬â‚¬ to pay any amount. No pecuniary liability

in regard to a claim for damages, arises till a court adjudicates upon the claim for damages and holds that the defendant has committed breach and has

incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only

to a right to sue for damages and not to claim any Ã¢â‚¬Å“debtÃ¢â‚¬. A claim for damages becomes a Ã¢â‚¬Å“debt dueÃ¢â‚¬, not when the loss is quantified by the

party complaining of breach, but when a competent court holds on enquiry, that the person against whom the claim for damages is made, has

committed breach and incurred a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages.

Damages are payable on account of a fiat of the court and not on account of quantification by the person alleging breach.

(iii) When the contract does not stipulate the quantum of damages, the court will assess and award compensation in accordance with the principles laid

down in Section 73. Where the contract stipulates the quantum of damages or amounts to be recovered as damages, then the party complaining of

breach can recover reasonable compensation, the stipulated amount being merely the outside limit.

(iv)Ã¢â‚¬Â¦

(v) Even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner stipulated in the contract,

by the party claiming damages, that will not convert a claim for damages into a claim for an ascertained sum due. Liability to pay damages arises only

when a party is found to have committed breach. Ascertainment of the amount awardable as damages is only consequential.

28. This is a case where the premises were given by the petitioner to the respondent on license basis vide lease and license agreement dated

18.2.2008. Lock-in period of 33 months was prescribed and the entire amount is claimed on account of premature termination of agreement by the

respondent. The petitioner is claiming total amount of the lock-in period. It is nowhere stated as to how it has suffered any loss on this account and

whether the liquidated damages stipulated in the agreement are genuine pre-estimate damages. Once we have accepted the judgment in Manju Bagai

(supra) and we are also in agreement with the view taken by the Bombay High Court in E-City Media Private Limited (supra), the consequence of

that would be to dismiss this petition as well.Ã¢â‚¬â€‹

(Emphasis supplied)

55. The afore-extracted passages from Tower Vision 2014 (183) CC 364, submits Mr. Jeevan Ballav Panda, clearly underscore the legal position that,

even if a clause, contemplating liquidated damages, existed in the MSA, the petitioner would, nevertheless, have to establish, on evidence, that the

liquidated damages sought by it were in the nature of a genuine pre-estimate of damages, failing which no claim for liquidated damages could sustain.

56. Mr. Jeevan Ballav Panda submits that the validity of the termination, by the respondent, of the MSA, was an issue which was entirely within the

domain of the arbitrator, who would adjudicate thereon. He relies on the decision of the Supreme Court in Kailash Nath Associates v. DDA (2015) 4

SCC 136, to contend that the legality of the termination cannot be tested in a petition under Section 9 of the 1996 Act. It is pointed out, in the context

of this judgment, that the petitioner has not sought to make out a case that it was impossible to prove actual loss or damage.

57. Reverting to Tower Vision 2014 (183) CC 364, Mr. Jeevan Ballav Panda points out that, even assuming there had been a premature and

unsustainable termination of the MSA by the respondent, the petitioner would be entitled, consequently, only to Ã¢â‚¬Å“reasonable compensation for the

injury sustained by himÃ¢â‚¬. As on date, submits Mr. Jeevan Ballav Panda, the petitioner has not sustained any injury. Even if he were to sustain injury,

the petitioner would be entitled, not to liquidated damages, but only to reasonable compensation. As such, submits Mr. Jeevan Ballav Panda, the

petitioner does not have any right to sue in praesenti.

58. Mr. Jeevan Ballav Panda also refers to the notice, dated 6th February, 2020, from the petitioner, whereby it invoked Article 10 of the MSA, which

provided for arbitration. It is pointed out, by Mr. Jeevan Ballav Panda, that the amounts claimed in the notice were the same as those which were

sought to be secured in the present petition, which, according to him, was clearly impermissible.

59. I may, even at this juncture, state that I am unable to appreciate this submission, of Mr. Jeevan Ballav Panda, as it is but natural that the claim, in

the notice invoking arbitration, would be the same as the claim in that Section 9 petition, where the prayer is for directing furnishing of security.

60. Mr. Jeevan Ballav Panda further submits that the petitioner was not facing any prejudice, as an amount of Rs. 45 lakhs was lying with the

petitioner.

61. Insofar as the specific requirements of Article 9.1.2 of the MSA are concerned, Mr. Jeevan Ballav Panda submits that, though the termination of

the MSA, as purportedly effected by his client, by the communication dated 25th February, 2019, may not be strictly in compliance with Clause 9.1.2,

the communication, dated 25th December, 2019 did nevertheless, terminate the MSA. Besides, Mr. Jeevan Ballav Panda relies on the communication,

dated 14th January, 2020 supra (through counsel) between the petitioner and its landlord to contend that the petitioner had acted on the aforesaid

communication, dated 25th February, 2019, and treated it as an effective termination of the MSA.

62. Insofar as the communications dated 26th February, 2020 and 13th March, 2020 are concerned, Mr. Jeevan Ballav Panda submits that, as

repeated attempts have been made by the courier company to deliver the consignment, but delivery could not be effected only owing to non-availability

of the petitioner, the petitioner was deemed to have been served with the said letters. In any event, he points out, prayer (i) in the petition did not

survive for consideration, as the respondent was willing to hand over the keys of the subject property to the petitioner.

63. Finally, Mr. Jeevan Ballav Panda reiterates his submission that the petitioner could not seek to secure any amount towards liquidated damages,

even if claimed under Article 3.3 (ii) of the MSA, prior to trial and determination of liability, by the competently constituted arbitral tribunal. Such

securing of liquidated damages, he submits could not be directed in a petition under Section 9 of the 1996 Act.

64. Mr. Jeevan Ballav Panda seeks to distinguish the judgment of this Court in General Electronics IInternational Inc. MANU/DE/1332/2009, on the

ground that the said decision was rendered in a petition under Section 34 of the 1996 Act, questioning the arbitral award and had no applicability,

therefore, to a litigation relatable to Section 9 of the 1996 Act. Mr. Jeevan Ballav Panda also questions the right, of the petitioner, to claim liquidated

damages on the ground that there was no evidence to indicate that the petitioner had taken any steps to mitigate its losses.

65. For all these reasons submits Mr. Jeevan Ballav Panda, no case, for passing of any interlocutory directions, under Section 9 of the 1996 Act, even

before the dispute was referred to, and suffered, adjudication by the arbitrator, exists.

66. Mr. Jeevan Ballav Panda has also sought to place reliance on the judgement, of a Division Bench of this Court in Associated Journal Ltd v. ICRA

Ltd MANU/DE/0851/2012, the Special Leave Petition, preferred against which, was dismissed, by the Supreme Court, on 12th April, 2013

[Associated Journal Ltd v. ICRA Ltd, MANU/SCOR/20429/2013].

67. Arguing in rejoinder, Mr. Ankit Jain submits that, once it was acknowledged by Mr. Jeevan Ballav Panda, that the purported termination of the

MSA, by the communication dated 25th December, 2019, was in accordance with Article 9.1.2 thereof, Article 3.3(ii) immediately kicked in, and

rendered the respondent liable to pay liquidated damages in terms thereof. Mr. Jain reiterates his submission that Tower Vision 2014 (183) CC 364

could not apply, in view of Article 3.3(iii), in the face of which it was not open to the respondent to seek to contend that the liquidated damages,

claimed under Article 3.3(ii) did not constitute a genuine plea estimate of damage.

68. The applicability of Article 3.3(ii), Mr. Jain points out, was, in fact, acknowledged by the respondent itself, as was manifest in its legal notice dated

30th March, 2020, as well as in other communications wherein the respondent demanded, from the petitioner, lock in pay outs, as mentioned in

Annexure A to the MSA. It is pointed out, by Mr. Jain, that his client is demanding from the respondent, the very same lock-in pay-outs, which the

respondent has, in its communication to the petitioner demanded from the petitioner.

69. Apropos the submission of Mr. Jeevan Ballav Panda, that there could be no pre-arbitral payment of liquidated damages, before the liability, of the

respondent, to take such payment was determined, Mr. Ankit Jain points out that, this petition does not pray for any such payment being made out to

his client but merely seeks to secure the amount involved, which is a remedy specifically statutorily contemplated, by Section 9 of the 1996 Act.

Analysis and Conclusion

70. Unlike Order XXXIX of the CPC, which relates to cases in which Ã¢â‚¬Å“temporary injunction may be grantedÃ¢â‚¬ by the Court, Section 9 of the 1996

Act delineates the circumstances in which the Court may pass orders of Ã¢â‚¬Å“interim protectionÃ¢â‚¬. The effort of the Section 9 court is, therefore, to

protect the corpus of the dispute, where it is found to be arbitrable.

71. The 1996 Act is, preambularly, Ã¢â‚¬Å“an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration

and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental

theretoÃ¢â‚¬. In my opinion, exercise of jurisdiction, by the Court, under the 1996 Act, has to be duly informed by this preambular declaration. The 1996

Act is not a statute which purports to delineate powers exercisable by a Court. It is a statute which consolidates and applies the law relating to

arbitration and conciliation, and for matters connected therewith or incidental thereto. Provisions, in the 1996 Act, which confers jurisdiction and

authority on the Court have, therefore, to be treated as provisions which are Ã¢â‚¬Å“connected withÃ¢â‚¬, or Ã¢â‚¬Å“incidental toÃ¢â‚¬, the arbitral or conciliatory

process. The 1996 Act does confer specific jurisdiction on civil courts, in certain eventualities, but, in my view, the civil court would be erring, in law,

if, in exercise of such jurisdiction, it remains unmindful of the preamble to the 1996 Act.

72. This position stands underscored by Section 5 of the 1996 Act, which determines the Ã¢â‚¬Å“extent of judicial interventionÃ¢â‚¬, thereunder, and

commences with a non obstante clause. The provision stipulates that, Ã¢â‚¬Å“notwithstanding anything contained in any other law for the time being in

force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this PartÃ¢â‚¬. The statutory caution,

administered by Section 5 must, in my view, also extend to the exercise of jurisdiction under Section 9. The Section 9 court is, therefore, to exercise

jurisdiction strictly in accordance with the said provision.

73. This aspect is pivotal to the understanding of Section 9, and to appreciating the amplitude of the jurisdiction conferred thereby. The provision

commences with the words Ã¢â‚¬Å“a party may, before or during the arbitral proceedings or at any time after the making of the arbitral award but before

it is enforced in accordance with section 36Ã¢â‚¬Â¦Ã¢â‚¬ Jurisdiction, under the said provision can be exercised, by the Court, either before arbitral

proceedings, or during the arbitral proceedings, or after making of the arbitral award but before enforcement thereof. The thread that runs through the

said expressions is, clearly, that there must exist arbitral proceedings, current or contemplated. It is for this reason that the Section 9 Court must be

convinced that the petitioner, before it, intends to initiate the arbitral process. Absent evidence of such intent, it would be impermissible for the Court to

pass orders under Section 9.

74. The Supreme Court has, in Sundaram Finance Ltd v. NEPC India Ltd (1999) 2 SCC 479, emphasised this aspect, by ruling that, before passing an

interim order under Section 9, the court is required to be satisfied about the existence of an arbitration agreement, and the applicantÃ¢â‚¬â„¢s intention to

take the matter to arbitration. The specific issue, addressed by the Supreme Court in the said case, was delineated, in the opening paragraph of the

judgement, as Ã¢â‚¬Å“whether under Section 9 of the Arbitration and Conciliation Act, 1996, the court has jurisdiction to pass interim orders even before

arbitral proceedings commence and before an arbitrator is appointed.Ã¢â‚¬ The High Court had, in that case, dismissed the Section 9 petition, filed by the

appellant (before the Supreme Court) on the ground that the appellant had not initiated any efforts towards setting arbitral proceedings in motion. The

Supreme Court reversed the decision, and the following passages, from the said decision, merit reproduction:

Ã¢â‚¬Å“11. The reading of Section 21 clearly shows that the arbitral proceedings commence on the date on which a request for a dispute to be referred to

arbitration is received by the respondent. It is in this context that we have to examine and interpret the expression Ã¢â‚¬Å“before or during arbitral

proceedingsÃ¢â‚¬ occurring in Section 9 of the 1996 Act. We may here observe that though Section 17 gives the Arbitral Tribunal the power to pass

orders, the same cannot be enforced as orders of a court. It is for this reason that Section 9 admittedly gives the court power to pass interim orders

during the arbitration proceedings.

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13. Under the 1996 Act, the court can pass interim orders under Section 9. Arbitral proceedings, as we have seen, commence only when the request

to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are Ã¢â‚¬Å“before or during the

arbitral proceedingsÃ¢â‚¬. This clearly contemplates two stages when the court can pass interim orders, i.e., during the arbitral proceedings or before the

arbitral proceedings. There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word

Ã¢â‚¬Å“beforeÃ¢â‚¬ occurring in the said section. The only interpretation that can be given is that the court can pass interim orders before the

commencement of arbitral proceedings. Any other interpretation, like the one given by the High Court, will have the effect of rendering the word

Ã¢â‚¬Å“beforeÃ¢â‚¬ in Section 9 as redundant. This is clearly not permissible. Not only does the language warrants such an interpretation but it was

necessary to have such a provision in the interest of justice. But for such a provision, no party would have a right to apply for interim measure before

notice under Section 21 is received by the respondent. It is not unknown when it becomes difficult to serve the respondents. It was, therefore,

necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect its interest. Reading the

section as a whole it appears to us that the court has jurisdiction to entertain an application under Section 9 either before arbitral proceedings or during

arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.

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16. In our opinion, this view correctly represents the position in law, namely, that even before the commencement of arbitral proceedings, the court

can grant interim relief. The said provision contains the same principle which underlies Section 9 of the 1996 Act.

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19. When a party applies under Section 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement

in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates

arbitration proceedings taking place between the parties. Mr Subramanium is, therefore, right in submitting that when an application under

Section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to

take recourse to the arbitral proceedings if, at the time when the application under Section 9 is filed, the proceedings have not commenced

under Section 21 of the 1996 Act. In order to give full effect to the words Ã¢â‚¬Å“before or during arbitral proceedingsÃ¢â‚¬ occurring in Section

9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under

Section 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute

referred to an Arbitral Tribunal, but a situation may so demand that a party may choose to apply under Section 9 for an interim measure

even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made, the court will first have to be satisfied

that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court

will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While

passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising

jurisdiction under Section 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that

effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the court is not

debarred from dealing with an application under Section 9 merely because no notice has been issued under Section 21 of the 1996 Act.

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21. In view of the aforesaid discussions, it follows that the High Court erred in coming to the conclusion that the trial court had no jurisdiction in

entertaining the application under Section 9 because arbitration proceedings had not been initiated by the appellant.Ã¢â‚¬â€‹

(Emphasis supplied)

75. Before exercising jurisdiction under Section 9, therefore, the Court has to satisfy itself that there exists (i) an arbitration agreement, (ii) an arbitral

dispute and (iii) manifest intention, on the part of the petitioner, to initiate arbitral proceedings. Issuance of a notice invoking arbitration is, however, not

a sine qua non, for manifest intention to initiate arbitral proceedings to be said to exist. If, such a notice is issued, that, by itself, may be sufficient to

evince the existence of such intention. The existence of intention has, however, necessarily to be determined, on a case to case basis, depending on

the facts before the court. Non-existence of evidence of such intent, therefore, would render the Section 9 petition incompetent. Where intent to

initiate arbitral proceedings exists, but no steps, towards fructification of such intent, have yet been initiated by the petitioner, then the Section 9 court

is empowered, therefore, to put the petitioner to terms, even while granting interim protection under Section 9. These, to my mind, had to be treated as

the guiding principles for every court, seeking to exercise jurisdiction under Section 9 of the 1996 Act.

76. Subject to observing these safeguards, the principles governing exercise of discretion under Section 9 are the same as those which apply to grant

of interim relief under Order XXXIX of the CPC, i.e. the existence of a prima facie case in favour of the Section 9 applicant, the balance of

convenience being in favour of grant of Ã¢â‚¬Å“interim protectionÃ¢â‚¬ and the possibility of irreparable loss or prejudice, were such interim protection not to

be granted.

77. The very use of the word Ã¢â‚¬Å“protectionÃ¢â‚¬, however, necessarily predicates the existence of something, which is required to be protected. This,

therefore, introduces a fourth factor, which the Section 9 court is required to bear in mind. The Section 9 petitioner was also required to establish, to

the satisfaction of the court, the existence of circumstances which require grant of interim protection and urgent necessity. Expressed otherwise, the

Section 9 court is required to be satisfied that, were interim protection not to be granted, there is a possibility of the arbitral proceedings being

frustrated. Only thus could the court be able to act in furtherance of the preambular purpose behind the 1996 Act, i.e., to ensure successful

commencement, conducting and conclusion of the arbitral proceedings, and resolution, thereby, of the dispute between the parties before it.

78. While exercising jurisdiction under Section 9, the Court is required to be mindful of the fact that it is not a pre-arbitral arbitrator. The Court should

not, therefore, entrench on the jurisdiction of the arbitral tribunal, to determine whether interim measures of protection, during the pendency of the

arbitral proceedings, are required to be granted, or not. This jurisdiction vests, statutorily, on the arbitral tribunal, by Section 17.

79. Whether under Section 9, or under Section 17, sub-clause (1)(ii)(b), which empowers the Court (under Section 9) or the Arbitral Tribunal (under

Section 17) to secure the amount in dispute in the arbitration, is to be administered with additional caution, as grant of any relief, under this sub-clause,

would also be justified only if it is by way of Ã¢â‚¬Å“interim protectionÃ¢â‚¬. For this reason, though there is some ambivalence, in judicial thought, on this

aspect, it is generally accepted that the principles governing Order XXXVIII Rule 5 would, generally, be applicable, while considering a prayer for

furnishing of security, under Section 9(1)(ii)(b) or Section 17(1)(ii)(b) [Ajay Singh v. Kal Airways Ltd, 2017 SCC Online Del 8934; BMW India Pvt

Ltd v. Libra Automotives Ltd, 261 (2019) DLT 579; Goodwill Non-Woven (P) Ltd v. Xcoal Energy and Resources LLC, MANU/DE/1165/2020].

The principle, enunciated by the Supreme Court in Raman Tech & Process Engineering Co. v. Solanki Traders (2008) 2 SCC 302 that, before being

entitled to relief by way of furnishing of security of the amount in dispute in the arbitration, the petitioner has to satisfy the Court that the respondent is

attempting to remove, or dispose of its assets, with the intention of defeating the decree that may be passed, has, generally, been regarded as a guiding

factor.

80. These principles emerge out of a long line of decisions, which this Court has, in its recent judgements in Avantha Holdings v. Vistra ITCL India

Ltd MANU/DE/1548/2020 and CRSC Research and Design Institute v. Dedicated Freight Corridor Corporation Of India Ltd MANU/DE/1803/2020,

attempted to digest and distil.

81. It remains, therefore, to apply these principles to the facts of the present case.

82. The petitioner contends that, after December 2019, the respondent defaulted in making payments, as required by the MSA. The respondent

contends, per contra, that it was not required to do so, as, w.e.f. 31st December, 2019, the MSA stood terminated.

83. Pivotal, to the assessment of whether the respondent was, or was not, in breach of the MSA, is the question of whether, in fact, the MSA itself

stood terminated w.e.f. 31st December, 2019.

84. The respondent has sought to contend that, in exercise of its jurisdiction under Section 9, this Court cannot adjudicate on this aspect and has relied,

for the said purpose, on the decision in Kailash Nath Associates (2015) 4 SCC 136. The contention is summarily rejected, as Kailash Nath Associates

(2015) 4 SCC 136 does not enunciate any such proposition and, in fact, does not even deal with Section 9 of the 1996 Act. Indeed, where the defence,

of the respondent, to the claims of the petitioner, urged in a petition under Section 9, is that the contract stands terminated, thereby terminating, also, all

liabilities of the respondent thereunder, I fail to understand how the Court can be expected to arrive at a prima facie finding, regarding the merits of

the petitionerÃ¢â‚¬â„¢s claim, without, in the first instance, examining, though again prima facie, whether the plea of termination of the contract is justified,

or not. Else, it would become possible for the respondent, in every case, to illegally terminate the contract with the petitioner and, on the petitioner

approaching this Court under Section 9, seeking securing of the amount, to which the respondent became liable as a consequence of such illegal

termination, oppose the petition on the ground that this Court cannot adjudicate on the validity of the termination.

85. I am unable to accept this proposition. Unquestionably, the final decision, regarding the validity of the termination, would be within the province and

domain of the Arbitral Tribunal. If, however, as in the present case, termination, if effected during the lock in period without due justification, results in

the respondent becoming liable to make payment to the petitioner, the Section 9 court would, in my view, be entirely within its jurisdiction in arriving at

a prima facie opinion regarding the validity of the termination, so as to appreciate the submission, of the petitioner, regarding its entitlement to payment

from the respondent. Any contention that, the moment the contract is terminated, even if illegally, the Section 9 Court stands denuded of its power has,

in my view, to be summarily rejected.

86. In the present case, the respondent contends that the MSA stood terminated w.e.f. 31st December, 2019, consequent on the e-mail

communication, dated 25th December, 2019 (reproduced in para 10 supra), from the respondent to the petitioner. I am unable to agree. All that is

stated, in the said communication, is that the respondent was unable to continue with operations of the banquet, and desired to vacate at the earliest.

No reason, for the decision, is contained in the communication dated 25th December, 2019.

87. Termination, of a contract, has strictly to abide by the covenants, in that regard, as engrafted in the contract itself.

88. The MSA contained, in Article 9 and the various clauses thereunder, the modes and methods by which it could be terminated. It is not in dispute

that the lock in period was yet to expire, on 31st December, 2019. The purported Ã¢â‚¬Å“terminationÃ¢â‚¬, by the respondent, of the MSA, therefore, took

place during the lock in period. The right of the Service Provider to terminate the MSA, during the lock in period, is circumscribed by Article 9.1.2

thereof. Clauses (b) to (f) of Article 9.1.2 (which stands reproduced in para 7 supra), admittedly, do not apply in the present case. The respondent

could, therefore, at best, pitch its case under clause (a) of Article 9.1.2. This clause permits the service provider to terminate the MSA any time, in the

event of material breach of the MSA by the lessee, i.e. the petitioner in the present case, if the lessee fails to remedy the said breach within 30 days

from the date on which it is notified thereof. Mr. Jeevan Ballav Panda has not been able to draw my attention to any communication, prior to 25th

December, 2019, whereby the respondent has notified the petitioner of any breach, on its part, of the covenants of the MSA. Notification, to the other

party, of such breach, and grant of 30 daysÃ¢â‚¬â„¢ time to the other party to remedy the breach, are indispensable prerequisites, before clause (a) of

Article 9.1.2 could apply. Mr. Ankit Jain specifically drew attention to the fact that these prerequisites were never satisfied in the present case, and

Mr. Jeevan Ballav Panda was unable to dispute the proposition. In fact, Mr. Jeevan Ballav Panda, while acknowledging that the termination of the

MSA, by the respondent, may not, strictly speaking, have been in accordance with the covenants in the MSA, sought to contend that the

communication, dated 25th December, 2019, nevertheless, terminated the MSA. The argument has merely to be noted to be rejected. Termination of

the contract has strictly to abide by the covenants of the contract, providing for termination. The parties to a contract, especially a commercial

contract, are inextricably bound by the specifications and stipulations contained therein. As there was no communication, prior to 25th December,

2019, from the respondent to the petitioner, drawing the attention, of the latter, to any breach of the covenants of the MSA, far less grant of 30

daysÃ¢â‚¬â„¢ time, to the petitioner, to remedy such breach, the communication, dated 25th December, 2019, cannot be said to have terminated the MSA.

The MSA, therefore, continued to remain in force even after the said communication. The contention, of Mr. Jeevan Ballav Panda, to the contrary,

prima facie, fails to impress.

89. Mr. Jeevan Ballav Panda also sought to place reliance, in the above context, on the recital in para 2 of the legal notice, dated 22nd May, 2020,

from the petitioner to the Counsel for the landlord of the premises, Raja Varshney. The reliance, by the respondent, is to the reference, in para 2 of the

said legal notice, to Ã¢â‚¬Å“the termination of the present leaseÃ¢â‚¬, as stated to have been communicated, by the petitioner to the landlord vide email dated

14th January, 2020.

90. In the first place, I am unable to understand how the respondent could seek to rely on a communication, by the lawyer for the petitioner, to the

lawyer of the petitionerÃ¢â‚¬â„¢s landlord. Recitals in such a communication cannot, by any stretch of imagination, terminate the contractual relationship

between the petitioner and respondent. Even assuming, therefore, arguendo, that the petitioner had communicated, to its landlord, that the MSA stood

terminated, that cannot, ipso facto, terminate the MSA, which was not between the petitioner and its landlord, but between the petitioner and the

respondent. Such termination could take place only in accordance with Article 19 of the MSA which, otherwise, would be reduced to a dead letter.

91. Besides, such a recital, at worst, was in the nature of a contention by the petitioner, in response to the legal notice issued by the landlord. Mr.

Jeevan Ballav Panda fairly acknowledged that the petitionerÃ¢â‚¬â„¢s landlord did not accept this contention, but asserted, per contra, that the MSA was

terminated only in April, 2020. Even between the petitioner and its landlord Raja Varshney, therefore, the date of termination of the MSA was in

dispute. There was no consensus, ad idem, on this aspect. The reliance, by Mr. Jeevan Ballav Panda, on the communication dated 22nd May, 2020, to

contend that the MSA stood terminated w.e.f. 31st December, 2019 is also, therefore, prima facie misconceived.

92. Besides, even if it were to be assumed that the respondent terminated the MSA vide its communication dated 25th December, 2019, such

termination, not having been effected for any reason contemplated by Article 9, the respondent would, prima facie, be visited with the liability cast by

Article 3.3(ii) of the MSA. This clause specifically ordains that, in the event of termination, by the service provider, i.e. the respondent, of the MSA,

during the lock-in period, for any reason other than those referred under Article 9, the service provider would be liable to pay liquidated damages, to

the petitioner, of an amount equivalent to the applicable Benchmark Revenue for every month of the remaining lock-in period. The demand, by the

petitioner, to the respondent, for compliance with this clause, and payment of the liability cast on the respondent thereunder, therefore, prima facie had

merit.

93. In this context, Mr. Jeevan Ballav Panda sought to contend that liquidated damages, even in a case of breach of contract, could be claimed only if

there was proof of injury having been sustained by the claimant as a consequence of such breach, and, even in such a case, would have to be

restricted to a Ã¢â‚¬Å“reasonable amountÃ¢â‚¬â€‹. Reliance has

been placed, by Mr. Jeevan Ballav Panda, for the purpose, on the judgement of this Court in Tower Vision India Pvt. Ltd. 2014 (183) CC 364Mr. Jain

contends, per contra, that Tower Vision India Pvt. Ltd. 2014 (183) CC 364is distinguishable on facts.

94. The covenants of the contract, in Tower Vision India Pvt. Ltd. 2014 (183) CC 364, which provided for the liquidated damages in the case of

breach, is clearly distinguishable from Article 3.3 in the present case. Clauses 11.3 and 11.4 of the agreement under consideration in Tower Vision

India Pvt. Ltd. 2014 (183) CC 364, read thus:

Ã¢â‚¬Å“11.3 Anchor Sires: with Respondent to Anchor Sites a Lock In period of 10 (ten) years shall apply, however, the Operator shall be liable for

payment of the IP Fees with respect to any specific Anchor Site as follows:

11.3.1 If the termination takes place during the initial 2 (two) years as of Commencement Date, then the Operator will pay 100% of the IP Fees for

the balance of the initial 2 year period and 50% of the IP Fees for the remaining 8 years.

11.3.2 If the termination takes place after the initial 2 (two) years as of the commencement date then the Operator will pay 50% of the IP fees for the

remaining of the 10 years Lock In Period.

11.4 Shared Sites: with respect to Shared Site, a Lock In Period of 5 (Five) years shall apply, however, the Operator shall be liable for payment of the

IP Fees with respect to any specific Shared Site as follows:

11.4.1 If the termination takes place during the initial 2 (two) years as of Commencement Date, then the Operator will pay 100% of the IP Fees for

the balance of the initial 2 year period and 30% of the IP fees for the remaining 3 years.

11.4.2 If the termination takes place after the initial 2 (two) years as of Commencement date, then the Operator will pay 30% of the IP Fees for the

remaining of the 5 year Lock In Period.Ã¢â‚¬â€‹

There was, therefore, no covenant, akin to Article 3.3(iii), in the present case, in the Agreement forming subject matter of consideration in Tower

Vision India Pvt. Ltd. 2014 (183) CC 364In fact, this Court held, in para 18 of the report, thus:

Ã¢â‚¬Å“Thus, while on one hand, damages as a result of breach are to be proved to claim the same from the person who has broken the contract and

actual loss suffered can be claimed, on the other hand, Section 74 of the Act entitles a party to claim reasonable compensation from the party who has

broken the contract which compensation can be pre-determined compensation stipulated at the time of entering into the contract itself. Thus, this

section provides for pre-estimate of the damage or loss which a party is likely to suffer if the other party breaks the contract entered into between the

two of them. If the sum named in the contract is found to be reasonable compensation, the party is entitled to receive that sum from the party who has

broken the contract. Interpreting this provision, the Courts have held that such liquidated damages must be the result of a Ã¢â‚¬Å“genuine pre-estimate of

damagesÃ¢â‚¬. If they are penal in nature, then a penal stipulation cannot be enforced, that is, it should not be a sum fixed in terrarium or in terrarium.

This action, therefore, merely dispenses with proof of ""actual loss or damage"". However, it does not justify the award of compensation when in

consequence of breach, no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage

which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.Ã¢â‚¬â€‹

(Italics and underscoring supplied)

95. In Kailash Nath Associates (2015) 4 SCC 136, too, this principle finds enunciation, in the following words:

Ã¢â‚¬Å“Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as

reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the

court.Ã¢â‚¬â€‹

96. In the present case, Article 3.3(iii) itself covenants that the liquidated damages, payable under Article 3.3(ii) are acknowledged, by the parties,

Ã¢â‚¬Å“to be a genuine and reasonable estimate of the damagesÃ¢â‚¬â€‹, and would Ã¢â‚¬Å“not be considered a penaltyÃ¢â‚¬â€‹. Prima facie, therefore, Section 74 of the

Indian Contract Act, 1872, cannot operate to disentitle the petitioner to payment, in accordance with Article 3.3(ii).

97. Interestingly, and as correctly pointed out by Mr. Ankit Jain, the respondent, in its notice dated 26th February, 2020, to the petitioner, specifically

stated that, as per its earlier notice, the petitioner was Ã¢â‚¬Å“called upon to refund all amounts payable to (the respondent) under the MSA without any

delay or demur, including but not limited to the amounts under lock in payouts and interest free refundable security depositÃ¢â‚¬. What is sauce for the

goose, axiomatically, is sauce for the gander.

98. Of course, the final entitlement, of the petitioner, to the said amount, would be subject to determination, by the court Ã¢â‚¬" i.e., in the present case, by

the Arbitral Tribunal Ã¢â‚¬" of such entitlement. A prima facie case of entitlement, however, does, in my opinion, stands established, in favour of the

petitioner and against the respondent.

99. No contest has been made, by the respondent, to the quantification of liquidated damages, by the petitioner, even by way of a residuary argument,

the respondent having contented itself by disputing the entitlement, of the petitioner, thereto. As I have held that, prima facie, the entitlement of the

petitioner to payment, by the respondent, in accordance with Article 3.3(ii), stands made out, I am not required, at least for the purposes of the present

order, to enter into the quantification thereof.

100. A prima facie case of entitlement, in favour of the petitioner, having thus been made out, it remains to be seen whether furnishing of security, as

prayed, would be justified on the principles of balance of convenience, irreparable loss and on the indicia applicable to Order XXXVIII Rule 5 of the

CPC. These considerations, apropos Section 9(1)(ii)(b) of the 1996 Act, are interlinked, and may, therefore, be examined together.

101. The averments of the petitioner, in paras 27 to 30 of the petition, the reply thereto, in the corresponding paras of the counter affidavit filed by the

respondent, and the rejoinder, by the petitioner, thereto, may be reproduced, for ready reference, thus:

Paras 27 to 30 of the Petition:

Ã¢â‚¬Å“27. That the respondent is in the process of winding up its affairs and its terminating various agreements with various persons/ entities. The

petitioner has come to know that the business model of the respondent has completely failed and hence the respondent has decided to wind up its

business in the near future. For the said reason the petitioner has come to know that respondent, is diverting its funds. The petitioner has also come to

know that the respondent is diverting its funds in order to defeat any and all liabilities that the respondent may be found liable for.

28. That in fact, Mr. Mohit Jain the Director of the Petitioner herein had a telephonic conversation with Mr. Amit Vig, Vice President-Retail Sales &

Banquets of the respondent and Mr. Hemant Pant, the Director of the Business Development Team of the respondent on 26.12.2019. In the said

conversation Mr Mohit had specifically asked the said two officials of the respondent herein as to the reason for the intention of the respondent to

terminate the agreement. On the same, the said officers of the respondent had informed Mr. Mohit Jain that they had entered into the Management

Services Agreement dated 04.09.2019, however, the top management of the respondent had taken a decision to terminate the agreement in view of

the fact that the respondent was not being able to make profit, as they had envisaged at the time of entering into the Management Services

Agreement dated 04.09.2019.

29. That the aforesaid conversation would reveal that in view of the rising liabilities of the respondent, the respondent is winding up its business and is

therefore, cancelling its agreements with various entities.

30. That the respondent is liable to immediately remove all its belonging from the said property and vacate the said property and hand over the same to

the petitioner herein.Ã¢â‚¬â€‹

Corresponding paragraphs of the reply of the respondent:

Ã¢â‚¬Å“27. The contents of the paragraph under Reply are denied as being false, baseless and misleading. It is specifically denied that the Respondent is

in the process of winding up its affairs and terminating its agreements with various persons/entities. It is stated that the Petitioner has resorted to bald

and reckless allegations to create prejudice and mislead the minds of right thinking people so as to create an illusion of a cause of action, when there

exists none. The Respondent is one of the largest and fastest-growing hospitality chains of leased and franchised hotels, homes and living spaces and

has multiple domestic and international investors. The Respondent in the month of March 2020 has raised a huge amount of funding from its major

investors, as stated in the preceding paragraphs.

Therefore, it is absurd on the part of the Petitioner to whimsically contend that the Respondent has decided to wind up its business in the near future

or is diverting its funds in order to defeat any or all liabilities as alleged or otherwise or at all. The statements made under the paragraphs under

reference are based on assumptions and hypothesis without the slightest of attempt or endeavor to ascertain the veracity of such allegations made.

Therefore, no reliance or credence whatsoever can be placed by this HonÃ¢â‚¬â„¢ble Court on such factually incorrect and fictitious statements.

28. The contents of the paragraph under reference and specifically the contents of the compact disk (copy not served on the Respondent) allegedly

filed, the transcript of the purported telephonic conversation dated 26 December 2019 in Hindi and its purported English translation are denied and

disputed in its entirety and the Petitioner is put to strict proof thereof by cogent evidence. It is denied that any official had been formally authorized by

the Respondent to act in their official capacity and make any statement as has been sought to be alleged in the paragraph under reference. Assuming

although not admitting that such a conversation did take place, the Respondent denies the same for want of knowledge and lack of authority of any

individuals concerned.

29. The contents of the paragraph under Reply are denied and disputed as being false and baseless. In this connection, the contents of the preceding

paragraph are referred to relied upon and are not being repeated for the sake of brevity and avoiding prolixity.

30. The contents of the paragraph under Reply are denied as being false and contrary to the records. It is reiterated that the Respondent has already

vacated the property on 31 December 2019 and has also handed over the keys of the property to the Petitioner and does not have any movable

property lying at the premises. In fact, a statement to that effect was made on behalf of the Respondent before the HonÃ¢â‚¬â„¢ble Court during the

proceedings dated 5 June 2020 and the same was also recorded in the order dated 5 June 2020. As stated hereinabove the Petitioner has itself

terminated the lease with its landlord vide an email dated 14 January 2020, which could not have been possible without the Petitioner having

possession of the premises. In this connection, reliance is placed on the contents of the letters dated 26 February 2020 and 13 March 2020 issued by

the Respondent to the Petitioner.Ã¢â‚¬â€‹

Corresponding paragraphs of the rejoinder :

Ã¢â‚¬Å“27. That the contents of Para No.27 of the reply are wrong and denied and the contents of corresponding Para of the petition are reiterated and

reaffirmed as correct. It is denied that the Petitioner has resorted to bald or reckless allegations to create any prejudice or mislead the minds of right

thinking people so as to create an illusion of a cause of action, when there exists none. It is denied that the Respondent is one of the largest and fastest

growing hospitality chains of leased and franchised hotels, homes and living spaces or has multiple domestic and international investors. It is denied

that the Respondent in the month of March 2020 has raised a huge amount of funding from its major investors, as stated in the preceding paragraphs.

It is denied that the statements made under the paragraphs under reference are based on assumptions and hypothesis without the slightest of attempt

or endeavor to ascertain the veracity of such allegations made or that no reliance or credence whatsoever can be placed by this Hon'ble Court on

such factually incorrect and fictitious statements.

It is further submitted that after this incident, the petitioner came to know that the respondent is a rank defaulter in fulfilling its requirements and has

cheated many persons in a similar manner as the petitioner herein. Had the petitioner known about this fact, it would have never entered into the MSA

with the respondent.

Some of such cases are as follows, in March 2020, Hyderabad based hospitality company Conclave lnfratech moved the National Company Law

Tribunal, Ahmedabad against OYO for non-payment of dues. Conclave lnfratech had accused OYO of breaching the assured revenue clause in the

contract, under which it owned nearly Rs. 13 Lakhs every month since May 2018.

In November 2019, a hotel owner from Bengaluru had also filed an FIR against Ritesh Agarwal and some other top executives over non-payment of

the assured benchmark revenue of Rs. 7 Lakhs per month.

In another case, the situation went out of hand in Sikkim in October 2019, when some hotel partners held four OYO employees hostage over unpaid

dues. Hotel owners alleged that dues had piled up to Rs. 1 Crore. Sikkim Hotel and Restaurant Association added that instead of paying the dues, the

company had sent the said employees to get more hotels on board. Besides, this there has been a series of protests against OYO since August 2019.

Hotel owners, who were not affiliated to any major union or association, had also carried out independent protests in multiple Indian cities including

Nashik, Pune, Kota, Ã¢â‚¬Â¢Manali, Jaipur, Ahmedabad and Delhi.

Hence, in view of such large scale protests across the country the apprehensions of the petitioner are very much genuine and the figure of investors

investing in the respondent company doesn't mean that the company is running successfully and earning huge profits, rather it is again adding up

further liabilities upon the respondent company to pay back to such investors, which is the respondent . company is utterly failing.

All the above facts came to the knowledge of the Petitioner from news reports.

28-29. That the contents of Para No.28 and 29 of the reply are wrong and denied and the contents of corresponding Para of the petition are reiterated

and reaffirmed as correct.

30. That the contents of Para No.30 of the reply are wrong and denied and the contents of corresponding Para of the petition are reiterated and

reaffirmed as correct. It is denied that the Respondent has already vacated the property on 31 December Ã¢â‚¬Â¢2019 or has also handed over the keys

of the property to the Petitioner and does not have any movable property lying at the premises. It is denied that the Petitioner has itself terminated the

lease with its landlord vide an email dated 14 January 2020,which could not have been possible without the Petitioner having possession of the

premises. It is denied that the respondent has ever issued the letters dated 26 February 2020 and 13 March 2020 to the Petitioner.

It is to submit that on the one hand the Respondent alleges that the keys were sent by them on 17.03.2020 (though denied) and on the other hand

Respondent seeks to contend that the Petitioner had keys to the property on 14.01.2020 itself when the Petitioner, as per the Respondent, sought to

terminate its lease.

In reply to the same, the factual submissions made in reply to Para No.12 and 19 herein above may kindly be read as reply to the Paragraph under

reply which are not repeated herein for the sake of brevity and to avoid repetition.Ã¢â‚¬â€‹

102. Mr. Jeevan Ballav Panda did not, during his submissions, choose to refute the contentions, of the petitioner, as extracted hereinabove, and as

contained in the petitioner and rejoinder. In my opinion, these averments, if correct, do make out a case for securing the amount, to which the

petitioner claims to be entitled, so as to ensure that the arbitral award, if ultimately passed in favour of the petitioner, is not rendered a futility.

103. At this juncture, I deem it appropriate, at the cost of repetition, to emphasise that, in directing furnishing of security, this Court is not adjudicating

the entitlement, of the petitioner, to the amount directed to be secured, with any modicum of finality. Were any such attempt to be made, this Court

would be trespassing on the jurisdiction of the arbitrator, to arbitrate on the dispute, which is clearly impermissible. All that this Court is required to

determine, while examining a prayer relatable to Section 9(1)(ii)(b), is whether a case, for securing the amount in dispute in the arbitration, is, or is not,

made out. Once the Court determines that the petitioner has an arguable case, and that the interests of justice requires securing of the amount, so as

to render the award, if finally passed in favour of the petitioner, meaningful and capable of enforcement, the Court is not only empowered, but is also

obligated, to secure the amount. The opinion of the Court, in such a case, has to be understood as expressly limited to determining the issue of whether

the amount is required to be secured or not, in the context of Section 9, and is not to be regarded as an expression of opinion on merits, regarding the

entitlement of the petitioner to the said amount. The Arbitral Tribunal would, therefore, proceed to decide the petitionerÃ¢â‚¬â„¢s entitlement, uninfluenced

by any observations, in that regard, contained in this judgement.

104. Mr. Jeevan Ballav Panda also placed reliance on General Electronics International Inc. MANU/DE/1332/2009 and Onida Finance Ltd v. Malini

Khanna 2002 (1) RCR (Rent) 546, to contend that this Court could not direct securing of liquidated damages, prior to the trial of the entitlement of the

petitioner, in the arbitral proceedings. I am unable to agree with the submission, which is not supported by either of the decisions cited by Mr. Jeevan

Ballav Panda. General Electronics IInternational Inc. MANU/DE/1332/2009 was a petition under Section 34 of the 1996 Act, after rendition of the

Award. Onida Finance Ltd 2002 (1) RCR (Rent) 546 does not deal with this issue at all.

105. Similarly, the judgement, of this Court, in Associated Journal Ltd MANU/DE/0851/2012 has no relevance to the controversy in issue is, in that

case, it was specifically found that the termination of the lease was in accordance with the covenants, in that regard, in the Lease Deed. In fact, para

15 of the judgement of the Division Bench significantly notes that the right, of the respondent, to terminate the lease by three monthsÃ¢â‚¬â„¢ prior notice

was not contingent upon any default committed by the appellant. In the present case, per contra, Article 9.1.2 of the MSA empowered the respondent

to terminate the MSA, during the lock in period, only on specific defaults having been committed by the petitioner. The consequences, of unjustified

termination of the MSA during the lock in period also stand specifically delineated therein. The decision in Associated Journal Ltd

MANU/DE/0851/2012 what, if anything, therefore, militates against, rather than support, the case sought to be canvassed by Mr. Jeevan Ballav

Panda.

Conclusion

106. Resultantly, I am of the opinion that the prayer, of the petitioner, for a direction, to the respondent, to secure the amount of Rs. 2,23,50,000/Ã¢â‚¬", is

required to be allowed. That, in my view, would sufficiently secure the petitionerÃ¢â‚¬â„¢s interest, and no further direction, to the respondent, restraining

transfer of its assets, or attaching its bank account, needs to be passed.

107. Article 10.1 of the MSA provides for resolution of the dispute, between the parties, by arbitration, and contemplates appointment of a sole

arbitrator, mutually, by the parties, in accordance with the provisions of the 1996 Act. It further provides that, in default of any party, to mutually

appoint the sole arbitrator, within 15 days from the date of invocation of the arbitration clause by the other, the sole arbitrator would have to be

appointed by this Court. Para 21 of the petitioner specifically avers that, vide legal notice dated 6th February, 2020, the petitioner has invoked the

aforesaid arbitration clause and that, despite receipt, of the said legal notice, by the respondent, on 13th and 14th February, 2020, no reply was

forthcoming. The subsequent communications, from the respondent to the petitioner, do not make any reference to the resolution of the disputes by

arbitration. In view thereof, there is clear default, on the part of the respondent, to cooperate in mutual appointment of an arbitrator, agreeable to both

parties.

108. Section 11 (6) of the 1996 Act requires either of the parties to approach this Court, in such circumstances, to appoint the arbitrator. In order to

ensure that no undue advantage, of the present order, is taken, I deem it appropriate to subject to the interim protection, granted by this order, to taking

of further steps, by the petitioner, towards appointment of the arbitrator.

109. Resultantly, the present petition is allowed, in terms of prayer (iii) thereof. The respondent is directed to deposit, with the Registrar General of this

Court, an amount of Rs. 2,23,50,000/Ã¢â‚¬", by way of demand draft. The deposit would be retained in an interest-bearing fixed deposit, and would

remain subject to the outcome of the arbitral proceedings. The petitioner is also directed, for this purpose, to take further steps, towards appointment

of the arbitrator, in accordance with the provisions of the 1996 Act, within a period of 15 days, failing which this order would cease to have effect, and

the respondent would be entitled to be returned the deposit of Rs. 2,23,50,000/Ã¢â‚¬", along with interest accrued thereon.

110. No orders are, in the circumstances, required to be passed on the remaining prayers in the petition, which, accordingly, stand disposed of.

111. There shall be no order as to costs.