

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 301/2010 & I.A. No. 7240/2010

HARSARANJIT SINGH KOCHHAR

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with
Mr. P.S Bindra, Advocates.

versus

M/S AMALGAMATED BEAN COFFEE

..... Respondent

Through: Mr. Trideep Pais with
Mr. Shivam Sharma, Advocates.

CORAM: JUSTICE S. MURALIDHAR

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| 1. | Whether Reporters of local papers may be allowed to see the order? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the order should be reported in Digest? | Yes |

ORDER
01.11.2011

1. This petition under Section 34 of the Arbitration and Conciliation Act 1996 ('Act') by Mr. Harsaranjit Singh Kochhar (hereafter 'Petitioner') is directed against an interim order dated 31st March 2010 passed by the learned sole Arbitrator in the arbitration proceedings between the Petitioner and the Respondent Amalgamated Bean Coffee Trading Company ('ABCTCL').

2. The Petitioner is the owner of Hotel Willow Banks on the Mall in Shimla and an adjoining Fiesta Food Court comprising 2600 sq. ft. open area and 1000 sq. ft. covered area. ABCTCL, which is engaged in the business of running a chain of restaurants under the name Café Coffee Day ('CCD') proposed to the Petitioner that it would operate a CCD outlet from the Petitioner's hotel premises. By a letter dated 29th February 2008, ABCTCL remitted a sum of Rs. 1,00,000/- by way of token advance. This was followed by a 'Term Sheet' signed by the parties on 3rd/6th March 2008. The area to be given to ABCTCL for running its CCD outlet was to comprise of 400 sq. ft. of covered area and 600 sq. ft. of open area within the 1000 sq. ft. of super built up

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area situated at the Fiesta Food Court. The agreement was to be for a period of nine years. There was a free fit-out period of 45 days or up to the commencement of operations of the CCD outlet whichever was earlier. Possession of the premises was to be given by the Petitioner to ABCTCL “at least 45 days prior to the targeted commencement date of operations.” The ‘Term Sheet’ was to be valid till 31st March 2008. It contemplated a commencement date for payment of ‘conducting fee’ after the completion of the fit-out period. The Petitioner was described as ‘Grantor’ and ABCTCL as ‘Conductor’. It was stated in the Term Sheet that the “the parties intend to enter into legally binding agreement which would reflect the above terms and conditions.”

3. Thereafter on 4th and 5th April 2008 the parties entered into six different agreements as follows:

- a) Conducting Agreement dated 4th April, 2008
- b) Water Charges Agreements dated 4th April, 2008
- c) CAM Agreement dated 4th April, 2008
- d) Maintenance Agreement dated 5th April, 2008
- e) Consultancy Services Agreement dated 5th April, 2008
- f) Supplemental Agreement dated 5th April, 2008.

4. The Conducting Agreement incorporated more or less all the terms and conditions as set out in the term sheet. However, a ‘lock-in period’ of twelve months was introduced in the Conducting Agreement. The relevant clauses of the Conducting Agreement read as under:

“1.5 The Conductor shall have the right to use the premises during the subsistence of this agreement as per the terms and conditions of this Agreement and that the Conductor shall be entitled to peaceful usage and quiet enjoyment of the Schedule Premises during the subsistence of this Agreement.

2. EFFECTIVE DATE AND TERM

2.1 The Grantor has agreed to give and the Conductor has agreed to take the Schedule Premises for a period of 9 years from the effective

date, of which the initial 12 months would be a lock-in period where the parties are not entitled to terminate the agreement.

2.2 This conducting Agreement shall become effective from the date of commencement of payment of Conducting fee by the Conductor, subject to completion of the initial 45 days conducting fee free fit-out period after handing over of the usage of the Schedule Premises by the Grantor to the Conductor, provided that the Grantor shall have completed his, obligations as set out in clause 7 hereunder; or upon commencement of operations by the Conductor at the Schedule Premises, whichever is earlier.

2.3 The parties may thereafter, agree to renew the Conducting agreement on such terms and conditions as shall be mutually acceptable to them.

4. CONDUCTING FEE:

4.1 In consideration, the Conductor shall pay a monthly conducting fee of Rs. 52,000/- (Rupees Fifty Two Thousand Only), inclusive of service tax, and an amount equivalent to 15% of the Net Revenues (Gross Revenues Less all /-applicable taxes, discounts, refunds and returns) earned in excess of Rs. 16,66,667/- per month earned from the business of the Conductor at the schedule premises, which shall be payable on an annualized basis. The conducting fee shall be payable on or before the 10th of every calendar month and is payable with effect from the effective date of this Agreement, after deduction of applicable taxes at source.

4.2 The Conductor shall compute the Net Revenues at the end of the year, and any extra amount payable if any, by the Conductor to the Grantor shall be paid thereafter.

4.3 The Conductor shall provide a certificate to the Grantor evidencing the deposit of the amount of taxes to the Appropriate Authority of the Income Tax department annually.

4.4 The parties agree that the minimum guaranteed amount shall be subject to an enhancement of 15% at the end of every 36-months/3 years on the last paid Conducting fees.

5. REFUNDABLE SECURITY DEPOSIT:

5.1 An amount of Rs. 12,50,000/- (Rupees Twelve Lakh Fifty Thousand Only), shall be paid at the time of signing of agreement as refundable interest free security deposit to the Grantor.

5.2 The Grantor acknowledges receipt of the said refundable interest free security deposit and undertakes to refund the same on termination of this Agreement.”

5. Clause 7 set out the obligations to the Grantor, i.e., the Petitioner and Clause 8 the obligations to the Conductor, i.e., ABCTCL. Clause 15 which provides for termination of the Conducting Agreement read as under:

“15. TERMINATION:

15.1 The Grantor may terminate this Conducting agreement by giving written notice of 30 days in the event that the Conductor fails to pay the monthly Conducting fee, herein reserved in respect of three consecutive months.

15.2 The Conductor may terminate this agreement by giving three months advance notice of termination in writing to the Grantor.

15.3 At the time of termination of this Agreement, the Conductor shall vacate the Schedule Premises and pay all sums outstanding, due and payable to the Grantor, if any; and the Grantor shall hand over the Demand Draft for the amount of the refundable interest free security deposit to the Conductor simultaneous to the Conductor vacating the premises.

15.4 In the event that the Grantor fails and neglects to hand over the Demand Draft for the amount of Security Deposit at the time of determination of this Conducting by efflux of time, or upon prior termination hereof, the Conductor shall not be liable to remove its belongings from the Schedule Premises, without liability for payment of Conducting fee or any other charges from the date the refundable interest free deposit becomes due till the date of realization of the deposit with interest @ 18% per annum from the due date till the date of payment. During this period the grantor will not operate from the said schedule premises.

15.5 Further, in the event that the Conductor fails to vacate the schedule premises upon determination of this Agreement or upon prior termination hereof, the Grantor will be at liberty to take the vacant possession of the Schedule Premises by removing the belongings of the Conductor and storing them in a safe place.”

6. Clause 20 provided for referring the dispute pending between the parties to arbitration under the Act.

7. On 8th April 2008 the Petitioner sent to the Respondent drawing of the premises in question indicating drain point water inlet, glazing, entrance etc. The kitchen/operating portion of the Fiesta Food Court was in the front of 400 sq. ft. covered area, chosen by ABCTCL was the 'schedule premises.' According to the Petitioner, he created new plumbing and drainage points and changed the existing plumbing work to create a separate water connection with a new water meter and installed three new water tanks to hold 3000 litres of water for the schedule premises in terms of Clauses 2.2, 3.2 and 7.1 of the Conducting Agreement. According to the Petitioner, the vacant schedule premises was made available to ABCTCL on 8th April 2008. However, only on 28th April 2008 did representatives of the ABCTCL come to the premises to take detailed measurements, photographs and appoint a local contractor to commence dismantling of existing flooring and the front rolling shutters. It was agreed that the official date of induction/handing over of usage would be 1st May 2008 instead of 28th April 2008. Thereafter, on 4th May 2008 the authorized officer of the ABCTCL along with its team prepared the site condition/availability note signed by both parties which confirmed that the Petitioner had completed his obligations in accordance with Clauses 2.2, 3.2 and 7 of the Conducting Agreement which was required to be done prior to the handing over of the usage of the schedule premises. On 5th May 2008 ABCTCL sent to the Petitioner a temporary Detail to be given to the contractor to commence work. ABCTCL noted in the email with which the Detail was attached that "the rent free period started from 1st May 08."

8. However, since the ABCTCL did not carry out any major renovation work other than dismantling of the existing flooring and the front rolling shutters in the schedule premises till 15th May 2008, the Petitioner telephonically requested the officer of ABCTCL to expedite the renovation and restoration of the damaged look of the schedule premises. On 24th May 2008 ABCTCL sent to the Petitioner an e-mail stating as under:

"As informed you earlier also, this is once again to request you that kindly refund the security deposit that we have given to you, because management has decided not to open CCD at your Hotel."

9. On 2nd June 2008 a further e-mail was sent by ABCTCL demanding refund of the security deposit “because management has decided not to open CCD in your hotel.” This was followed by a letter dated 14th June 2008 in which ABCTCL explained that “after execution of the Agreement, due to information received by us, we re-visited the premises, and found that your premises at Willow Banks is not a feasible or a suitable address for running of our café, and the same will not be a profitable venture, owing to its location in Shimla.” *Inter alia*, it was stated in the said letter by ABCTCL that the Conducting Agreement was to take effect only on the completion of 45 days of the free fit out period or upon the commencement of operations whichever was earlier and since neither of the two events had taken place, ABCTCL did not see any prejudice being caused to the Petitioner. It reiterated its demand for refund of the security deposit of Rs. 12,50,000/-.

10. On 28th June 2008 the Petitioner in his reply reminded ABCTCL that soon after the signing of the Agreement the Petitioner had closed down the food court and carried out modification with respect to claim, drainage, electricity and other activities. The intention of the parties in executing the agreements, the Petitioner pointed out, was “that the Guests in your outlet and my Food Court would purchase food from either of us and consume the same at any point in the entire ‘Fiesta Food Court’, the purpose being to attract more guests.” The Petitioner in his letter dated 28th June 2008 claimed that he was surprised to receive e-mail of 24th May 2008 from ABCTCL seeking refund of the security deposit. He termed the demand of ABCTCL as “illegal and unjust” and maintained that “there is no question of terminating the agreement as the Agreement provides that the same cannot be terminated for a period of clear one year (lock-in-period) and thereafter it can only be terminated. Therefore, you are estopped from terminating the agreement.” The Petitioner also refuted the contention of the ABCTCL that the Conducting Agreement had not come to existence. He urged that all the clauses of the agreement had to be read together and the agreement “came into existence on the date it was signed.” The Petitioner accordingly requested ABCTCL to reconsider its decision and follow up with the agreements in letter and spirit.

11. On 10th July 2008 ABCTCL refuted the Petitioner's contentions, reiterated its decision to terminate the Agreement and again requested for refund of the security deposit. On 22nd July 2008 the Petitioner claimed, *inter alia*, the amounts payable in accordance with the agreements including fees/charges for a period of at least 15 months (12 months of lock-in period and 3 months of notice of termination) and loss of business of the Fiesta Food Court, the cost of restoration of the scheduled premises to its original shape, damages, opportunity losses etc. This was refuted by a reply dated 6th August 2008 of ABCTCL. In a letter dated 24th December 2008 the Petitioner quantified the claims aggregating to Rs. 1,22,38,712/-. On 3rd February 2009 the Petitioner invoked the arbitration clause.

12. ABCTCL then filed a civil suit in the Court of the learned Additional District Judge (ADJ) at New Delhi against the Petitioner. ABCTCL, *inter alia*, contended that the suit was maintainable as such since the Conducting Agreement, containing the arbitration clause, had not come into operation. The Petitioner however filed an application under Section 8 of the Act in the said suit. The said application was allowed by the learned ADJ on 20th April 2009. As a result the learned Arbitrator came to be appointed to adjudicate the dispute between the parties.

13. A perusal of the impugned interim Award dated 31st March 2010 of the learned Arbitrator reveals that after completion of pleadings before the learned Arbitrator it was decided that the issue relating to whether the Conducting Agreement had commenced or not should be decided at the outset since it was a principal issue which crystallized the rights of the parties in relation to the claims and the counter claims made by the Petitioner and ABCTCL respectively. The learned Arbitrator in the impugned interim Award, *inter alia*, held as follows:

- (i) The termination obligations under Clause 15 of the Conducting Agreement have to be read along with Clause 2 and would be available to either party from the effective date and not the date of signing of the agreement.
- (ii) The fit out period of 45 days would commence after handing over of the usage of the premises, i.e., after 1st May 2008. The fit out period thus came to an end on 14th June 2008. The conducting fee became

payable from the next date, 15th June 2008, which therefore was the ‘effective date of the agreement.’

(iii) Since ABCTCL had requested for refund of the security deposit on 14th June 2008, i.e., prior to the date from which the conducting fee became payable, it could not be said that the Conducting Agreement had become effective on the date on which ABCTCL expressed its intention not to continue with the agreement. In other words “the rights and obligations relating to the payment of Conducting Fee under Clause 4 did not commence.”

(iv) Although under Clause 5.2 the security deposit was refundable only upon termination of the agreement it did not mean that “unless the agreement was terminated in terms of Clause 15, the refundable security deposit was not required to be or could not be refunded.”

(v) Since ABCTCL had communicated on 14th June 2008 that it did not want to proceed with the agreement prior to the effective date, “the agreement had not commenced.”

(vi) The Conducting Agreement had not commenced and, therefore, the Conducting Agreement had not become effective.

14. The learned Arbitrator concluded the interim Award dated 31st March 2010 by observing that a further date of hearing would have to be fixed for considering the effect of the interim Award on the claims and counter claims of the Petitioner and the Respondent respectively. This was reiterated by the learned Arbitrator in the orders dated 12th April 2010 and 30th April 2010. In the meanwhile, the Petitioner filed before the learned Arbitrator an application under Section 33(1)(a) of the Act seeking correction of the interim Award. On 18th May 2010 arguments were heard on the said application and orders were reserved. On 20th May 2010 the said application was dismissed by the learned Arbitrator. The case was then adjourned to 4th June 2010 for considering arguments on the question as to the extent that the claims and counter claims survived for adjudication.

15. The present petition was filed by the Petitioner on 22nd May 2010 and notice was directed to issue by this Court on 25th May 2010. The learned Arbitrator then

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adjourned the case to 9th July 2010. On 6th July 2010, this Court observed that since the parties were not willing settle their disputes on account of the difference between the claim made by the Petitioner and the amount offered by the Respondent, the case would have to be heard on merits. This Court requisitioned the record of the learned Arbitrator.

16. Mr. Sandeep Sethi, learned Senior counsel appearing for the Petitioner submitted that the learned Arbitrator erred in holding that the Conducting Agreement had not commenced when in fact the parties had acted upon the said Agreement. The Petitioner had discharged all his obligations during the free fit out period prior to the 'effective date'. The correspondence exchanged between the parties revealed that they acted on the agreement which obviously had commenced on the day it was signed. The intention of the parties was that for a lock-in period of twelve months after the effective date, the agreement could not be terminated by either party. It was submitted that the unilateral action of the ABCTCL in terminating the agreement just to the effective date was arbitrary and illegal. It is submitted that the conclusion of the learned Arbitrator that the Conducting Agreement had not commenced would foreclose any further decision on the claims and the counter claims since all the rights and the obligations flowed principally from the Conducting Agreement.

17. Countering the submissions, Mr. Trideep Pais, learned counsel for ABCTCL submitted that the view taken by the learned Arbitrator was a perfectly plausible one and did not call for interference. He referred the decision of the Supreme Court in *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63* and the decision of this Court dated 28th November 2005 in O.M.P. No. 106 of 2003 (*M/s Shree Vinayak Cement Clearing Agency v. M/s Cement Corporation of India Ltd.*). Mr. Pais submitted that the lock-in period of one year commenced only from the effective date of the Conducting Agreement, prior to which the said Agreement was terminated. Consequently, there was no question of there being any fetter on ABCTCL against termination in terms of Clause 2.1. Lastly, it is submitted that the learned Arbitrator was yet to decide on the effect of the impugned interim Award on the claims and counter claims and it would still be open to the parties to make their submissions in that regard before the learned Arbitrator.

18. In *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.* the Supreme Court summarized the legal position that emerged from the earlier decisions of the Court concerning the scope of interference by the Court with the Award of the Arbitrator as under:

“18. It is not necessary to multiply the references. Suffice it to say that the legal position that emerges from the decisions of this Court can be summarised thus:

(i) In a case where an arbitrator travels beyond the contract, the award would be without jurisdiction and would amount to legal misconduct and because of which the award would become amenable for being set aside by a Court.

(ii) An error relatable to interpretation of the contract by an arbitrator is an error within his jurisdiction and such error is not amenable to correction by Courts as such error is not an error on the face of the award.

(iii) If a specific question of law is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face.

(iv) An award contrary to substantive provision of law or against the terms of contract would be patently illegal.

(v) Where the parties have deliberately specified the amount of compensation in express terms, the party who has suffered by such breach can only claim the sum specified in the contract and not in excess thereof. In other words, no award of compensation in case of breach of contract, if named or specified in the contract, could be awarded in excess thereof.

(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.”

19. Although Mr. Pais, learned counsel for the Respondent contended that Clause (vi) of para 18 of the above decision would stand attracted in the present case, Mr. Sethi, learned Senior counsel for the Petitioner, drew attention to Clause (iv) of para 18

which according to him was attracted. For the reasons discussed below, this Court is inclined to agree with the submission of the learned Senior counsel for the Petitioner.

20. The Conducting Agreement dated 4th April 2008 set outs the rights and obligations of the parties. It envisages the Petitioner having to take a series of steps even prior to the effective date defined in Clause 2.2. The effective date signifies the date from which period of nine years, constituting the tenure of the Conducting Agreement, was to commence. It is also the date from which the conducting fee became payable. The effective date was to be at the end of the free fit out period of 45 days. The free fit-out period of 45 days was to commence “after the handing over of the usage of the Schedule Premises by the Grantor to the Conductor, provided that the Grantor shall have completed his, obligations as set out in clause 7 hereunder; or upon commencement of operations by the Conductor at the Schedule Premises, whichever is earlier.” An analysis of Clause 2.2, read in the context of the entire Agreement reveals that:

- (i) The date of commencement of the Conducting Agreement is not the same as the ‘effective date’.
- (ii) The ‘effective date’ would have to be preceded by the following steps:
 - (a) The Grantor, i.e., the Petitioner should have completed his different obligations as set out in Clause 7. In other words, the Petitioner should have provided certain utilities and amenities in the scheduled premises “before putting the Conductor into usage of the Schedule Premises.”
 - (b) The Conductor, i.e. ABCTCL, would be handed over the usage of the schedule premises only after the Petitioner, i.e., the Grantor completed his obligations in terms of Clause 7.1.
 - (c) After the Petitioner completed his obligations, ABCTCL would have a free fit out period of 45 days thereafter within which it will make the CCD outlet operational in the schedule premises. In the present

case since the date of hand over of usage of the premises was taken as 1st May 2008, the 45 day fit out period commenced on that date.

(iii) The effective date was to be either on the expiry of 45 days after the date of handing over of the usage of the schedule premises, i.e., 45 days after 1st May 2008, or the date of actual commencement of operations of the CCD outlet whichever was earlier. In the present case the operations of the CCD outlet did not commence prior to 15th June 2008, the effective date for the purposes of clause 2.2 of the Conducting Agreement. Prior thereto the agreement was terminated by ABCTCL. Till then the Conducting Agreement which had been acted upon by the parties, was subsisting.

21. In interpreting clauses of a contract the intention of the parties as reflected in the contract itself and in contemporaneous documents in the form of correspondence between them is relevant. The mails exchanged by the parties around the time of entering into the agreement and thereafter reveals that they took steps consistent with their respective obligations under the Conducting Agreement soon after executing it on 4th April 2008. As noted hereinbefore, the parties exchanged the drawings and Detail of the schedule premises. A note on the site condition/availability dated 4th May 2008 was signed by both parties. The understanding of ABCTCL as expressed in its e-mail dated 5th May 2008 addressed to the Petitioner was that “the rent free period started from 1st May 2008.” There can be no doubt therefore that the parties understood the Conducting Agreement as having commenced on the date it was signed.

22. The learned Arbitrator has in the impugned interim award conflated the date of commencement of the Conducting Agreement with the effective date under Clause 2.2. As already noticed, the effective date was relevant for the purpose of computing the nine year period and for the payment of the conducting fee. This Court is unable to concur with the finding of the learned Arbitrator that the Conducting Agreement had not commenced because the Conducting Agreement had not become effective.

23. Clause 15 sets out the circumstances under which the Conducting Agreement could be terminated. That clause does not envisage termination being brought about by either party during the fit out period. It would appear at first blush that the Petitioner is not liable to refund the security deposit since the termination was not in terms of Clause 15 of the Conducting Agreement. However, on this aspect, this Court is inclined to accept the construction placed on the said clause by the learned Arbitrator. The wording of Clause 15 makes it impossible for either party to comply with its requirements when they terminate the agreement during the fit out period. The only fair manner of dealing with the consequence of such termination is to hold that it would not be open to the Petitioner to contend that he is not liable to refund the security deposit to ABCTCL only because the termination as contemplated in Clause 15 did not take place.

24. For the aforementioned reasons, this Court set asides the impugned Award dated 31st March 2010 of the learned Arbitrator to the extent he holds that the Conducting Agreement has not yet commenced. However, this Court does not consider it necessary to interfere with the finding of the learned Arbitrator in the impugned Award dated 31st March 2010 that the Respondent had, prior to the effective date, terminated the Conducting Agreement. This Court concurs with the learned Arbitrator that the claim of ABCTCL for refund of the security deposit cannot be defeated only because the termination was not in terms of Clause 15 thereof. Further this Court does not express any view on the contention of Mr.Sethi that as a result of the illegal and unilateral termination of the Conducting Agreement by the Respondent, the Petitioner would be entitled to recover losses and damages for the entire lock-in period as well as the three months' notice period. It will be for the learned Arbitrator to decide the said plea as well.

25. The arbitral proceedings will recommence before the learned Arbitrator who determine the claims and counter claims of the parties in light of the present order. He will also decide the incidental issues of interest and costs. The record of the learned Arbitrator be returned forthwith with certified copy of this order. The matter will be placed before the learned Arbitrator for directions on 1st December 2011 at 4.30 pm. If

for some reason the said date is not convenient to the learned Arbitrator he will inform the parties accordingly and fix a date as soon as is practicable thereafter. The learned Arbitrator will inform the parties of his fee for the hearings.

26. The petition and pending application are disposed of in the above terms. Order dasti.

S. MURALIDHAR, J.

NOVEMBER 01, 2011
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