

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

+ **ARB.P.No.220/2009**

% **Date of decision: 10th September, 2009**

MR RAKESH KHANNA Petitioner

Through: Mr. Vikas Dhawan and Mr Siba Prasad
Das, Advocates

Versus

M/S SURYA VINAYAK INDUSTRIES PVT LTD ... Respondent

Through: Mr. N.K. Vohra, Advocate.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | NO |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

RAJIV SAHAI ENDLAW, J.

1. This petition has been preferred under Section 11 of the Arbitration Act, 1996 for appointment of an arbitrator pursuant to an arbitration clause contained in the Registered Lease Agreement dated 11th June, 2007 between the parties. The counsel for the respondent has appeared and states that since this is his first appearance he should be given time to file reply. The respondent having been served with the notice of the petition issued on 29th May, 2009, if needed to file reply ought to have filed before today and cannot seek time for filing reply as a matter of right. The counsels have been heard.

2. The counsel for the respondent has raised two contentions. Firstly, it is contended that Registered Lease Agreement containing arbitration clause has been novated and secondly, it is contended

that there is no live issue between the parties for adjudication by arbitration.

3. As far as the plea of novation is concerned, the petitioner himself has in the petition stated that disputes and differences had arisen with the respondent earlier also resulting in the petitioner then also terminating the tenancy of the respondent; that the said disputes and differences were subsequently settled and a settlement deed dated 21st March, 2008 executed. The contention of the counsel for the respondent is that the novation of the lease agreement is by the said settlement deed; that the said settlement deed does not contain any provision for arbitration. It is also contended that the petitioner itself does not accept the said settlement deed.

4. As far as the last of the aforesaid submissions is concerned, the petitioner has not pleaded having not accepted the settlement deed. The contention of the petitioner is that the respondent had unilaterally sent an addendum dated 6th April, 2009 to agreement to lease and which was not accepted by the petitioner.

5. A perusal of the settlement deed shows that in the recitals thereof reference is made to the disputes which had earlier arisen between the parties and resulting in the petitioner then terminating the lease of the respondent. The settlement deed is executed to record the settlement arrived at of the disputes which had so arisen. A reading of the said settlement deed does not show that same is in supersession of the lease agreement between the parties. In fact in clause 6 of the said settlement deed reference is expressly made to the stipulations in the lease agreement which were to continue. The settlement deed also does not record any fresh agreement between the parties. The counsel for the petitioner has also pointed out that

the respondent itself has in the reply to the notice of termination of tenancy now issued, referred to the said lease agreement and the plea taken today of novation is an afterthought. I thus, do not find that the lease agreement containing the arbitration clause has been novated or that the arbitration agreement between the parties has been novated.

6. As far as the plea of there being no live issue between the parties, the same is falsified from the contention of the counsel for the respondent that the petitioner has till now not taken possession of the premises from the respondent in spite of the respondent offering the same. Once it is found that the respondent is admittedly in possession of the premises, it cannot be said that there is no live issue between the parties.

7. The counsel for the respondent has further urged that the petitioner has encashed the cheque for Rs.64,41,972/- sent along with the addendum dated 6th April, 2009 to the agreement to lease and by encashment of the said cheque has impliedly accepted the terms of the said addendum. In this regard, the plea of the petitioner in the petition that neither the addendum nor the payment by cheque aforesaid is acceptable to the petitioner as the same is admittedly in variance of the agreement between the parties may be noticed. Even if the petitioner has encashed the said cheque, encashment of the cheque cannot be said to be in full and final settlement of all the claims of the petitioner against the respondent. The counsel for the petitioner further informs that, in fact, the cheque was encashed pursuant to the orders obtained in another petition preferred under Section 9 of the Act.

8. At this stage, it may also be noticed that the addendum dated 6th April, 2009 relied upon by the respondent itself shows the lease agreement dated 11th June, 2007 to be subsisting and the conduct of the respondent shows that the respondent has been indulging in taking convenient pleas whatever suits it at whatever time.

9. Else, it is found that the parties had in the Registered Lease Agreement (Supra) provided for settlement of all disputes by arbitration. The petitioner has also issued a notice dated 21st March, 2009 to the respondent proposing the name of arbitrator. Thus, the petitioner had occasion to prefer this petition.

The petition is accordingly, allowed.

10. Ms Justice Sharda Aggarwal (Retd) is appointed as the arbitrator to adjudicate the disputes between the parties. The counsel for the petitioner states that the claims of the petitioner against the respondent are for a sum of over Rs.2 crores and the respondent is also liable to be ejected from the premises. On this premise, the consolidated fee of the arbitrator is fixed at Rs.1,50,000/- (besides out of pockets expenses). The fee to be shared equally by the parties subject to award as to costs. The parties to appear before the arbitrator with prior appointment on 22nd September, 2009.

September 10th, 2009
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RAJIV SAHAI ENDLAW,J