

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

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Judgment delivered on: 13.01.2012

**OMP No.310/2010**

S.K. Pandey

.....Petitioner

Through: Mr Sunil Goel, Adv.

Versus

MCD & Ors.

.....Respondents

Through: Ms. Mini Pushkarna, Adv.

**CORAM:-**

**HON'BLE MR JUSTICE MANMOHAN SINGH**

**MANMOHAN SINGH, J.**

1. The above mentioned matter pertains to Section 34 of the Arbitration & Conciliation Act 1996. The petitioner Mr. S.K. Pandey was allotted a parking space by the one of Respondents, MCD, at Arya Samaj Road, Karol Bagh. The project was under the name of Remunerative Project Cell. The petitioner was to take possession of the said parking space w.e.f 31.8.2001 for 1 (one) year for a monthly remuneration of Rs.3,51,100/- per month.

2. The petitioner deposited Rs.14, 04,400/- towards security amount. Respondent on 31.08.2001 handed over possession to the petitioner. As per the case of the petitioner, soon after taking

possession the petitioner started to face difficulty in smooth running of the parking site, as there were hindrances from the fruit sellers, roadside vendors and other occupants. The petitioner submits that a particular stretch which has been allotted to him cannot be used by him smoothly because of such encroachments. The petitioner approached concerned authorities for appropriate steps and also sent two letters to Karol Bagh Police Station dated 05.10.2001 and 09.10.2001 stating that he could not use about 60% of the total area of the parking space allotted to him and sought help. The respondent vide their letter dated 26.12.2001 directed the petitioner to clear the outstanding amount within 7 days failing which action would be initiated against the claimant/petitioner.

4. The petitioner through his letter dated 03.01.2002 sought the reference to arbitration as he was not able to use the parking space fully.

5. The respondent issued a show cause notice to the petitioner on 04.02.2002 who replied the same by letter dated 08.02.2002 who did not give his claims and filed a suit before this Court bearing Suit No. 105/2002 dated 08.05.2002. The said suit was disposed of and by

order an independent arbitrator was appointed. The claims raised by both the parties shall be dealt with in detail.

### **CLAIMS RAISED BY PETITIONER**

Claim 1 : Rs, 18,92,429/- per month w.e.f. 1.9.2002 date of taking possession of parking site, towards refund of license fee paid by petitioner on account of being able to use only 51% area instead of 100% area upto April 2002 for the time being.

Claim 2 : Interest @ 24% p.a. on claim 1.

Claim 3 : Rs. 4.40 lakhs as loss of profit upto April 30, 2002. For unable to utilize 49% area of the parking site for commercial purpose of parking vehicles.

Claim 4 : Interest @ 24% p.a. on Claim 3.

Claim 5 : Refund of security deposit amount of Rs. 10,53,300/-.

Claim 6: Rs. 75,000/- towards cost of legal and arbitration proceedings.

By order dated 10.05.2002, the respondent was restrained from cancelling the contract. The petitioner deposited Rs. 5 lac with respondent.

### **REPLY TO THE CLAIMS RAISED BY RESPONDENTS**

Claim 1: It is not maintainable for want of statutory notice U/s 477 and 478 of DMC Act, 1957.

**Section 447- Liability of the occupier to pay in default of owner**

- (1) *If any notice, order or requisition has been issued to any person on respect of property of which he is the owner, the authority or officer at whose instance such notice, order or requisition has been issued, may require the occupier of such property or nay part thereof to pay him, instead of the owner, any rent payable by him in respect of such property, as it falls due up to the amount recoverable from the owner under section 446.*

*Provided that if the occupier refuses to discloses the correct amount of the rent payable by him or the name or address of the person to whom it is payable, the authority or officer may recover from the occupier the whole amount recoverable under Section 446 as an arrear of tax under this Act.*

- (2) *Any amount recovered from an occupier instead of from an owner under sub-section (1), shall in the absence of any contract between the owner and the occupier to the contrary, be deemed to have been paid to the owner.*

**Section 448 - Execution of work by occupier in default of owner and deduction of expenses from rent**

*Whenever the owner of any land or building fails to execute any work which he is required to execute under this Act or any bye-law made thereunder, the occupier, if any, of such land or building may, with the approval of the Commissioner, execute the said work and he shall, subject to any contract between the owner and occupier to the contrary, be entitled to recover from the owner the reasonable expenses incurred by him in the execution of the work and may deduct the amount thereof from the rent payable by him to the owner.*

Claim 2 : The respondents claim that it is barred by time and against the contractual provisions governing the contract.

Claim 3 : Respondents states beyond ambit of agreement.

Claim 4 : Against provision of the contract ask for compensation or damages for the alleged delay and defaults. There is no provision to claim damage/ remission in monthly license fee.

Claim 5 : As claimed by respondent, the claimant/petitioner has no locus standi to ask for compensation/damages.

Claim 6 : Claimant's / Petitioner's plaint is liable is liable to be rejected for want of cause of action under Order 7 Rule 11 of the Code of Civil Procedure Code, 1908.

Claim 7 : Claimant liable to pay an amount of Rs.1,12,11,056/- with interest @ 24% p.a. till realization of the said amount.

Claim 8 : No amount was payable under clause 6 (a) and clause 6 (b) of the terms and conditions.

6. **SUBMISSIONS OF THE RESPONDENTS ON MERITS**

- i. There was no encroachment on the parking site.
- ii. Respondents handed over full and vacant possession of the parking site. It was purely a commercial transaction. The respondents claim no responsibility for any loss of the claimant/petitioner.
- iii. In Suit No.105/2005 the petitioner pleaded that he was able to utilize 60% of the total area of the site and now the petitioner claimed that he could not use 51% of the area.
- iv. The petitioner continued to run the site upto 16.10.2003 and deposited a total license fee of Rs.33,46,522/-

petitioner was given suit premises for nine and a half months approximately. But the petitioner operated for 25 months and 15 days. Hence petitioner liable to pay 17 months to the respondent @ Rs.3,51,100/-. As per clause 11 of the terms and conditions, petitioner to pay respondent @ double monthly license fee for the period of the unauthorized occupation. Therefore, petitioner liable to pay Rs. 56,05,528 x 2= Rs.1,12,11,056/- with the interest @24% till the realization of the said amount.

- v. As per clause 14 of the terms and conditions claimant had to charge parking fee from the owners of shops/offices located in front of site.
- vi. Security amount could not be adjusted against the outstanding dues. It was clearly mentioned in the contract that if the petitioner fails to pay the monthly rental 10<sup>th</sup> day of the succeeding month. But the term of the contract was already over hence the security/earnest money forfeited and hence license to pay damages.
- vii. Respondent claim Rs.2,00,000/- as cost of arbitration and other legal proceedings.

7. **OBSERVATIONS AND FINDING OF THE ARBITRATOR IN HIS IMPUNGED AWARD**

- i. Firstly the question as to what extent was the claimant/petitioner being able to use the parking site was raised. The same was answered by the Sole Presiding Arbitrator. The Arbitrator held vide the exhibited documents i.e. Exhibit CW 1/17 (letter dated 6.2.2002), Exhibit CW 1/18 (letter dated 8.2.2002) and also MCD's inspection report dated 16.5.2002. However it came to the

conclusion of the Arbitrator that claimant was not being able to utilize or exploit 40% of the area of the parking site. Hence claimant/petitioner would be entitled to reduction/ adjustment of 40% in the monthly license fee.

- ii. The contract period of the parking site on 31.08.2002. But claimant/petitioner continued to run and operate the parking site till 16.10.2003
- iii. The contract ended on 31.08.2002 then it can be said that after 01.09.2002 the claimant was at the site at claimant/petitioner's risk. Hence claimant/petitioner is not entitled to any reduction/adjustment in the license fee for the period from 1.9.2002 to 16.10.2003. Claimant has to pay full license fee @ Rs.3,51,100/- per month.
- iv. The respondent counter claim of Rs.1,12,11,056/- and claimant paid only Rs.33,46,522/- as nine and a half months license fee. But however it is claimed that claimant/petitioner ran parking site for twenty five and a half months. Therefore sixteen months an amount of Rs.56,05,528/- had been claimed by respondent as due by the claimant.
- v. The respondent has claimed double amount of Rs.56,05,528/-. After reading of Cl.11 of the Agreement, the Arbitrator came to conclusion that Respondent have not got any evidence.
- vi. The Arbitrator then goes on to discuss two types of damages under the Contract Act. After discussion the Arbitrator came to the conclusion that respondent did not claim license fee double the rate

and demanded only Rs.3,51,100/- p.m. for the period March 2002 till October 15, 2003.

- vii. Hence by absence of any evidence of the actual loss suffered by respondent, the Arbitrator thought it best to levy reasonable damages. The reasons given are hereunder :
  - a. No evidence by Respondent given
  - b. Arbitration Petition No.105/2002 pending and respondent made no effort to expedite the hearing and in appointing an arbitrator.
- viii. Hence Rs.3,51,100/- p.m was considered to be reasonable compensation from 01.09.2002 till 16.10.2003.
- ix. Claim No. B and Claim C is the claim for interest @24% p.a. Claimant not entitled to interest on the amount due to claimant in accordance of 40% adjustment/ reduction as the same has been factored in the net amount payable by the petitioner.
- x. Claim No. C relates to Rs.10,53,300/- on security amount deposited by claimant.
- xi. Counter claim No.1 is for Rs.1,12,11,056/-. This is for monthly license fee for the period of March 2002 to October 15, 2003 at double rate @ 9% p.a.
- xii. Finally an amount of Rs.26,57,238/- was fixed which was to be paid by the claimant/petitioner to the Respondent. On this award dated passed by the Arbitrator, the claimant/petitioner moved an application under section 34 of the Arbitration and

Conciliation Act, 1996 to seek interference of this Court.

8. The petitioner has now by filing the objections under Section 34 of the Arbitration and Conciliation Act, 1996 has challenged the Arbitral Award dated 01.02.2010 read with corrigendum dated 04.02.2010 passed by the sole proprietor.

After having gone through the objections as well as Award, it is to be considered as to whether the same are liable to be set aside or not in view of settled law on the issue involved.

9. In the case of **Godrej Agrovat Limited Vs. M/s Surya Soaps & Chemicals** : 2010 (4) R.A.J. 446 (Del) the court held as under :

*“7. The scope of interference by a court hearing objections under Section 34 is well settled. An Award can only be interfered with if the same is illegal against the law of the land or against the contractual provisions or is so perverse that it shocks the judicial conscience. Only in such limited cases, can an Award be interfered with. A Court hearing objections under Section 34 does not sit as an appellate court to re-appraise the evidence and further, this Court will not interfere with the view taken by an Arbitrator merely because another view is possible than the view taken by the Arbitrator. Once the view taken by the Arbitrator is one of the plausible views then this Court would not set aside the Award merely because this Court is of another view. Keeping in view the aforesaid law as applicable for hearing of the objections,*

*I have considered the arguments of the counsel for the petitioner.*

8. *Before I consider the arguments of the counsel for the petitioner, I must state that the Arbitrator in his detailed Award, which runs into as many as 87 pages, has very thoroughly, exhaustively and extensively considered all issues, all arguments, documentary evidence, affidavits by way of evidence, cross-examinations etc. to arrive at the findings on each issue. Each issue has been taken up one by one and after discussing the entire pleadings and evidence, as also the arguments of the parties, such issue has thereafter been decided. The Arbitrator has also while deciding the principal contentions, given his conclusions in various sub-paras at the end of the conclusions by serially numbered paragraphs, and which are supported by the relevant reasons. In sum and substance, the Award is a detailed Award which has given detailed reasonings by appraising the evidence and the arguments before arriving at the conclusions.”*

It was also held in **S.R.P. Industries Ltd Vs. Gea Process**

**Engg. Ltd : 2009 (109) DRJ 186 (DB)** in relevant paragraph 8 of the judgment which is stated hereunder :

*“8. In Hindustan Iron Co. v. K.Shashikant & Co, AIR1987SC81 the Court held that the award of the Arbitrator ought not to be set aside of the reason that, in the opinion of the Court, the Arbitrator reached wrong conclusions or failed to appreciate the facts. That this was a well settled proposition of law was reiterated in the decision of the Apex Court in Coimbatore District Podu Thozillar Sangam v. Balasubramania Foundary: [1987]3SCR852 . It was opined that it is only an error of law and not a mistake of fact, committed by the*

arbitrator, which is justiciable in the application/objection before the Court. If there is no legal proposition either in the award or in any document annexed with the award which is erroneous and the alleged mistakes or alleged errors, are only mistakes of fact and if the award is made fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the award is not amenable to corrections of the Court. Similar views were again expressed in *Indian Oil Corporation Ltd. v. Indian Carbon Ltd.* [1988]3SCR426 ; *Jawahar Lal Wadhwa v. Haripada Chakroberty* AIR1989SC606 ; *Puri Construction Pvt. Ltd. v. Union of Indi* AIR1989SC777 ; *Sudarsan Trading Co. v. Government of Kerala* (1989) 2 SCC 30; *Food Corporation of India v. Joginderpal Mohinderpa* AIR1989SC1263 where even a plausible view taken by the Arbitrator was held not to be open to Court interference. In *Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar* : [1988]1SCR180 the Court held that if the reasons appear per se to be not unreasonable and irrational the Court ought not to reappreciate the evidence. In *Hind Builders v. Union of India* [1990]2SCR638 the Court cautioned that where two views were possible it could not be predicated that there was an error apparent on the face of the award. In *Bijendra Nath Srivastava v. Mayank Srivastava* AIR1994SC2562 the view was expressed that the reasonableness of reasons given by the arbitrator were not open to challenge and that the proper approach would be for the Court to support the award. Similarly, in *Hindustan Construction Co. Ltd. v. Governor of Orissa* [1995]2SCR441 it was repeated that the Court cannot reappreciate the material on the record. In *Trustees of the Port of Madras v. Engineering Constructions Corporation Ltd* AIR1995SC2423 the decision of a Division Bench of the High Court of Madras, which reversed the Award on a question of fact and not a question of law, was set aside by the Supreme

*Court. After considering its previous decisions, the Apex Court in B.V. Radha Krishna v. Sponge Iron India Ltd. [1997]2SCR707 again held that the Court could not substitute its own view in place of that of the Arbitrator.”*

10. In another notable judgment of this Court in the case of

**Mahanagar Telephone Nigam Ltd Vs. Haryana Telecom Limited,**

**2010 IV AD (Delhi) 443** held in para 7, which is stated hereunder :

*“7. The scope of hearing of objections under Section 34 is now well settled. This court while hearing objections does not sit as an Appellate Court against the Award. If two views are possible and the Arbitrator has taken one plausible view, this Court will not interfere with the Award merely because another view is equally acceptable and which is sought to be canvassed by the objector. An Award is set aside only if it is illegal i.e. beyond the law of land, or violative of the contractual provisions or that its findings are so perverse that it shocks the judicial conscience...”*

11. Admittedly in the present case, the respondent gave parking site to petitioner on “As is where is basis” and the MCD is not responsible for any decline in the potential of the customers and other problems. The offer letter dated 10.08.2001 and the terms and conditions of the tender document clearly stipulated that any claim for remission on the basis of harm to business interest for any reason shall be liable to be rejected and not entertained. The petitioner contractor was required to inspect the parking site at the time of submitting the

tenders and as before offering bid for the same, so the petitioner must have inspected site before that.

12. As per agreement the MCD was not liable to entertain any claim for remission on the basis of harm to business interest on any conditions and the license was not entitled to make any claim/remission on that account.

13. It was the responsibility of the Petitioner contractor not to allow unauthorized encroachments and maintenance of the parking site during the currency of the contract as provided therein. The contract agreement also mandated that the general upkeep of the parking site was also the responsibility of the contractor.

14. The parking site was handed over to the contractor free from all encumbrances. The contractor had every opportunity to get the clarification regarding the parking site from the department in order to satisfy himself before offering bid for the same. Thus the argument of the petitioner that there were obstructions and hindrances in running the parking site and that he could only 60% of the area allotted to him is without any substance as said dispute raised by the petitioner at the late stage. It is admitted that the petitioner had completed one year of

contract w.e.f. 31.08.2001 to 31.08.2002. Thereafter the contractor continued in possession of the site for further period under stay order of this Court in AA No. 105/2002. The contractor continued to run the site upto 16.10.2003 i.e. for a period of 25 months and 15 days under stay order from this Court. Had the running of the parking site not been remunerative or there were obstructions as alleged by the petitioner he would not have taken the parking site for further period under stay orders. The document showing handing over the vacant possession of site to the Petitioner is placed on record.

15. The objections now raised by the petitioner are not tenable as the claims by the petitioner are not within the ambit of the terms of the conditions of the agreement. Not a single objections raised for claims falls within the range of the agreement and the same are belied by the material documents placed on record which show that entire vacant possession of the parking site was handed over to the petitioner.

16. The parking site in question is commercial site and the petitioner accepted the terms and conditions of the letter of offer. The terms and conditions of the contract agreement stipulate that the

parking site has been given an “As is where is basis”. Thus, no dispute can be raised by the petitioner with regard to any loss or damages as the other was accepted by the petitioner with open eyes.

17. The petitioner occupied the parking site for 25 months and 15 days. But only deposited total license fee of only Rs. 33,46,522/- which is the license fee for approximately 9 ½ months. Thus as per award, petitioner is to pay further license fee for 17 months to the respondent MCD of Rs.3,51,100/-. The said amount has still not been paid to the MCD despite award by Ld. Arbitrator that MCD was entitled to compensation of Rs.3,51,100/- per month for the period from 01.09.2002 to 16.10.2003.

18. The petitioner has not been able to point out any illegality or error in the award passed by the arbitrator so in view of above said reasons, the objections filed by the petitioners are not sustainable and the same are dismissed.

19. No costs.

**MANMOHAN SINGH, J.**

**JANUARY 13, 2012**