

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 381/2011

Reserved on: November 17, 2011

Decision on: November 28, 2011

SUNIL KHANNA & ANR. Petitioner
Through: Mr. Umesh Sharma, Advocate.

versus

M/S VODAFONE ESSAR
MOBILE SERVICES LTD. Respondent
Through: Mr. Tarun Sharma with Ms. Monica
Sharma, Advocate.

CORAM: JUSTICE S.MURALIDHAR

JUDGMENT

28.11.2011

Caveat No. 452/2011

Since Mr. Tarun Sharma, Advocate enters appearance on behalf of the Respondent, the caveat stands infructuous and is disposed of as such.

O.M.P. 381/2011 & I.A. No. 8255/2011

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 14th February 2011 passed by the learned Sole Arbitrator directing the Petitioners herein to pay to the Respondent Vodafone Essar Mobile Services Ltd. ('VEMSL') a sum of Rs. 26,89,954/- and further to pay simple interest on the said sum @ 10% per annum from 16th January 2009 up to the date of the payment.
2. By a lease deed dated 7th February 2008 the Petitioners leased out their

premises bearing No. FF-03, First Floor, Commercial Complex, “The Metropolitan” at Commercial Plot No. A-2, Saket Place, Saket, New Delhi-110017 (‘the premises in question’) to VEMSL at a monthly rent of Rs. 4,31,659/- for a period of nine years. The possession of the premises in question was given to VEMSL on 1st February 2008.

3. In terms of the Clauses 3 and 5 of the lease deed the VEMSL deposited with the Petitioners an interest-free security deposit of Rs. 25,89,954/- equivalent to six months’ rent. Further, VEMSL in terms of Clause 6 deposited with the Petitioners a refundable maintenance security deposit of Rs. 1,00,000/- .

4. VEMSL served on the Petitioners a notice dated 16th October 2008 terminating the lease with effect from 16th January 2009. In response to the said letter on 12th December 2008 the Petitioners wrote to VEMSL drawing its attention to Clause 9 of the lease deed and stating that VEMSL should settle all the maintenance charges raised by the mall management up to 16th January 2009 and obtain a no dues certificate while handing over the shop “to enable us to hand over the Security Amount.” The case of VEMSL is that the premises in question was restored to its original unfurnished condition and was vacated by it on 15th January after clearing all the subsisting dues in respect of maintenance charges owed to the mall management. VEMSL states that despite its requests, the Petitioners failed refused to acknowledge receipt of possession of the premises on one pretext or the other with the object of evading the refund of the security deposit.

5. The case of the Petitioners, however, is that VEMSL failed to hand over vacant possession of the premises in question. They state that they wrote to

VEMSL on 4th, 7th and 27th February 2009 asking it to hand over vacant possession of the premises in question. They state that ultimately actual physical possession was handed over only when keys of the premises were handed over during the pendency of this petition.

6. It is not in dispute that the Petitioners herein filed Civil Suit No. 463 of 2009 in the Court of the Additional District Judge ('ADJ'), South-II, New Delhi against VEMSL for recovery of damages for use and occupation of the premises in question. In the said suit VEMSL filed an application under Section 8 of the Act referring to the arbitration clause in the lease deed and praying that the disputes be referred to arbitration. The said application was allowed by the learned ADJ by an order dated 20th July 2009 with a direction to the Petitioners to refer their disputes to arbitration. VEMSL meanwhile filed Arbitration Petition No. 252 of 2009 in this Court under Section 11 of the Act seeking the appointment of an Arbitrator. A separate application was filed by the Petitioners herein for a direction to VEMSL to hand over possession of the premises in question. An order was passed on 17th August 2009 by this Court noting respective contentions of the parties and in particular submission of learned counsel for VEMSL that keys of the premises in question have been delivered to the Petitioners herein. This Court then permitted the Petitioners herein to remove the locks, if any, on the door/shutter of the premises in question and to enter into the premises. With the consent of the parties, the learned Arbitrator was appointed by the said order.

7. Before the learned Arbitrator, VEMSL filed its statement of claim and the Petitioners herein filed counter claims seeking to recover from VEMSL a sum of Rs. 69,06,544/- along with interest, costs and certain other reliefs.

Both parties examined their respective witnesses.

8. One of the key issues before the learned Arbitrator was whether the possession of the premises in question was transferred in favour of the Petitioners herein with effect from 15th January 2009. On behalf of VEMSL reliance was placed on a gate pass dated 15th January 2009 and e-mails sent to the Petitioners. The Petitioners, however, maintained that till an order was passed by this Court on 17th August 2009 actual physical possession was not delivered to the Petitioners and therefore the Petitioners were entitled to adjust the said amount against the security deposit apart from the rent for the notice period.

9. The learned Arbitrator analysed the evidence presented by the parties. In particular, he found that although the Petitioners claimed that they were ready with the demand draft for the security amount on 15th January 2009 they did not issue any notice to VEMSL to that effect. The learned Arbitrator noted that the Petitioners had not either in Suit No. 463 of 2009 filed in the Civil Court or in the counter claims or in reply to the claim of VEMSL before the learned Arbitrator mentioning the fact of they were ready with the demand drafts. It is only during the cross-examination of the witness of the Petitioners herein that this fact was disclosed. Further, there was nothing on record to show that the Petitioners approached the mall to ascertain the exact amount payable by VEMSL. The learned Arbitrator concluded that “for reasons best know to them the respondents kept the taking of the drafts to themselves without informing the claimant and insisted on an NoC from the mall before they could take possession. If that is the position then the corollary will be who could be responsible for the present situation. The answer undoubtedly is that the Respondents are

responsible.”

10. Before this Court, it is urged by Mr. Umesh Sharma, learned counsel for the Petitioners that the impugned Award is contrary to the express terms of the contract and contrary to the substantive provisions of law and therefore is vitiated by “patent illegality”. It is submitted that the handing over of possession of a property can only be proved by way of a document and not by any other evidence. Further, in the rejoinder filed by VEMSL they had admitted that only constructive possession of the premises in question was handed over on 15th January 2009. Consequently, the finding of the learned Arbitrator to the contrary was without any basis. The ledger showed that maintenance and electricity charges were paid by VEMSL even after 15th January 2009. This belied its contention that it had handed over the possession of the premises in question on that date. The gate pass relied upon by VEMSL was issued only by a Security Guard and showed only the movement of stock and not the handing over of possession.

11. Countering the above submissions, Mr. Tarun Sharma, learned counsel appearing for VEMSL pointed out that the Petitioners deliberately refused to take possession of the premises in question in order to avoid refunding of the security deposit. VEMSL validly issued the termination notice three months in advance in terms of Clauses 24 and 25 of the lease deed. At no stage before the Civil Court or in reply to the claims or in their counter claims did the Petitioners disclose that they were ready with the demand drafts for the amount of the security deposit. Therefore, the said plea belatedly raised in these proceedings was not *bona fide*. Mr. Sharma pointed out that there was nothing to show that VEMSL had paid any maintenance or electricity charges after 15th January 2009. The entries

regarding such payment were in the ledger maintained by the mall management. He finally submitted that the scope of interference by this Court with the Award under Section 34 of the Act was limited and no grounds had been made out for such interference.

12. The above submissions have been considered. The key issue in the present case concerns the handing over of the possession of the premises in question by VEMSL to the Petitioners. It is correct that neither in the suit filed in the Civil Court nor in the reply to the claims of VEMSL before the learned Arbitrator or in their own counter claims before the learned Arbitrator did the Petitioners make any mention of their having kept ready three demand drafts for the security deposit amount on 15th January 2009 itself. For the first time in the present proceedings the Petitioners have enclosed photocopies of the said demand drafts. This justifies the interference drawn by the learned Arbitrator that the drafts dated 14th January 2009 were retained by the Petitioners in order to make VEMSL first furnish to the Petitioners a no due certificate. If the Petitioners harboured doubts that maintenance charges were owed to the mall management they could easily have made enquiries. The Petitioners' letters dated 4th, 17th and 27th February 2009 do not make any mention of the drafts supports the conclusion of the learned Arbitrator. As regards the payment of maintenance and electricity charges, it does appear that the ledger account in question was maintained by the mall management. There is nothing to show that the entries evidencing payment after 15th January 2009 were on account of payment made by VEMSL to the mall management. The gate pass is but one document that supports the plea of VMSL that it removed its belongings and vacated the premises in question on 15th January 2009. There is nothing to show that they used the premises

in question thereafter. Cumulatively considered in light of the depositions of the witnesses it cannot be said that the conclusion of the learned Arbitrator was erroneous or suffered from any 'patent' illegality.

13. The petition is accordingly dismissed with costs of Rs. 20,000/-, which will be paid by the Petitioners to the Respondent within a period of four weeks from today. The pending application is disposed of.

S. MURALIDHAR, J.

NOVEMBER 28, 2011

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