

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

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OMP No. 383/2004

%16.04.2009

Date of decision: 16th April, 2009

SMT. SHAKUNTLA GUPTA

.....Petitioner

Through: Mr. C Mukund, Mr Ashok Jain, Mr Amit
Kasera and Mr Shashank Sharma,
Advocates.

Versus

UNION OF INDIA & OTHERS.

.....Respondents

Through: Ms Rachna Srivastava and Mr Mohd.
Noorullah, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Whether reporters of Local papers may
be allowed to see the judgment? YES
2. To be referred to the reporter or not? YES
3. Whether the judgment should be reported
in the Digest? YES

RAJIV SAHAI ENDLAW, J.

1. Petition under section 34 of the Arbitration and Conciliation Act, 1996 with respect to the arbitral award dated 9th July, 2004 is for consideration.
2. The petitioner/ her predecessor is/was the owner of a portion of a property No. 2, Under Hill Road, Civil Lines, Delhi. The said property was requisitioned on 3rd April, 1980 under the provisions of the Requisition and Acquisition of Immovable Property Act, 1952. It is not in dispute that the said requisitioning lapsed on 10th March, 1987. The Government, however, on 6th March, 1987 issued notification under the provisions of the Land Acquisition Act for acquisition of the said property. The said notification was challenged by the petitioner by filing Civil Writ Petition No.894/1987 in this Court and which was allowed vide Order dated 26.02.1997.

While allowing the said Writ Petition and directing the restoration of possession of the property to the petitioner within a period of four weeks thereof, it was held

“The petitioner is entitled to receive from respondents damages for use and occupation of the property from 10.03.1987 till possession is restored. The same are required to be determined under the provisions of the (Requisition and Acquisition of Immovable Property) Act, (1952) by appointment of an arbitrator. Considering the facts and circumstances in Banwari Lal case that after the Act lapsed on 10.03.1987 and possession was not restored for almost four years while quashing the impugned notifications, the Court on its own proceeded to make appointment of an arbitrator. The facts of this case are also similar. The Act lapsed on 1987. For almost ten years now, the petitioner has been deprived of the amount of damages. As such, we are also of the view that it would be just appropriate that an arbitrator also appointed in this by us to avoid further delay in determination of damages payable to the petitioner. Mr. Justice P. K. Bahri, a retired Judge of this Court is appointed as arbitrator, who will enter upon a reference within a period of four weeks from the date of receipt of a copy of this order. The arbitrator will call upon the parties to submit their respective claims and will proceed to make his award in accordance with law ascertaining the amount of damages for the period from 10.03.1987 till the date the possession is restored to the petitioner.”

3. The Union of India preferred a special leave petition against the above order to the Apex Court. The same was dismissed on 14th November, 2000. The application for review of the order of dismissal was also dismissed on 27th August 2002. It is not in dispute that the possession of the property was restored to the petitioner on 11th November, 2002.

4. The arbitrator appointed vide order aforesaid has rendered the award dated 9th July, 2004. The petitioner has preferred objections thereto. The petitioner seeks the modification of the award in terms of her claim petition before the arbitrator.

5. It was inter alia the case of the petitioner before the arbitrator that the property in question is commercial, situated in the commercial locality, being closely connected to Old Secretariat, Punjab National bank, Exchange Stores, Oberoi Maidens Hotel, ISBT etc; that the property in question was requisitioned for having public offices and was used after requisitioning for running different public offices and particularly of Food & Supply Department; that the approved Government Valuer engaged by the petitioner had determined the value of the land as Rs.55,000/- per sq. mt. as on September 1994. The petitioner claimed damages in the total sum of Rs.15,73,83,914/-.

6. It was the case of the respondent before the Arbitrator that the premises were in a dilapidated condition, residential in nature and even the zonal development plan showed the user of the premises as residential; that the respondent had been paying compensation to the petitioner determined under the Requisitioning Act at the rate of Rs.5,703/- per month and such payment had been accepted by the petitioner without any objection up to 30th September, 1996.

7. The petitioner in rejoinder before the arbitrator contended that the zonal development plan showing the property as residential was inconsequential as the property was constructed for running a guest house (Hotel) and further since during requisitioning the property had been used for office/ commercial purposes.

8. The arbitrator in Para 8 of the Award found

“It is indeed admitted fact that the premises in question have been requisitioned for running public offices and have been used since the requisition for running a public office. Thus, the user of the premises cannot be considered to be residential at all.”

The arbitrator further found that the valuation relied upon by the petitioner was on the basis of a notice issued by the Income Tax Department U/s. 269 UD(1A) of the Income Tax Act, in relation to a plot of land at Rajpur Road, Civil Lines, Delhi but there was nothing to show that the Income Tax Department had pursuant to the notice acquired that property at said rates. The arbitrator also found that the valuer of the petitioner had taken double the rate than that in the Income Tax notice aforesaid, treating the property in question to be commercial.

9. The arbitrator held that the basis of the report of the valuer of the petitioner was wrong inter alia on the ground

“Moreover the property in question cannot be considered as commercial. Relying on this report may not be an assured method for determining the compensation payable to the claimant”.

10. The petitioner had also produced before the arbitrator documents of letting out of properties in Chandni Chowk, Bunglow Road, Sabzi Mandi and Kamla Nagar. The arbitrator held the said instances to be not applicable or relatable to the property in question for the reason of the said properties being far away and or for the reason of being in established commercial markets / commercial areas, while the area where the property in question is situated is not such. The arbitrator held that the petitioner had not given any instances of letting of any similar property in that area. The arbitrator thus held that there was no evidence brought on record to show as to what rent was being fetched by similar types of properties in the locality.

11. The petitioner had also placed before the arbitrator a report of the committee of three PWD Engineers, constituted by the

respondent determining the market rent of property for paying compensation to the petitioner. Though the respondent did not challenge the existence of such report but contended that the building being dilapidated, the petitioner, during requisitioning, was satisfied accepting much lower rent, without any demur and was thus not entitled to higher rent as suggested by the said committee.

12. The parties were also at issue before the arbitrator as to the plinth area of the property. While, compensation under the Requisitioning Act was being paid to the petitioner on the plinth area of 6286.46 sq. ft., the petitioner contended before the arbitrator that the plinth area was 7740 sq. ft. besides open area of 8117 sq. ft. and claimed compensation thereon. The arbitrator, however, held that the petitioner having not disputed the plinth area on the basis whereof compensation was determined under the Requisitioning Act, was now not entitled to contest the plinth area. It was further held that the open area had no independent use and was meant to be an adjunct of the main premises, so no separate rent for the same was to be determined.

13. The Committee aforesaid constituted by the respondent of three officers of the PWD had reported the letting out value of the property to be Re.1.41p per sq. ft. p.m. for the period 10.03.1987 to 13.12.1987, Rs.2.68p per sq. ft. p.m. for the period 14.12.1987 to 13.12.1992 and at the rate of Rs.5.49p per sq. ft. p.m. for the period 14.12.1992 to 13.12.1997.

14. It was the contention of the petitioner before the arbitrator that the committee had determined the rent aforesaid, treating the property as residential, while admittedly the property was commercial and was requisitioned for commercial purposes and was

used during requisitioning for office purposes and thus those rents were required to be enhanced. The arbitrator, however, found that

“The Committee has determined the rate keeping in view the fact that the property was used for office purposes. I have no reason to enhance the rates fixed by the Committee. There is no satisfactory evidence that this property would have fetched any better rate of rent for the periods for which the committee determined the rate. The Committee has determined the rates only for the period 10.03.1987 to 13.12.1997. In respect of period 14.12.1997 to 11.11.2002, I think 10 per cent enhancement would be fair compensation to the claimant”.

15. The arbitrator in Para 25 of the Award held

“There was a controversy raised as to the user prescribed for the building in question under the Zonal Development Plan of the area, a copy of which stands filed on the record. According to the claimant, the user prescribed is commercial, although in the rejoinder to the statement of defence, the claimant did not deny the averment of the respondent that the user prescribed in the said plan is residential. No expert has been examined to pinpoint the building in question in the zonal development plan of the area so that it could be determined as for what purpose, the user of the building is prescribed”.

16. The arbitrator thus directed payment of damages to the petitioner at the rates as per the report of the Committee constituted by the respondent aforesaid save that from 14th December, 1997 to 11th November, 2002 for which period there was no report, the rate of damages was enhanced by 50 per cent of the last prevalent rate. It was further ordered that upon failure of the respondent to pay the amount within two months, the respondent shall be liable to pay interest at 12 per cent per month. The respondent was also directed to pay the property tax dues for the period 10.03.1987 to 11.11.2002 to the petitioner, besides costs of Rs.1 lakh.

17. The counsel for the petitioner has contended that the award is perverse for the reason that the arbitrator though finding user of the premises to be commercial has applied rates of residential. It is also

contended that there is inconsistency in the award and which as recently held by this Court in **Union of India V/s. Sanghu Chakra Hotels Pvt. Ltd.** 152 (2008) DLT 651 called for interference with the award; it is also contended that there was a huge disparity between the rates of letting as determined by the committee of PWD Engineers and as laid down by MCD for the purposes of determination of property tax. Lastly, it was contended that while the Committee itself had doubled the rent for the period from 14.12.1992 to 13.12.1997 over the rent for the period 14.12.1887 to 13.12.1992, the arbitrator has for the period 14.12.1997 to 11.11.2002 only given an increase to 50 per cent and which was also without any basis. Reference was also made to **Numaligarh Refinery Ltd Vs Daelim Industrial Co. Ltd** 2007 (8) SSC 466 wherein the Court had modified the award and to the reply received during the pendency of the present petition before this Court by the Counsel for the petitioner to a query under Right to Information Act from the MCD Department which showed that the property tax on the property had been charged on commercial rates since 1969.

18. Per contra, the counsel for the respondents urged that there could no interference with arbitral award of such a nature, U/s. 34 of the Act. Para 46 of **Mcdermott International Inc. Vs. Burn Standard Co. Ltd. (2006) 11 SCC 181** was cited urging that the scope of the interference under 1996 Act was much narrower than under the 1940 Act.

19. Before proceeding to deal with the contentions aforesaid, I may observe that though not urged by any of the counsels but in the present case, the arbitration is not pursuant to in any Arbitration Agreement between the parties within the meaning of Section 7 of the Arbitration Act. The Civil Writ Petition No.894 of 1987 preferred

by the petitioner was also confined to quashing of the notification for acquisition of the property. However, since that petition remained pending for 10 years and since the respondent continued in possession of the premises, while disposing of the Writ petition, it was felt that the petitioner was entitled to receive damages for use and occupation from the respondent. For determination thereof, this Court seems to have been guided by Section 8 of the Requisitioning Act providing for appointment of an arbitrator by the Central Government for such determination. However, I find that Section 8 (1) (g) provides that nothing in the Arbitration Act, 1940 is to apply to arbitrations thereunder. Upon substitution of the 1996 Act by the 1940 Act, reference thereunder to the 1940 Act, under Section 8 of the General Clauses Act is to be read as a reference to the 1996 Act. Section 11 of the Requisitioning Act further provides for appeals from the awards made under Section 8. Thus even though Section 2(4) of the Arbitration Act, 1996 provides that most of the provisions thereof shall apply to every arbitration under any other enactment for the time being in force as if the arbitration was in pursuance to an arbitration agreement and as if that other enactment were arbitration agreement, I find that the provisions of the Arbitration Act 1940 and or of 1996 are inconsistent with the provisions for arbitration under the Requisitioning Act. Thus from an arbitration under the Requisitioning Act in my view, no objection U/s. 30/33 of the 1940 Act or U/s. 34 of the 1996 Act shall lie.

20. However, the present petition cannot be disposed of for this reason only in as much as admittedly the property had come out of requisitioning as on 10th March, 1987. Thus, even though this Court appears to have been guided in the appointment of an arbitrator for determination of the compensation, for the reason of appointment of

an arbitrator provided for determination of compensation for requisitioning U/s. 8 of the Requisitioning Act, it cannot be said that the arbitration was strictly under the Requisitioning Act.

21. However, the question does arise of the status of arbitration in the present case. Was the arbitrator, though so called, was a referee or an expert in the present case. The Apex Court in **K.N. Modi Vs K.K. Modi** (1998) 3 SCC 573 has noticed that in complex modern state of today, there is an immense variety of tribunals, their functions and the source from which their powers are derived differ fundamentally. Nomenclature used has been held not to be a conclusive test. If the appointment was as an expert, then his decision would be final and binding and no objection under the Arbitration Act entertainable. It is significant that determination of mesne profits/damages for use and occupation, under the CPC also, is an enquiry which can be delegated to a commissioner. After the Requisitioning Act had lapsed, the petitioner to be entitled to damages for use and occupation was required to file a suit. The limitation therefor was three years. However, this court, while quashing the acquisition notification in 1997, leading to possession of respondent after requisitioning lapsed on 10th March, 1987 becoming unauthorized, appointed an “arbitrator” to determine damages for use and occupation from 11th March, 1987 onwards, even though the claim for immediately preceding three years may have been within time. No consent of the parties to arbitration is recorded. However, since this aspect has not been argued, I deem it appropriate to consider the objections on merits.

22. Yet another reason which persuades me to consider the objections within the ambit of Section 34 of the Arbitration Act is that the arbitrator in the present case was appointed following

similar appointment of an arbitrator in the case of Banwari Lal with respect to identical requisitioning and acquisition notification of another property. I find from the judgment reported in **Union of India Vs. Banwari Lal & Sons (P) Ltd.** (2004) 5 SSC 304 that against the award in that case objections U/s. 34 were adjudicated and appeal there against entertained and the matter finally decided by the Apex Court; even though in the judgment of the Apex Court at least, there is no discussion on the aspect of maintainability of objections.

23. Coming to the objections in the present case, I find that the Apex Court in the Banwari Lal case aforesaid while setting aside the award in that case fixing the damages @ 15 per sq. ft. per month in respect of covered area and of Rs.10 per sq. ft. per month for large open spaces and of Rs.7 per sq. ft. per month for smaller open spaces held that the possession of the Union of India post lapsing of the requisitioning could not be in the nature of tress pass. The text book of the author Kameshwara Rao on law of damages and compensation was cited to hold that the right to mesne profits presupposes a wrong whereas right to rent proceeds on the basis that there is a contract. It was further held that there is an intermediate class of cases in which the possession though not wrongful in the beginning assumes a wrongful character when it is unauthorisedly retained and in such cases, the owner is not entitled to claim mesne profits but only the fair rent. The Apex Court held that in view of the permission granted by the Court in that case, enabling the Union of India to use and occupy the property, it could not be said that the possession of Union of India after the requisition had lapsed was illegal and wrongful and in the nature of tress pass. It was further laid down that in the circumstances damages were claimable not on

the basis of mesne profits but on the basis of fair rent. The basis adopted by the arbitrator in that case of Income/ profit method was thus not found by the Apex Court to be applicable in the facts of the case. The Apex Court also noted that the fair rent of the property as determined under the Requisitioning Act was being accepted by the owner in that case, as in this case also and the arbitrator had erred in not considering the said rent. The Apex Court also held that there was no reason for the arbitrator to assess damages for open spaces which formed part of the main building for which damages had been assessed. The Apex Court also laid down that the factor of the age of the building was relevant.

24. In my view, the judgment (supra) on identical facts addresses most of issues raised in the present case also. Firstly, the method of computation has to be of fair rent and not of income/profit or of mesne profits. Secondly, nothing is payable for the open areas. Thirdly, the amount being paid during the period of requisitioning without protest has to be considered while fixing the fair rent for the period thereafter.

25. The arbitrator in the present has found that the petitioner failed to produce any evidence of letting of any property in the locality before the arbitrator. The said part of the award has not been challenged. It was for the petitioner which was claiming the mesne profits / damages for use and occupation or fair rent as aforesaid to do so and the onus of leading evidence in that regard was on the petitioner. The petitioner having failed to discharge the said onus, the arbitrator had no option but to proceed on the basis of the material available to him. The Division Bench of this Court in **National Radio & Electronic Co. Ltd. Vs. Motion Pictures Association** 2005 (122) DLT 629 has held that the burden for

proving the rate at which mesne profits are claimed is on the person claiming the mesne profits and in the absence of any evidence led by such person the Court cannot award mesne profits at any rate higher than the rate at which the rent was being last paid, by the defendant in that case who was earlier a tenant in the premises. It was further held by the Division Bench of this Court that no judicial notice could be taken of any increases in rent by the Court, in the absence of there being any evidence to that effect.

26. The arbitrator in the present case found the valuation report submitted by the petitioner to be on the wrong premise. It appears to be so even as per the **Banwari Lal** case (Supra). The arbitrator also found the instances of letting produced by petitioner to be not relatable to the premises in question. No interference with such a finding of the arbitrator is permissible U/s. 34 of the Act. The arbitrator being a judge chosen by the parties and in the present case appointed by this Court, with a view to assess the mesne profits / damages for use and occupation even for a period for which the same may have been time barred, had the petitioner been made to institute a suit for recovery thereof, his decision is final and binding on the parties, even if a different view is possible. In any case, I also find that the leases of Chandni Chowk, Bunglow Road, Subzi Mandi and Kamla Nagar produced by the petitioner were rightly held by the arbitrator to be not capable of enabling the arbitrator to deduce as to what should have been the fair rent of the property at Under Hill Road.

27. As far as the argument of inconsistency in the award, also is concerned I do not find any. The arbitrator has only held that there is no dispute that the premises were used during requisitioning and thereafter for commercial purposes. Otherwise, the arbitrator has

recorded that the pleading of the respondent of the same being situated in a residential colony had not been controverted by the petitioner in rejoinder and that no witness with respect to the zonal plan was examined. The arbitrator thus adopted the report by committee of the engineers of the PWD constituted by the respondent itself and the damages awarded as per which report are higher than the amount being paid to the petitioner during requisitioning and to which amount only the petitioner would have been entitled to in the absence of any evidence of letting of nearby premises having been produced by the petitioner before the arbitrator.

28. As far as the documents procured by the petitioner during the pendency of these objections and filed in this Court is concerned, in my view such procedure is not permissible in law. The inquiry U/s. 34 is to be confined to whether the award is in conflict with the public policy of India and which in **Oil & Natural Gas Corp. Ltd Vs. Saw Pipes Ltd.** AIR 2003 SC 2629 has been held to be the law of India. The courts have gone to the extent of holding that as long as the correct law has been applied even if the decision is found by the Court to be incorrect, the award would still not be in conflict with the public policy of India. The contention of the counsel for the respondent that the purport of the 1996 Act was to reduce the interference of the Court in the arbitration is correct. Such purport will be defeated if the Court in exercise of powers U/s. 34 of the Act interferes with the findings as those of rate of compensation / damages / mesne profits assessed by an arbitrator, particularly when the approach of the arbitrator is not found to suffer from any illegality.

29. Though there appears to be some inconsistency in the award with respect to the mesne profits / damages for use and occupation for the period post 13.12.1997 i.e. whether the increase is to be of 10 per cent or of 50 per cent but I may notice that the respondent had preferred objections to the same award, being OMP No.324/2005 and which came to be dismissed on 12.09.2005. It was held in that judgment also that this Court cannot sit in appeal over the award and it was held that the award called for no inference. The respondent preferred a special leave petition against the said order being SLP Civil No.7240/2006 which was dismissed for the reason of availability of the alternate remedy of appeal. It is informed that an appeal being FAO(OS) 168/2007 has been preferred and which is still pending.

30. Thus no merit is found in this petition U/s. 34 of the Arbitration Act, 1996. The same is dismissed, however, with no orders as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

April 16, 2009
Jr