

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

+ **FAO (OS) No. 438/2009 and CM No. 13637/2009**

% Reserved on: 19th August, 2010

Decided on: 6th September, 2010

Mr. Ajit Mittal,
Proprietor of M/s Ajit Mittal Corporation,
At 406, 9, Barakhamba Road,
New Delhi-110 001

..... Appellant

Through: Ms. Amita Gupta, Advocate.

versus

Heat Exchange (P) Ltd.
At A-131, WHS Kirti Nagar,
New Delhi-110 015

..... Respondent

Through: Mr. Jasmeet Singh, Advocate.

Coram:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MS. JUSTICE MUKTA GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not Necessary |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MUKTA GUPTA, J.

1. This Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (in short 'A & C Act') lays a challenge to the Order dated 15th September, 2009 whereby the Objection Petition of the Appellant under

Section 34 of the A&C Act assailing the Award dated 23rd January, 2009 passed by the Sole Arbitrator was dismissed, thus, upholding the Respondent's monetary claim of ₹50,86,485/- after giving adjustment of Counter Claim of the Appellant and directing possession of the tenanted premises along with payment of ₹6,000/- per day with effect from 12th January, 2009 as damages till vacation of premises and an interest @12% per annum on the awarded amount.

2. According to the learned counsel for the Appellant the arbitration agreement in the Lease Deed was operational only till the lease agreement was subsisting and once the said agreement came to an end by efflux of time, there being no subsisting arbitration agreement between the parties, the entire proceedings before the Arbitrator are in nullity.

3. A brief narration prior to determination of the issue in the present Appeal is that the Appellant entered into a Lease Deed with the Respondent as Lessee in respect of industrial property No. 349, admeasuring 450 Sq. mtrs. situated in Functional Industrial Estate, Patparganj, Delhi-110 092 duly allotted to the Lessor by the office of the Commissioner of Industries, Delhi, for a period of three years from the date of actual possession on a monthly rent of ₹90,000/- only and during the lease period the monthly rent was to increase by 10% after every two years. The premises were handed over to the Appellant on 4th July, 2003 however he neither paid the rent nor handed over the

vacant possession on expiry of the lease on 3rd July, 2006. In the Lease Deed it was provided that in case of disputes the same would be referred to arbitration. The relevant clause 14 of the Lease Deed is reproduced as under:

“14. For dispute resolution, instead of approaching the courts for litigation, both the parties agree to only approach Indian Council for Arbitration venue Delhi, for arbitration with panel of one (1) each with a provision for appointing an umpire proposed by arbitrators. Award must be provided within a period of six (6) months of reference. The award shall be enforced through Courts in Delhi.”

4. In terms of clause 14, the Respondent sent a communication dated 17th August, 2006 to the Registrar, Indian Council of Arbitration (hereinafter referred to as 'ICA') nominating a former Judge of this Court as its Arbitrator. Pursuant thereto the ICA addressed a letter to the Appellant dated 22nd August, 2006 calling upon the Appellant to forward the name of its nominee to be appointed as an Arbitrator. In response to this letter the Appellant expressed his intention through a letter from his Advocate, to appoint an Arbitrator through the Chief Justice of the Delhi High Court as provided under law. As the Appellant failed to appoint its nominee, the Respondent filed a petition being Arbitration Petition No. 452/2006 under Section 11 of the A&C Act 1996 for appointment of an Arbitrator. This Court vide Order dated 28th February, 2007 appointed a former Chief Justice as the Arbitrator. It was also observed that the conduct of the Appellant was highly

unreasonable, malafide and the sole aim seemed to be to delay the appointment of the Arbitrator. This order of the learned Single Judge was challenged by the Appellant before the Hon'ble Supreme Court mainly on two grounds, that is, prior to making the Application under Section 11 (6) of the A&C Act, no notice had been given by the Respondent to the Appellant before invoking the provision and secondly, having regard to the adoption of the rules of arbitration of the ICA by the parties in the arbitration agreement, on the failure of the parties to agree and to decide upon the appointment of an Arbitrator it was for the ICA to appoint the Arbitrator to decide upon the difference. The Hon'ble Supreme Court dismissed the Special Leave Petition of the Appellant and held that the purpose of notice appears to have been fulfilled by the notice issued by the ICA to the Appellant on 22nd August, 2006 and secondly, in view of the letter of the Appellant's learned advocate to the ICA on 22nd September, 2006 it disentitled the Appellant from taking such an objection since the letter categorically indicated that the Appellant intended to have an Arbitrator appointed through the Hon'ble Chief Justice of the Delhi High Court. More so, as the Appellant had failed to appoint its Arbitrator in terms of the rules of the Arbitration of the ICA thus, it disentitled it to take such an objection.

5. The learned Arbitrator appointed by this Court vide Order dated 28th February, 2007 resigned thus, necessitating the Respondent to file

a fresh petition under Section 11 (6) of the A & C Act, whereupon vide order dated 17th December, 2007 another former Judge of this Court was appointed as an Arbitrator. Even this order was challenged by the Appellant before the Hon'ble Supreme Court inter alia on the ground that the appointment of the sole arbitrator was illegal specially when the agreement laid down a prescribed procedure for a panel of three Arbitrators. The said Special Leave Petition was dismissed as infructuous by the Hon'ble Supreme Court vide Order dated 16th February, 2009 in view of the fact that the final award had already been passed by the learned Arbitrator.

6. Conscious of the limited scope of interference in a petition under Section 34 of the Arbitration and Conciliation Act, 1996, the Appellant has sought to challenge the Award principally on the ground that in the absence of a subsisting lease agreement there was no subsisting arbitration agreement and no arbitrator could be appointed in terms thereof. Thus, according to him the Arbitration proceedings are a nullity.

7. We find the present Appeal to be a clear abuse of the process of the Court. From the narration of events, set out above, it is apparent that the Appellant is malafidely avoiding and delaying the arbitration proceedings on one pretext or the other and for this he has had recourse to number of proceedings. In the reply to the two Arbitration Petitions and the SLPs filed before the Hon'ble Supreme Court nowhere

this ground has been urged that an Arbitrator cannot be appointed as there was no subsisting arbitration agreement and the same related only for the disputes pending the lease period. A perusal of the pleadings, contentions of the Appellant show that he always endorsed the subsistence of an arbitration agreement and appointment of the Arbitrator, the only dispute raised being the appointment of an Arbitrator through the Indian Council of Arbitration or the Delhi High Court.

8. The Hon'ble Supreme Court in *Hope Plantations Ltd. vs. Taluk Land Board, Peermade and another*, 1999 (5) SCC 590 observed:

“26. It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstrably wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are “cause of action estoppels” and “issue estoppels”. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the CPC contains provisions of res judicata but these are not

exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."

9. In *State of U.P. vs. Nawab Hussain, 1977 (2) SCC 806* it was held:

"The principle of estoppel per rem judicatam is "the broader rule of evidence which prohibits the reassertion of a cause of action". This doctrine is based on two theories: (i) The finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of community as a matter of public policy and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon. It is thus not permissible to obtain a second judgment for the same civil relief on the same cause of action, for otherwise the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. It is the cause of action which gives rise to an action, and that is why it is necessary for the courts to recognise that a cause of action which results in a judgment must lose its identity and vitality and merge in the judgment when pronounced. It cannot therefore survive the judgment, or give rise to another cause of action on the same facts. This is what is known as the general principle of res judicata."

10. We do not find any merit in the contention of the learned counsel for the Appellant that this plea having not been taken in the earlier proceedings the party is entitled to urge it. Section 11 Explanation 4 of the CPC, 1908 is a complete bar to this plea. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have

litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be as if the matter had been actually controverted and decided. Where a matter has been constructively in issue though not actually heard and decided, it is deemed to have been heard and decided.

11. This Appeal is nothing but another vain attempt to avoid vacation of premises and payment of the decretal amount. We find no merit in the present Appeal. The same is dismissed with cost of ₹50,000/- to be paid to the Prime Minister's Relief Fund within a period of four weeks from today.

(MUKTA GUPTA)
JUDGE

(VIKRAMAJIT SEN)
JUDGE

SEPTEMBER 06, 2010
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