

* **HIGH COURT OF DELHI : NEW DELHI**

+ IA No.917/2009 & IA No.8694/2009 in CS (OS) No.152/2009

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Reserved on : 15th July, 2009

Decided on : 8th September, 2009

Surjit Singh & Anr.

...Plaintiffs

Through: Mr. Pradeep Gupta, Adv. with
Mr. Suresh Bharti & Ms. Laxmibai
Leitanthem, Advs.

Versus

Express Retail Services Pvt. Ltd. & Ors.

....Defendants

Through: Mr. A.K. Singh, Sr. Adv. with
Mr. Deepak Acharya, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MANMOHAN SINGH, J.

1. The plaintiffs filed the suit for possession of ground floor of property no.38, Ram Vihar, Vikas Marg, New Delhi-110092 [hereinafter referred to as the 'suit property'] given on rent for commercial purposes to the defendants vide lease deed dated 16th June, 2007. Defendant no.1 company was running a show room by the name of 'Big Apple' in the disputed property. Vacant physical possession of the suit property was given to the defendants on 31st May, 2007 on the condition that the said premises will be used for commercial purposes i.e. for operating retail

outlet and will not be used for any other purposes.

2. As per the terms of the lease deed, the suit property i.e. ground floor, was leased out only for commercial purposes for 180 months at a monthly rent of Rs.1,28,180/- for the first 36 months, for Rs.1,47,407/- per month for the next 36 months, for Rs.1,69,518/- per month for the next 36 months, for Rs.1,96,916/- per month for the next 36 months and for Rs.2,24,188/- per month for the last 36 months.

3. The suit property was sealed by the Delhi Local Body i.e. MCD/DDA on 28th September, 2007 as per direction of the Supreme Court of India regarding usage of the suit property as a commercial one.

4. The case of the plaintiffs is that after sealing of the suit property, the Senior Manager of the defendant company, Mr.A.N. Juneja, in view of the Supreme Court direction filed the affidavits and application dated 4th October, 2007 and affidavit dated 19th October, 2007 by way of an undertaking, *inter alia*, stating that the defendants are applying for de-sealing of the suit property and that they will not misuse the suit property after de-sealing and shall vacate it within the stipulated period, as early as possible.

5. It is also contended by the plaintiffs that defendant no.1 and plaintiffs jointly filed a writ petition being WP (C) no.9575/2007 by impleading Municipal Corporation of Delhi as respondent no.3 therein with a prayer seeking declaration that the road on which the disputed property is located is for Mixed Land Use as per Notification dated 15th September, 2006 and for de-sealing of the suit property. The said writ petition was disposed of vide order dated 19th December, 2007. The

plaintiffs submit that in view of dismissal of the said writ petition, the prayer for allowing and using the suit property for commercial purposes has already been rejected by this Court.

6. The plaintiffs contend that in view of the undertaking given by the defendant company, the suit property was de-sealed on 17th November, 2007 and immediately thereafter though the defendant company had taken out all the goods from the suit property, it did not remove the sign boards and locked the suit property. The defendants' security guards are present at the site round the clock. It is also contended that the de-sealing order was passed with the specific condition that the suit property would be used for residential purposes only and not for commercial purposes and in pursuance of the same, the plaintiffs sent a letter to the defendant company for handing over its possession to the plaintiffs and also requested the defendant no.1 to pay the electricity dues as well as arrears of rent. But the defendants did not hand over vacant possession of the suit property to the plaintiffs nor did they pay the electricity dues and arrears of rent despite various requests. Further, the defendants are in violation of their undertaking as they are keeping the said premises in their possession without paying any charges and arrears of rent, therefore, the present suit has been filed by the plaintiffs.

7. No written statement has been filed by the defendants in this case. The defendants filed an application being IA no.8694/2009 under Section 8 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator. It is contended by the learned counsel for the

defendants that the plaintiffs have relied upon the registered lease deed dated 16th June, 2007, which contains an arbitration clause, therefore, as per the said arbitration clause, all the disputes between the parties with regard to the terms and conditions of the lease deed are to be adjudicated by the Arbitrator, hence, the suit of the plaintiffs is not maintainable.

8. Clause 29 of the lease deed dated 16th June, 2007 which is relevant in the present case is reproduced herein below :-

“In case any dispute arises regarding any terms and conditions of the agreement the same shall be referred to arbitration with each party appointing one arbitrator each. After that if may be referred to court if unsatisfied.”

9. Learned counsel for the defendants has argued that where an arbitration clause exists, the court has a mandatory duty to refer the dispute arising between the contracting parties to an arbitrator. He further argues that in view of the arbitration clause being Clause 29 of the lease deed, civil court has no jurisdiction to continue with the present suit once an application under Section 8 of the Act has been filed. He has referred the judgment reported as ***Hindustan Petroleum Corpn. Ltd. V/s. Pinkcity Midway Petroleums [2003] 6 SCC 503***. He further contended that once the application under Section 8 of the Act is decided and the court refers the parties for arbitration, no further directions of any kind are warranted. His submission is that in fact, the judicial authority under the above-mentioned circumstances becomes *functus officio* after referring the parties to arbitration. He has also referred to the judgment passed by this court in the matter of ***Sri***

***Narayan Prasad Jalan V/s. Sri Chetan P S Chauhan & Anr.
123[2005] DLT 270.***

10. It is not in dispute that the plaintiffs have relied upon the registered lease deed dated 16th June, 2007 wherein there is an arbitration clause in the lease deed. It is the admitted case of the parties that in pursuance to the sealing order of the Supreme Court of India, the suit property was sealed on 28th September, 2007 as it was being used for commercial purposes. Learned counsel for the defendants has not denied that Shri A.N. Juneja gave an undertaking on 4th October, 2007 and on 19th October, 2007 wherein the defendants had stated that misuse of the suit property will be stopped after de-sealing and that the defendants shall vacate the suit property.

11. As regards the other claims of the plaintiffs regarding electricity charges, damages as well as arrears of rent, the details of the same are mentioned in the plaint, which are being reproduced herein :-

Rent w.e.f. 17.11.2007 to 31.12.2008 @ Rs.1,28,180/- p.m.	Rs.17,26,157.00
Electricity arrear bill due by Dec.'2008	Rs.1,66,720.00
Damages for mental torture/harassment [Interest part has not been included]	Rs.5,00,000.00
Total Claim	Rs.23,92,877.00

12. In the present case as far as the vacation of the suit property is concerned, it is an undisputed fact that the defendants have given an undertaking for vacating the same. It is an admitted fact that both the

parties jointly filed a writ petition before this court for declaring the road on which the suit property is situated as mixed land use which was duly rejected. The defendants have admitted that they have removed all their belongings from the suit property and that the suit property is under the lock and key of the defendants. From the aforesaid admitted position in the matter, it appears that as far as vacation of property is concerned, it has already been vacated by the defendants on the basis of their undertaking, therefore, no dispute exists between the parties to be determined by an arbitrator nor can any other interpretation be given to it.

13. The Supreme Court in the case of **P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corporation, 1994 Suppl (3) SCC 126** clearly laid down the proposition that where a claim has been fully and finally settled by and between the parties, such a dispute or difference does not remain an arbitrable dispute. Similar position was reiterated in the case of **Nathani Steels Ltd. vs. Associated Construction, 1995 Suppl(3) SCC 324**. Relevant portion of this case is reproduced hereunder :

“....once there was a full and final settlement in respect of any particular dispute or difference in relation to a matter covered under the Arbitration clause of the contract and that dispute or difference was finally settled by and between the parties, such a dispute or difference did not remain to be an Arbitrable dispute.”

14. In the case of **Kelkar and Kelkar Vs. Indian Airlines and Anr., 2004(1)ARBLR381(Bom)** it was held in para 17 as under :

“17...the legal position is clearly and unambiguously reflected

in Nathani Steels Ltd. (supra), and it is this that once there is a full and final settlement in respect of any particular dispute or difference in relation to a matter covered under the Arbitration clause in the contract and that dispute or difference is finally settled by and between the parties, such a dispute or difference does not remain to be an Arbitrable dispute and the Arbitration clause cannot be invoked. As held therein, once the parties have arrived at the settlement in respect of any dispute or difference arising under the contract and that dispute or difference is settled by way of final settlement by and between the parties, unless that settlement is set aside in an appropriate proceedings, it cannot lie in the mouth of one of the parties to the settlement to challenge it on the ground that it was a mistake and to proceed to invoke the Arbitration clause. In the words of Supreme Court, if this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then question the same on the ground of mistake without having the settlement set aside. The law laid down by the Apex Court in Nathani Steels (supra), admits of no ambiguity and it is equally applicable to a case where a party to the settlement questions such settlement on the ground of duress or coercion or Undue influence or like reason.”

15. In view of the well settled law, I am of the considered view that when the defendants have given a clear and unequivocal undertaking dated 19th October, 2007 to vacate the suit property after desealing, the dispute with regard to physical vacant possession of the suit property was finally settled between the parties. Such a dispute cannot be referred to arbitration as it no longer remains an arbitral dispute. In accordance with their undertaking, the defendants are therefore directed to give the physical vacant possession of the suit property to the plaintiffs within two weeks from today. The defendants are further directed to remove the sign boards, locks and security guards from the suit property.

16. As regards the other disputes raised by the plaintiffs

concerning the arrears of rent, electricity and damages on account of mental torture, family harassment and interest as per details mentioned in para 11 of my order, partly the prayer of the application filed by the defendant under Section 8 of the Arbitration Act is allowed. Parties are given liberty to initiate arbitration proceedings in accordance with law in view of Clause 29 of the Registered Lease Deed. The suit and all pending applications are disposed of accordingly. No costs.

SEPTEMBER 8, 2009
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MANMOHAN SINGH, J