

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB. P. 122/2011 & I.A. No. 6891/2011

Reserved on: November 30, 2011

Decision on: December 21, 2011

M/S BARCO ELECTRONIC SYSTEMS PVT. LTD. Petitioner

Through: Mr. Sachin Puri with
Ms. Vaadam Bari, Ms. Namitha Mathur
and Ms. Monica Chugh, Advocates.

versus

MRS. KIRAN MALIK Respondent

Through: Mr. Jagjit Singh with
Ms. Neetu Chauhan, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

21.12.2011

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the parties.

The Petitioner's version of the facts

2. The Petitioner states that it is a private limited company and a 100% subsidiary of M/s Barco N.V., Belgium which was carrying on manufacturing activities from the premises at A-5, Sector-5, Noida (hereinafter 'premises in question'). On 11th September 2000 an agreement of lease was executed whereby the Respondent Mrs. Kiran Malik gave on lease to the Petitioner the premises in question, which is an industrial factory built on a plot measuring 1906 sq. m., and of which the Respondent is the absolute owner. It is stated that the covered area comprised of ground floor, second floor and basement of 100 sq. m. with 32 toilets and 2

pantries. The lease amount was Rs. 2,50,000/- for the first four months between 15th September 2000 to 15th January 2001, Rs. 3,75,000/- for the next four months, i.e., 15th January 2001 to 15th May 2001 and Rs. 5,00,000/- per month for the next ten months, i.e., from 15th May 2001 to 15th March 2002. The rent was to be increased by 6% from 15th March 2002 for the next one year up to 15th March 2003 and thereafter increased at a rate of 6% yearly over the previous prevailing rent. The lease agreement was for a total period of eight years up to 15th September 2008. The Petitioner was to pay security deposit of Rs. 6 lakh which was to be returned to the Petitioner on vacation of the premises after deduction by the Respondent of dues and damages, if any. It is stated that the Petitioner paid the security deposit of Rs. 6 lakh and a separate security deposit of Rs. 1,01,437/- was given towards the security deposit of the U.P. State Electricity Authority under the lease deed which was unregistered. The lease could be terminated by either party by giving at least six months' prior notice. Clause 9 of the lease deed stated that any dispute between the lessee and lessor would be referred to the arbitrator "Mr. Sushil Nayar S/o Y.P. Nayar R/o E-25, Sector-27, NOIDA whose award shall be final and binding on both the parties." The arbitration was to be governed by the Act.

3. On 6th February 2006 the Petitioner gave six months' written notice to the Respondent for termination of the lease expressing its intention to vacate the premises by 5th August 2006. According to the Petitioner, by mutual agreement of the parties the date of termination was extended up to January 2007 and the Petitioner continued to pay rental and other charges. On 19th January 2007, to avoid any controversy, the Petitioner issued another notice of termination of 15 days calling upon the Respondent to refund all the security deposit held by her and further asked her to take over the possession of the premises in question on 3rd February 2007, upon refunding the entire security deposit. According to the Petitioner it asked

the Respondent to inspect the premises in question in the meanwhile in case the Respondent required any repairs to be carried out by the Petitioner. However, the Respondent failed to do so.

The Respondent's version

4. The version of the Respondent however is that after the Petitioner's notice dated 6th February 2006 discussions took place between the parties and the Respondent requested the Petitioner to submit a no dues certificate ('NDC')/no objection certificate ('NOC') from all the departments concerned. The Respondent also requested the Petitioner to get the premises repaired before handing over possession. The Petitioner in its letter dated 7th April 2006 stated that there was no condition in the lease agreement providing for NDC/NOC and that the premises could be inspected. In her reply dated 15th April 2006 the Respondent *inter alia* stated that she had already got the premises inspected and that damages could only be assessed after the partition put up therein by the Petitioner was removed. The Revenue Department of Noida had raised a demand of Rs. 1 crore towards registration charges payable by the Petitioner in respect of the tenanted premises. A further letter was sent by the Respondent on 12th June 2006 calling upon the Petitioner to hand over the premises in good and original condition. A photocopy of a pay order of Rs. 60,00,000/- dated 12th May 2006 was enclosed stating that the said amount would be paid after the Respondent received the dues. Another letter dated 15th July 2006 was written by the Respondent to the Petitioner whereby the Petitioner was informed that they had to vacate the premises in August 2006 and that if they retained the premises beyond the said date they would have to pay a sum of Rs. 50,000/- per day in addition to the rent payable by the Petitioner to the Respondent. It was also stated that, if the Petitioner did not vacate the premises in question, the rent from August 2006 would be double the prevailing rent. According to the Respondent by a letter dated

7th August 2006 the Petitioner was informed that since it was not vacating the premises, it was liable to pay double the prevailing rent and a penalty in the sum of Rs. 50,000/- per day. It is stated by the Respondent that after receiving a letter dated 7th August 2006 the Petitioner paid the rent for the month of August 2006 which was accepted by the Respondent under protest.

5. According to the Respondent, the Petitioner wrote a letter on 7th September 2006 stating that it was not in a position to vacate the premises in a few months. At the same time it was demanding refund of the security deposit and denied its liability to provide NOC/NDC. The Respondent admitted to receiving the notice dated 19th January 2007 whereby the Petitioner stated that the tenancy would stand terminated within fifteen days. According to the Respondent the Petitioner thereafter removed the goods and vacated the premises in question. However, it is maintained that the Petitioner stopped paying rent from September 2006 till January 2007.

6. The Respondent states that the Petitioner vacated and the Respondent took vacant possession of the premises on 3rd February 2007 from the Petitioner. The Respondent states that the Petitioner sent a letter dated 12th March 2007 confirming the vacation of the premises in question on 3rd February 2007. However, the Petitioner states that the possession of the premises in question remained with the Petitioner till 6th December 2007 when the Respondent in order to avoid paying the security deposit, through her agents and representatives (including her husband and Mr. Sushil Nayar) forcibly took over the possession of the premises in question without refunding the security deposit.

7. The Petitioner states that by a letter dated 17th April 2008 it invoked the arbitration clause and called upon the Respondent to either clear the dues,

calculated as Rs.39,69,987 apart from the electricity deposit of Rs. 1,15,077 together with interest at 18% within a period of seven days, failing which the disputes would be referred to arbitration. The Petitioner nominated an Advocate as Arbitrator. This was reiterated by the Petitioner in a letter dated 7th May 2008 to the Respondent. The Petitioner stated that it has no faith in the named Arbitrator Mr. Sushil Nayar as he was the broker of the Respondent and therefore not a neutral person.

Submissions of the parties

8. It is mentioned in the petition that the Respondent has not taken any steps to appoint her Arbitrator although the Respondent has from 2008 onwards approached the Petitioner several times to settle the matter. It is mentioned that the Petitioner also took adjoining premises at A-4, Sector-5, Noida on lease from the Respondent's husband Mr. Adarsh Malik on similar terms. With a view to getting the disputes arising in respect of the said lease referred to arbitration, the Petitioner filed Arbitration Petition No. 225 of 2008 in this Court under Section 11 of the Act in July 2008. By an order dated 21st October 2009, this Court appointed Ms. Justice Usha Mehra (Retired) as Sole Arbitrator to adjudicate the said dispute. It is stated that the said proceedings are pending. The Petitioner states that the Respondent filed a suit for injunction in relation to the premises in question in the civil court at Noida which was, however, dismissed for non-prosecution. In the above circumstances, the present petition was filed on 18th April 2011 seeking the appointment of an Arbitrator.

9. There are two preliminary issues raised by the Respondent. The first is that no part of cause of action has arisen within the jurisdiction of this Court and, therefore, this Court has no jurisdiction to entertain the petition. Secondly, it is contended that the cause of action in relation to the dispute in respect of the return of the security deposit arose on 3rd February 2007

when possession of the premises was taken from the Petitioner. Therefore the limitation for raising a claim in that regard expired three years thereafter. The present arbitration petition was filed after the expiry of the said limitation period. With the claim sought to be referred to arbitration itself being time barred, there was no arbitrable dispute which could be referred for adjudication.

10. In addition, the Respondent also points out that, in response to the notice issued to it, in the suit filed by her in the civil court at Noida, the Petitioner appeared and filed a written statement. However, the Petitioner did not raise any objection as to the maintainability of the said suit by filing an application under Section 8 of the Act. Lastly it is submitted that, in any event, the Petitioner cannot seek the appointment of an Arbitrator other than the one named in the lease agreement. The fact that a different Arbitrator was appointed in relation to the dispute concerning the adjoining premises was not a sufficient justification for the appointment an Arbitrator other than the named one as regards the present dispute.

The issue concerning limitation

11. Counsel for the Petitioner relied on the decisions in ***Pandit Munshi Ram & Associates v. Delhi Development Authority*** 95 (2002) DLT 482 (DB), ***Kartar Singh v. Punjab State Electricity Board*** (2007) 147 PLR 589 and an order dated 13th September 2011 passed by this Court in Arbitration Petition No. 192 of 2011 (***M/s Satya Developers Pvt. Ltd. v. M/s Sunflower Durabuild Pvt. Ltd.***) to urge that the Petitioner having invoked the arbitration clause on 17th April 2008, the present petition was filed within three years from the said date. Referring to Section 43(2) read with Section 21 of the Act, it is contended that the claim cannot be said to be time barred since the arbitration would be deemed to have commenced “on the date on which a request for that dispute to be referred to arbitration is

received by the respondent.”

12. The scope of the proceedings under Section 11 of the Act as regards the issue of limitation has been explained by the Supreme Court in ***Shree Ram Mills Ltd. v. Utility Premises (p) Ltd. (2007) 4 SCC 509*** (SCC, p. 607) as under:

“...what the Chief Justice or his designate does is to put the arbitration proceedings in motion by appointing an arbitrator and it is *for that purpose* that the finding is given in respect of the existence of the arbitration clause, the territorial jurisdiction, live issue and the limitation. It cannot be disputed that unless there is a finding given on these issues, there would be no question of proceeding with the arbitration.”

13. Explaining that the question of limitation was “always a mixed question of law and fact”, the Supreme Court in ***Shree Ram Mills Ltd.*** further observed (SCC, p. 608):

“The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.”

14. In ***Shree Ram Mills Ltd.*** the Supreme Court reiterated the earlier decision in ***Hari Shankar Singhania v. Gaur Hari Singhania (2006) 4 SCC 658*** (SCC, p. 611) “that till such time as the settlement talks are going on directly or by way of correspondence no issue arises and with the result

the clock of limitation does not start ticking.” In ***Pandit Munshi Ram & Associates v. Delhi Development Authority*** after discussing the decisions of the Supreme Court in ***Union of India v. L.K. Ahuja AIR 1988 1172***, ***Union of India v. Momin Construction Company (1997) 9 SCC 97*** and ***Major I.S. Rekhi v. DDA (1998) 2 SCC 338***, it was held that the rejection by one party of the assertion of a claim by the other would be the starting point of limitation as far as the filing of the petition under Section 11 of the Act was concerned.

15. The case of the Respondent, as stated in para 22 of its reply is that “the dispute in respect of return of security amount arose on 3.02.2007 when the possession of the premises at Noida was taken from the Petitioner.” The Petitioner however maintains that it retained possession till 16th December 2007. This is therefore a disputed question of fact which can be conclusively established only after evidence is led by the parties. For the purposes of the present petition even if the starting point of limitation as far as the claim for return of security deposit is taken to be 3rd February 2007, the next relevant date is the date on which the Petitioner invoked the arbitration clause. The Petitioner’s assertion is that it invoked the arbitration clause on 17th April 2008 by sending a letter of that date by Speed Post with acknowledgment due and then resent the said notice on 7th May 2008. Receipt of both notices is denied by the Respondent. However, a photocopy of the said notice dated 17th April 2008 has been enclosed with the petition. A postal receipt in proof of despatch of the notice on 7th May 2008 has also been enclosed by the Petitioner. For the purposes of the present petition, the dispatch by registered speed post permits a presumption to be raised of delivery and is by itself sufficient to hold that the Petitioner invoked the arbitration clause either on 17th April 2008 or 7th May 2008 both within three years of 3rd February 2007. In terms of Section 43 (1), which states that the Limitation Act 1963 (which in turn means

Article 137 thereof) read with Section 43 (2) and Section 21 of the Act, the arbitral proceedings would commence “on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

16. The situation that emerges is as follows. As far as the present petition is concerned it has been filed within three years of the Petitioner invoking the arbitration clause by the notice dated 17th April 2008, re-sent on 7th May 2008. Therefore in terms of Section 43 (1) of the Act read with Article 137 of the Limitation Act 1963, the present petition is within time. As far as the question whether the claim for refund of the security deposit is time barred, it would be a mixed question of fact and law and it is not necessary for this Court at the present stage to finally decide the said question. The deemed commencement of arbitral proceedings on 17th April 2008 would be a relevant factor in determining whether the claim for refund of the security deposit can be said to be barred by limitation. This question is for the Arbitrator to decide on the basis of the evidence led by the parties. Consequently, this Court rejects the plea of the Respondent as to limitation.

The issue concerning territorial jurisdiction

17. As regards the territorial jurisdiction of this Court, it requires to be noticed that both parties are *ad idem* that the claim of the Petitioner is for refund of security deposit. Therefore even if the premises in question is located at Noida and the agreement of lease dated 11th September 2000 was executed there, the present claim of the Petitioner is not with reference to the premises itself. In contrast, the reliefs sought by the Respondent in Suit No. 999 of 2007 filed by her in the civil court at Noida was in relation to the premises. With the Petitioner having admittedly vacated the premises, its claim is nothing but one for recovery of money. Therefore the said claim would be outside the ambit of Section 16 CPC and would be covered by Section 20 CPC.

18. The decisions in *Inox AIR Products Ltd. v. Rath Ispat Ltd.* 2007 (3) R.A.J. 492 (Del) and *Harshad Chiman Lal Modi v. DLF Universal Ltd. JT 2005 (8) SC 561* are distinguishable on facts. In both cases, the reliefs sought were in relation to the immovable property involved in those cases. In the present case, the claim of the Petitioner is only as regards the refund of the security deposit. Although, the security deposit was given by the Petitioner to the Respondent in relation to the premises located in Noida the subject matter of the present claim is confined to the refund of the security deposit. If a suit were to be filed by the Petitioner for that purpose, then under Section 20 of the CPC it could be instituted in the Court within the local limits of which the defendant resides or is carrying on work. Admittedly, the Respondent resides at S-434, Greater Kailash-II, New Delhi which is within the jurisdiction of this Court. Consequently, the plea of the Respondent as regards the lack of territorial jurisdiction of this Court to entertain the present petition is rejected.

Appointment of an arbitrator other than the one named

19. Considering that the suit filed by the Respondent was in relation to regaining the possession of the premises, which in any event is with the Respondent, the fact that the Petitioner did not file an application under Section 8 of the Act in the said suit is of little consequence. It will not affect the right of the Petitioner to seek reference of the dispute relating to refund of security deposit to arbitration. As regards the named arbitrator, it is significant that Mr. Sushil Nayar was the named arbitrator even in the lease agreement relating to the adjoining premises which were taken on rent by the Petitioner from the Respondent's husband. The dispute arising from the said lease, was by consent of parties, referred to the adjudication of Ms. Justice Usha Mehra (retired) as sole Arbitrator. Apart from this, there is no specific denial that Mr. Sushil Nayar did in fact act as the broker of the Respondent. In the circumstances, there is merit in the contention of

the Petitioner that an arbitrator other than the named one should be appointed by the court.

20. This Court accordingly appoints Ms. Justice Usha Mehra, learned retired Judge of this Court, C-1/36, Safdarjung Development Area, New Delhi as Arbitrator to adjudicate the disputes between the parties. The fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules.

21. The petition and pending application are disposed of in the above terms. A copy of this judgment be delivered to the learned Arbitrator forthwith.

S. MURALIDHAR, J.

DECEMBER 21, 2011

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