

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

+

OMP 163/2005

%26.02.2009

Date of decision: 26.02.2009

**M/S GENERAL ELECTRIC
INTERNATIONAL INC.**

..... Petitioner

Through: Mr. Abhinav Vasisht & Ms. Harsita
Priyanka, Advocates.

Versus

M/S U.C. JAIN HUF & Ors.

..... Respondents

Through: Mr. B.B.Gupta, Advocate for the
respondents No. 1to3 & 5.
Mr. S.K. Chandwani & Mr. M.S.
Rahman, Advocates for the
respondents No.4,6&7.

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. Objections under Section 34 of the Arbitration Act, 1996 with respect to the award dated 8th February, 2005 of Shri. H.C. Gupta, Member (Retd.), M.R.T.P.C. are for consideration.

2. The disputes between the parties arose out of several agreements entered into by the petitioner with different respondents all in relation to letting out of the ground floor of House No.13, Palam Marg, Vasant Vihar, New Delhi – 110057. The lease agreement and the security deposit agreement are between the petitioner and the respondent No.1 M/s U.C. Jain (HUF) of which the respondent No.2 Mr. U.C. Jain is the Karta. The Generator Set

maintenance agreement is between the petitioner and the respondent No.3 Smt. Rakhee Jain. The AC maintenance agreement is between the petitioner and the respondent No.4 Mr. Ashish Jain. The other maintenance agreement is between the petitioner and the respondent No.5 Ms. Raj Rani Jain and the renovation agreement is between the petitioner and the respondent No.6 M/s Ease Consultants (P) Ltd. Each of the said agreements contained a clause of arbitration of disputes or differences arising out of or in connection with the agreement to be referred to two arbitrators one each to be appointed by each party and for the arbitration to be subject to the Arbitration and Conciliation Act, 1996 and the rules of Arbitration of Indian Council of Arbitration.

3. However, notwithstanding the arbitration clause, disputes and differences having arisen between the parties the petitioner instituted suit No.1903/1998 in this court against all the respondents for mandatory injunction directing the respondents to assume possession of the property and claiming recovery of Rs.32,63,100/- from the respondents. Though certain pleadings/documents of that suit were also filed in the present proceedings but during the hearing, with the consent of the parties, the file of the suit was also called for. It was the case of the petitioner in that suit that as against the promised date of delivery of possession of 1st April, 1997 it was given possession after inordinate delay only on 1st July, 1997; that after possession it was found that the premises and the amenities and services therein were not as assured, promised and agreed; that the petitioner therefore terminated the lease agreement and called upon the respondents to accept possession and refund the security deposit placed by the petitioner with each of the

respondents under different agreements; that the respondents had however illegally refused to do so. The respondents also upon receipt of summons of the suit inspite of arbitration clause in the agreements did not apply under Section 8 of the Arbitration Act, 1996 and filed their written statement. During the pendency of the suit on 23rd September, 1998 an interim settlement was arrived at between the parties as per which a sum of Rs.10 lacs was agreed to be paid to the petitioner and a court commissioner was appointed for inspecting the property, taking photographs with regard to the condition and for assessing the quantum of damages, if any; it was further agreed that the keys of the property shall be handed by the petitioner to the court commissioner and the court commissioner after looking into the question of electricity bills shall submit the report. The commission was executed on 15th October, 1998 and the commissioner on the same day also delivered actual possession of the premises, amenities etc. therein to the respondents. Some of the respondents also preferred objections to the report of the court commissioner. On the basis of the pleadings of the parties and even though no counter claim had been preferred by the respondents, on 31st July, 2000, the following issues were framed:-

1. Whether the plaint does not disclose any cause of action?
2. Whether the suit is bad for mis-joinder of parties and causes of action?
3. Whether the suit has not been properly valued for purposes of court fee and jurisdiction?
4. Whether the lease agreement was terminated by notice dated 12th December, 1997/9th January, 1998? If so, to what effect?
5. Whether the plaintiff is not liable to pay rent and maintenance charges from 1st December, 1997 to 15th October, 1998? If so, to what effect?
6. Whether there was any damage to the property at the time it was vacated by the plaintiff?

7. If issue No.6 is proved in the affirmative, whether the defendant is entitled to claim compensation/damages for this loss? If so, to what extent?
8. To what amount, if any, is the plaintiff entitled from the defendants?
9. Whether the plaintiff is entitled to interest? If so, at what rate and for what period?
10. Relief.

And the trial was ordered. On 20th May, 2002 it was noted in the order sheet of that suit that the counsel for the parties on instructions were now agreed that in view of the arbitration agreement between the parties, the disputes/differences “subject matter of the present suit” be referred for adjudication by a sole arbitrator. Accordingly, Mr. H.C. Gupta aforesaid was appointed as the sole arbitrator “to resolve the disputes/difference subject matter of the present suit between the parties”. It was also noted in the said order that after the institution of the suit, a sum of Rs.10 lac had already been paid to the petitioner and it was ordered that after adjusting the said amount, the total claim of the petitioner as it so stood reduced shall be treated as the petitioner’s claim in the suit.

4. It may be noted that after the institution of the suit aforesaid by the petitioner, the respondent No.1M/s U.C. Jain (HUF) also instituted suit No.1923/2008 in this court for recovery of possession of the premises from the petitioner. Along with the said suit an application under Order 2 Rule 2 of the CPC was also filed to sue separately the petitioner for recovery of the arrears of rent and other dues. However, after the possession of the premises was handed over on 15th October, 1998 by the court commissioner appointed in the other suit, this suit was on 1st February, 1999 dismissed as

infructuous. The file of this suit also was called during the hearing of the objections with the consent of the counsel for the parties.

5. The petitioner preferred its claims before the Arbitrator of Rs.19,50,000/-, after adjustment of Rs.10 lacs received as aforesaid during the pendency of the suit and Rs.30,000/- towards electricity charges. The respondents filed their statement of defence and counter claim. The petitioner herein filed their response to the counter claim of the respondents. The parties also filed affidavit by way of evidence.

6. The arbitrator has vide award aforesaid awarded a sum of Rs.3,92,760/- to the respondents No.1to3 & 5 against the petitioner along with interest at 12% per annum from 15th October, 1998 till the date of payment and awarded a sum of Rs.82,500/- to the petitioner against the respondent No.4 Mr. Ashish Jain together with interest on 12% per annum from 15th October, 1998 till the date of payment. No objections have been preferred by the respondent No.4 Mr. Ashish Jain to the award in so far as against him. Objections have been preferred by the petitioner only to the award against it for sum of Rs.3,92,760/- with interest and for dismissal of its claims.

7. According to the petitioner though it had paid rent and other charges under the various agreements w.e.f. 1st April, 1997 from which date it was to be put on possession of the premises but the possession was delivered to the petitioner on 1st July, 1997 only. The petitioner had, therefore, claimed refund of the rent and other charges paid for the said period. The arbitrator has found the claim of the petitioner of having been put into possession on 1st July, 1997

to be fallacious. Though in the pleadings objection has been raised to the said finding also, but the counsel for the petitioner during the course of hearing fairly conceded that such objection was outside the ambit of Section 34 of the Arbitration Act.

8. According to the petitioner, it had given notice of termination of tenancy on 12th December, 1997 or in any case on 9th January, 1998 – which was acknowledged by the respondents; its liability for rent and other charges ceased on that date even though the possession was delivered by the court commissioner on 15th October, 1998. Alternatively it is contended that the petitioner at best is liable for rent and other charges till 31st March, 1998 only, on which date respondents had agreed to receive possession. The arbitrator however found that though the petitioner had offered possession of the premises and other amenities, such offer was conditional on payment of various security deposits. The arbitrator further held that the respondents were also ready to take possession and refund security deposits, subject to deduction of rental dues, damages, electricity charges therefrom and with respect where to no settlement could be arrived at between the parties. The Arbitrator, therefore, held the petitioner liable for rent and other charges till 15th October, 1998. Axiomatically, the arbitrator after adjusting the balance security deposit in the rent and other charges till 15th October, 1998 found the aforesaid sum of Rs.3,92,760/- to be due from the petitioner, inclusive of Rs. 20,000/- towards value of damages to the premises and Rs. 32,760/- towards electricity charges. The arbitrator also negated the claim of the petitioner of Rs. 9,60,000/- paid under the renovation agreement holding that it

was a one time payment and the petitioner has not led any evidence that the renovation was not carried out.

9. The counsel for the petitioner besides challenging the aforesaid findings of the arbitrator has also argued that only the claims of the petitioner had been referred to arbitration. He has urged that the arbitrator ought not to have considered the counter claims of the respondents. He has further urged that the counter claims of the respondents even if to be considered were on the date of institution thereof barred by time. He has further urged that though the issue had been framed in the suit instituted by the petitioner of the claims of the respondents but the respondents had neither made any counter-claim nor paid any court fee thereon. He has argued that when refund of security deposit is sued for, the party denying the liability for refund is required to make a counter claim with respect to its claims and unless so makes a counter claim is not entitled to oppose the refund of security deposit.

10. Under Section 34 of the Arbitration Act, the court is empowered to set aside an award if the same deals with the disputes not contemplated by and not falling within the terms of submission to arbitration or if it contains decision on matters beyond the scope of submission to the arbitration. Thus, if the contention of the petitioner that the counter claims of the respondents were not referred to arbitration is to be found true, the award in so far as allowing the said counter claims would certainly be liable to be set aside.

11. As noticed above, this court vide Order dated 20th May, 1992 referred the disputes/differences subject matter of that suit to arbitration. The question which arises is as to what were the disputes and differences subject matter of that suit.

12. I will first deal with the contention of the counsel for the petitioner that in a suit for refund of security deposit, the defendant; averring that the security deposit is liable to adjustment, has to prefer a counter claim to that effect and unless does so, a decree for refund of security deposit is to follow without adjudication of the claims for adjustments therefrom. It is essential to understand the nature and character of a security deposit. The security deposit is generally meant to secure the landlord against various defaults of the tenant at the time of final determination of the lease. Such default may include damage to the property, arrears of rent, arrears on account of electricity or water charges, telephone bills etc. It was so held by this court in **Parmanand Vs. Vimal Chand Jain** 1995 III AD (Delhi) 547 that the security deposit is not liable to be adjusted at interim stages towards rent unless there is an agreement to the contrary between the parties. Similarly in **Uberoi Sons Machines Ltd. Vs. Samtel Colour Ltd.** 105 (2003) DLT 383 this court held that security is paid to the landlord for the purpose of guaranteeing that no damage is done by the tenant nor any fixture and fittings are removed and the landlord is entitled to use the security for repairing the damages done by the tenant. In the present case, the security deposit agreement between the parties also provided of mutually agreed reasonable deduction therefrom of damage or pending dues if any on account of lessee's occupation of the demised premises. Once it is found that the very purpose of security deposit is to secure

to the landlord the value of any outstandings from the tenant, it would be inherently, contradictory to hold that though the landlord is holding the said security deposit but in a suit by the tenant for refund thereof the landlord is required to maintain a counter claim (and which is same as a suit) for the adjustment of claims and that without maintaining the said counter claims, is not entitled to the relief of adjustments. The occasion for the tenant instituting a suit/claim for refund of security deposit would arise only when the tenant contends that there is nothing to be adjusted from the same and the landlord contends otherwise. The question for adjudication before the court in such case would be whether any adjustment is to be done from the security deposit or the same is refundable in toto to the tenant. For the same adjudication, the landlord cannot be asked to file a counter claim and pay court fee thereon. The said counter claim would also adjudicate an adjudication as to whether the landlord is entitled to claim adjustments or not. The law provides for court fee to be paid on adjustments, counter claim, set off, when the claim of the opposite party is admitted and is sought to be adjusted/set off against some claim. In such a situation, the adjudication involved qua the set off or adjustment is different from the claimed amount. It is for this reason that a separate set of court fee is required to be paid thereon. However, where as in the case of security deposit, the question of adjudication is whether adjustment permitted to be made, is to be made or not out of the security deposit no court fee is required to be paid thereon. The said contention of the counsel for the petitioner does not find favour with me.

13. Thus, even in the absence of a counter claim of the respondents the arbitrator while adjudicating the claim of the petitioner for refund of security deposit was entitled to go into the question of adjustments, to which the respondents were entitled to therefrom.

14. However, since the arbitrator besides merely allowing adjustments from the claim for security deposit has also found claims over and above thereto of the respondents against the petitioner and which have been allowed to the extent of Rs. 3,92,760/- herein above, it is also important to adjudicate whether the findings of the arbitrator of the counter claims also having been referred calls for any interference under Section 34 or not.

15. At the outset, it may be noted that when the respondents preferred their counter claims no application under Section 16 of the Act was made by the petitioner. The petitioner though filed reply to the counter claim of the respondents did not even challenge therein that the said counter claims had not been referred to arbitration. It was only while addressing arguments before the arbitrator that the said plea was taken by the petitioner.

16. It has been held by the Division Bench of this court in **S.N. Malhotra & Sons Vs. Airports Authority of India** (2008) IV AD (Delhi) 424 that without following the procedure under Section 16 of the Arbitration Act, the plea under Section 34 (2) (a) (4) of the Act cannot be taken for the first time. Admittedly no plea under Section 16 of the Act was taken. The said objection of the petitioner is liable to be dismissed on this ground alone.

17. Besides aforesaid, even otherwise I am unable to find fault with the award to the effect that the counter claims were also referred to arbitration.

18. The contention of the counsel for the petitioner is that since no counter claim had been preferred by the respondents in the suit in which the reference was made, the order of this court to the effect that the dispute subject matter of the suit were being referred to arbitration could include only the claims of the petitioner. The argument of the petitioner would have been correct had the issues No. 5, 6 and 7 not been framed. The said issues clearly are to the effect as to whether the respondents are entitled to amounts claimed. The contention of the petitioner is that the said issues were erroneously framed. However, the fact remains that they were framed in the presence of the counsel for the petitioner and without any objection whatsoever from the petitioner. The petitioner having allowed the said issues to have been framed and to remain on record till the date the disputes subject matter of suit were referred to arbitration, the said disputes have to necessarily relate to the issues framed in the suit and which issues as aforesaid include the counter claims of the respondents also. This court made the order of reference in relation to the issues. If according to the petitioner any of the issues was wrongly framed, the petitioner should have got the same clarified. The petitioner by allowing the said issues to stand till the date of reference and in fact till the date of award has led not only this court while making the order of reference but also the arbitrator as well as the respondents to believe that their claims on which issues had been framed were also being referred to arbitration and were to be adjudicated by the arbitrator only. Had the

petitioner raised the objection at that time, the respondents would have stood warned and would have either sought clarification from this court or would not have agreed to arbitration or would have sought a specific direction of reference of its counter claims also. It may be noted, the respondents in suit filed by them had filed application reserving right to sue for their counter claims. Had the issues aforesaid not been framed or had objection been taken by the petitioner, the respondents would have separately sued.

19. I had, during the course of hearing, put to the counsel for the petitioner as to what would have been the effect had instead of being referred to arbitration, the suit proceeded. In that case also at the stage of final arguments, what course would have been adopted by the court, whether to refuse to answer these issues because no counter claim had been preferred or to allow the respondents to pay court fee thereon. The counsel for the petitioner naturally was non-committal. In my view, had the trial proceeded on issues, after several years it would have been unjust to refuse to answer the issues on counter claims of respondents without giving an opportunity to the respondents to pay the court fees.

20. A perusal of the written statement of the respondents in the suit would show that though the respondents made their claims but did not formally make a counter claim and axiomatically the question of valuing the same for purpose of court fee did not arise. However, the manner in which the said written statement was understood by all concerned including the petitioner was that the respondents besides raising the pleas of adjustment of the entire security deposit, were also claiming other amounts from the petitioner. In my opinion,

it is too late in the day for the petitioner to poke holes in the issues framed in the suit and which were referred to arbitration and no illegality can be found with the finding of the arbitrator of the counter claims also having been referred to him.

21. There is yet another aspect of the matter. The respondent raised the counter claims before the arbitrator on the premise that the same were arbitrable. The petitioner replied to the said counter claims also on the premises that the same were arbitrable. In my opinion an arbitration agreement within the meaning of Section 7 (4) (c) of the Act came into being, even if there had been no reference of the said counter claims to arbitration.

22. That brings me to the question of limitation. It is the contention of the counsel for the petitioner that since counter claims were not made in the suit, the date of institution thereof should be the date of filing counter claim before the arbitrator and which was beyond three years from date of vacation. However, the said question of limitation would arise only if the counter claims are found to have been not referred to arbitration by order of this court. Since I have held that the counter claims were referred to arbitration, I do not find any merit in the plea of the counter claims being barred by time. Even otherwise the respondents by raising the said disputes and by pressing and having framed issues thereon had raised the same within the meaning of Section 21 of the Act and for this reason also it cannot be said that the counter claim was barred by time or that the finding of the arbitrator thereon is contrary to the policy of India. Moreover, no bar of limitation was pleaded. It was argued for the first time during arguments before arbitrator.

Limitation is a mixed question of law and facts and no fault can be found in the reasoning of the arbitrator and the court can in absence of pleading refuse to entertain the same.

23. That brings me to the awards on merits.

24. The findings of the arbitrator of there being damage to premises of value of Rs. 20,000/-, of there being electricity arrears of Rs. 32,760/- and of the petitioner having led no evidence to be entitled to refund of Rs. 9,60,000/- are pure findings of facts and non-interfereable under Section 34. The counsel for the petitioner has rightly raised no argument with respect thereto.

25. The arbitrator has found that though the petitioner had offered the possession to the respondents but the said offer was conditional and therefore the liability of the petitioner for rent and other charges did not cease till the date of actual delivery of possession. Is such finding such which is liable to be interfered with under Section 34? In my opinion not. It cannot be argued that the said finding is contrary to the policy of India which as per the dicta in **ONGC Vs. SAW Pipes Ltd.** (2003) 5 SCC 705 has been held to be the law of India.

26. I may notice that while this court in **Uberoi Sons Machines Ltd.** (Supra) has held that a tenant could not have retained possession of the premises without paying the rent on account of non-refund of security deposit by the landlord and that the tenant in such case has an independent remedy to recover the security deposit and if retains possession of the premises on the ground of non-refund

of security deposit, would remain liable for payment of rent and other charges with respect to the premises till the date of possession, another single judge of this court in **ICRA Ltd. Vs. Associated Journals Ltd.** 2007 VII AD (Delhi) 437 has held that if the defendant/landlord does not take possession in spite of offer of the tenant, the tenant cannot be liable for rent and other charges thereafter. To the same effect is another judgment of a single judge of this court in **Onida Finance Ltd. Vs. Ms. Malini Khanna** 2002 (III) AD (Delhi) 231. Thus, it would be seen that whether possession has been offered unequivocally or not is a question of fact. In the present case, the arbitrator has returned a finding that the offer of possession of the petitioner was not unequivocal and not unconditional and therefore the petitioner continued to be liable for rent. Such factual findings of the arbitrator is outside the purview of interference under Section 34 of the Act.

27. In the present case, the agreement in writing between the parties entitled the petitioner to retain possession till the refund of the security deposit. However, a detailed inspection of the security deposit agreement would show that only **mutually agreed** reasonable deduction due to damage or pending dues, if any, were allowed to be deducted therefrom. It was only on the landlords default in refunding such mutually agreed amount that the petitioner was entitled to withhold possession without any liability for rent and other charges. However, the present was a situation where no mutual agreement could be arrived at between the parties as to the deductions. The remedy provided therefor in the agreement itself was of arbitration. The only reasonable way of interpreting such a clause in the agreement would be that, if in spite of a mutual

agreement as to the amount of security deposit refundable, the same is not refunded, the tenant even if withholds possession would not be liable for any rent. If, however, the parties are not able to arrive at any mutual settlement, the only remedy open to the tenant is to surrender possession and to resort to the dispute resolution mechanism agreed to between the parties. If the tenant in such a case continues to occupy, he will do so at his own peril of being found liable to pay rent and other charges, till the date of actual delivery of possession.

28. A perusal of the correspondence between the parties also shows that the petitioner had therein agreed to pay rent till 31st March, 1998. The respondents were however claiming more amounts. The respondents vide letter dated 13th February, 1998 showed willingness to take possession and to pay the security deposit after adjusting the damages, if any. The petitioner however did not come forward to deliver the possession and ultimately the respondents got issued the legal notice dated 10th May, 1998, thereafter. Even in response thereto, the petitioner did not offer possession and instead filed the suit.

29. The law as to interference in arbitral awards need not be restated. The arbitrator being a judge chosen by parties to finally decide the matter, the awards are not to be seen as in appeal. Findings of arbitrator purely based on appreciation of material on record cannot be interfered with. The award in this case is not found contrary to the agreement or the law. No inconsistency is found in the award.

30. The counsel for the respondent No.4 has urged that this court should interfere with the rate on interest awarded by the arbitrator. However, no objections have been preferred; in the absence of the objections, this court does not have the power to interfere with the award. Moreover, I find that the arbitrator has allowed against the respondent No.4 interest at the same rate as allowed against the petitioner in relation to the counter claims of other respondents. For this reason also no ground is found to interfere with the rate of interest.

31. Thus, I do not find any ground to interfere with the award. The petition under Section 34 is dismissed. However, in the facts and circumstances of the cases the parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**February 26, 2009
PP**