

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Judgment Reserved on : December 02, 2014*
Judgment Delivered on : December 09, 2014
+ **FAO (OS) 262/2013**

ADIDAS INDIA MARKETING PVT. LTD. Appellant
Represented by: Mr.Arvind Nigam, Sr.Advocate
instructed by Mr.Pramod K.Singh
and Mr.Vijay Srivastava,
Advocates

versus

HICARE INDIA PROPERTIES PVT. LTD. Respondent
Represented by: Mr.Arun Kathpalia, Advocate with
Mr.M.Shoeb Alam, Mr.Santosh
Kumar, Mr.Anupam Pandey and
Mr.Shikhar Garg, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS.JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Award dated December 10, 2010 passed by the learned sole arbitrator against the appellant and in favour of the respondent was challenged by the appellant by way of objections under Section 34 of the Arbitration and Conciliation Act, 1996 before the learned Single Judge of this Court. The challenge partly succeeded because of a concession given by the respondent. The concession finds a reflection in the last paragraph of the impugned order dated February 27, 2013 which reads as under:-

“The objections are dismissed except as agreed by the respondent the amount awarded towards rent/damages for use and occupation from October, 2008 to March, 2009 (six months), which comes to ₹3,61,600/- multiplied by 6 = ₹21,69,600/- minus the amount of ₹4,84,990/- paid = ₹16,84,610/- is set aside and further the amount paid so far by the petitioner i.e. ₹4,84,990/- towards the rent/damages

and ₹7,23,200/- towards two months' security deposit adjusted against the award of ₹86,78,400/- (amount of 24 months' rent for lock in period for damages) under clause is set aside."

2. To understand the effect of the concession we note that as per the award the learned arbitrator has awarded the respondent a sum of ₹1,27,35,612/- as under:-

"₹86,78,400/- (24 months' rent) under clause 48 of the agreement.

Balance rent from October, 2008 to March, 2009 = ₹16,84,610/-.

Total ₹1,03,63,010/-

Interest @ 12% per annum on ₹1,03,63,010/- from April 31, 2009 till date of award = ₹20,72,602/-."

3. The factual backdrop of the dispute between the parties commences when an agreement to lease Ex.C-2 was executed on August 02, 2007 between Uppal Housing Ltd. and the appellant, referring to Uppal Housing as the intending lessor and the respondent as the intending lessee. The recitals to Ex.C-2 record that the intending lessor was in the process of developing a shopping mall and multiplex on the land bearing Municipal No.177/D, Industrial Area, Phase-I, Chandigarh and the intending lessee was desirous of taking on lease a commercial space having approximate super area 1808 sq.ft. (covered area 1130 sq.ft.) on the ground floor on lease basis for an initial term of three years. The recitals further record that the lease commencement date would be when the intending lessor intimates to the intending lessee that possession of the commercial space was being offered and that possession would be delivered when a registered lease deed would be executed for which

stamp duty and registration charges shall be borne by the intending lessee. The recitals further record that within 30 days of the possession being offered the intending lessee would take possession of the commercial space. The lease commencement date i.e. the date when possession of the commercial space was offered is referred to in the recitals as the '*Effective Date*'. The recitals further record that notwithstanding the agreement between the parties that the lease shall commence from the effective date, 75 days reckoned from the effective date would be treated as rent free and this period would be treated as '*fit out period*'. The agreement Ex.C-2 records that the intending lessee shall pay to the intending lessor rent @ ₹200/- per sq.ft. of the super area i.e. ₹3,61,600/- for a period of three years and thereafter the rent shall be increased by 15% every three years; the lease to be extended after three years at the option of the intending lessee, to be communicated at least three months prior to the expiry of the lease. Thus, a further recital was recorded that as regards the intending lessor it would be obliged to grant a lease for three terms of three years each, but as regards the lessee, the obligation was to continue as a lessee for a period of two years from the effective date.

4. Under the agreement Ex.C-2 it was intended that three months rent towards interest free security deposit i.e. ₹10,84,800/- would be paid by the intending lessee to the intending lessor which was to be adjusted if apart from normal wear and tear the commercial space let out was found damaged. It was agreed that possession would be handed over before August 31, 2007.

5. Parties are not at variance that towards interest free security deposit, as against ₹10,84,800/-, only ₹7,23,200/- i.e. two months agreed rent was paid by the intending lessee to the intending lessor.

6. The further admitted facts between the parties are that the intending lessor offered possession of the commercial space to the intending lessee on May 20, 2008 and possession was taken over on July 07, 2008.

7. The respondent purchased under a registered sale deed Ex.C-3 the commercial space which was the subject matter of the agreement Ex.C-2 from the intending lessor and thus on October 22, 2008 change of ownership was conveyed to the intending lessee that the liability to pay rent henceforth of the intending lessee would be towards the respondent. It was followed by an e-mail dated November 11, 2008 written by the intending lessor i.e. Uppal Housing Ltd. to the appellant regarding transfer of the right in favour of the respondent to have the lease deed executed.

8. On December 15, 2008 the appellant addressed a letter Ex.C-11 to the respondent as under:-

“December 15th, 2008

*Dear Mr.Satnam S.Nanuwa,
Hicare India Properties Pvt. Ltd.
9-Rukhmini Building,
A-5, Dilshad Colony,
New Delhi – 110095*

This has reference to the adidas exclusive shop at Chandigarh which we/our partner have taken on lease at a monthly rent of ₹3,61,600/-.

The Indian economy is currently undergoing a slow down which has resulted in a huge impact on the business all around. Retailers across the country are either closing down or not expanding their business. Our business has also been impacted by the negative sentiment which is causing losses to our franchisees and to us. The key element of these losses is the high cost of rentals.

In the spirit of partnership, we would urge you to partly reduce the burden on our business by being flexible on the rental being charged to us (rentals have also crashed by 40-50% across the country as you would be well aware). In this regard we propose that we move to a revenue sharing model wherein we offer you @ 10% on our net sales per month from January 2009 onwards as we have already got the rent waiver from Uppal's Housing till November, 2008 and we would request you to please extend the rent waiver till December 2008. This is required to help us sustain our business and this will be mutually beneficial in time to come for both you as the owner of the property and us as a brand conducting business in your premises through our Franchisee.

We are keen to close this discussion immediately so please contact our Regional Manager Mr.Rajeev Chettri at 9910899189 immediately on receipt of this notice.

Looking forward to a long and mutually beneficial association.

*Yours sincerely
Sd/
Sundeep Chugh
National Sales Manager
Adidas India
Gurgaon, Haryana, India – 122001”*

9. It is apparent that the appellant considered itself to be a lessee with liability to pay rent @ ₹3,61,600/- per month. It requested that rent should be waived till December, 2008 and from January, 2009 the parties should move in the direction of a revenue sharing. It is further apparent that the appellant recognized the respondent to be the owner of the premises and entitled to the lease rent.

10. Appellant continued to be in possession of the commercial space agreed to be leased to it under Ex.C-2, but did not pay rent. On March

06, 2009, vide Ex.C-15 the appellant terminated the relationship and we simply note that the communication was addressed to the respondent. Treating itself to be a tenant under an unregistered lease (and though not expressly stated in Ex.C-15, but the underlying signature tune being that the appellant would be deemed to be a tenant on month to month basis), referring to Section 106 of the Transfer of Property Act, the lease was determined intimating that possession would be handed over on March 23, 2009. Referring to interest free security deposit in sum of ₹7,23,200/- with the respondent, and treating the period up to November 30, 2008 as rent free on the stand taken that Uppal Housing Ltd. had extended the rent free period to November 30, 2008, it was indicated that remainder rent would be paid simultaneously with possession being handed over by the appellant and taken over by the respondent.

11. The respondent was rightly advised to litigate later but take possession as offered, for the reason law requires a landlord to take possession when offered by the tenant and if it is a case of a breach of the term of the lease, to litigate for damages. Thus, the respondent took ₹4,84,990/- offered by the appellant towards rent payable up to March 23, 2009 and commencing from December 01, 2008; ₹7,23,200/- being adjusted by the appellant towards two months' rent with respect to the security deposit paid when agreement to lease Ex.C-2 was executed. It took over the possession as well.

12. Ex.C-2 contains an arbitration clause which was invoked by the respondent and in a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 a learned Single Judge of this Court appointed Justice Awadh Bihari (Retd.) as the sole arbitrator who, after considering the pleadings of the parties and the evidence led published an award on December 10, 2008 awarding ₹1,03,63,010/- as damages and interest in

sum of ₹20,72,602/- for the pendente lite period. He also held that the security deposit was liable to be forfeited.

13. The concentrate of the distillate of the Award is as under:-

(a) Agreement Ex.C-2 has been held to be an agreement to lease and not an agreement of lease and thus the same not requiring compulsory registration nor requiring to be drawn on a stamp paper : treating the same to be an agreement of lease.

(b) The effect of the finding (a) above being that Ex.C-2 was admissible in evidence.

(c) The possession of the appellant in the commercial space pursuant to Ex.C-2 was permissive possession because the parties did not give effect to Ex.C-2 and execute an agreement of lease.

(d) The respondent being entitled to damages for breach of Ex.C-2 i.e. not executing a registered lease deed which would have contained a clause of 24 months period being the lock in period and this period could be treated as the reference point to compensate the respondent; and as regards the quantum thereof : the rent required to be paid per month as per Ex.C-2 being the measure to compute the damages.

14. The learned arbitrator has held that the security deposit in sum of ₹7,23,200/- was liable to forfeited and on said reasoning has not adjusted said amount while awarding damages for breach of Ex.C-2. (As per the award damages were payable under two heads : (i) forfeiture of the security deposit on account of not executing a lease deed; and (ii) by way of damages 24 months' rent to be paid).

15. Since the respondent has conceded before the learned Single Judge that the award in relation to forfeiture of security deposit be set aside and said sum be adjusted towards damages payable on account of the obligation to retain as a tenant the commercial space for 24 months, we

simply note said fact, which is a historical fact, for purposes of record. No adjudication is required in appeal qua said aspect of the award.

16. Before the learned Single Judge, laying a challenge to the award, contention of the appellant was that Ex.C-2 was a demised in presenti and thus the same was an agreement of lease and not an agreement to lease, and being neither drawn on a stamp paper of adequate value the document was not admissible in evidence unless proper stamp duty was paid thereon and the consequence being the arbitration clause itself perishing and thus the arbitrator having no jurisdiction to decide the dispute with reference to Ex.C-2. The second contention was that in the absence of Ex.C-2 being registered, it was not admissible in evidence, for the purposes of relying upon its contents for the reason as per Ex.C-2 the initial term of the lease was for three years. The extended limb of the second contention was that appellant's status under the respondent would have to be treated as that of a tenant from month to month, sans any liability of a lock in period, and thus the award was liable to be set aside being founded on wrong principles of law and thus opposed to public policy. In a decision which is a re-run of the award the learned Single Judge has negated the contentions advanced by the appellant. In a nut shell, the impugned decision has affirmed the four concentrates of the distillates extracted by us hereinabove of the award.

17. We do not intend to burden ourselves with various judicial pronouncements where a particular document between the Court was held to be an '*Agreement to lease*' and where it was held to be '*Agreement of lease*'. The distinction between the two is well-recognized by now and admits of no debate. As explained in '*Woodfall in Law of Landlord and Tenant*' Vol.I, 28th Edition at Page 127 : '*A contract for a lease is an agreement enforceable in law whereby one party agrees to grant and*

another to take a lease. The expressions 'contract for lease' and 'agreement for lease' is to be preferred in being more definite, agreement frequently means one of many stipulations in a contract. A contract for a lease is to be distinguished from a lease, because a lease is actually a conveyance of an estate in land, whereas a contract for a lease is merely an agreement that such a conveyance shall be entered into at a future date'.

18. Whilst it may be true, as held in the decision reported as 1995 RPC 255 Glaverbel SA Vs. British Coal Corp & Anr., that interpretation of a document is a question of law and not one of fact; and therefore an issue relating to an interpretation of a document would be an issue of law and not one of fact, but it is settled law that where a document is required to be interpreted, it would be within the jurisdiction of the arbitrator to interpret the same. It is equally settled law that if two interpretations are possible, while considering a challenge to the award the Court would not set aside the interpretation adopted by an arbitrator and would not reason whether the other interpretation is more plausible.

19. The learned arbitrator has noted the rival versions and has referred to various clauses of the agreement Ex.C-2 to conclude that the same is a contract to enter into a lease and not a contract of lease. In our opinion the learned Single Judge was not even obliged to discuss the various authorities cited before him for the reason each authority dealt with a different document and interpreted the same whether it was a contract to enter into a lease or a contract of lease. Suffice it to state that Ex.C-2 refers to Uppal Housing Ltd. as the intending lessor, and to the appellant as an intending lessee. What better expression could the parties use to clearly indicate what was their intention in presenti and in the future. When they described themselves as the intending lessor and the intending

lessee, they clearly indicated that the document does not create the relationship of a lessor and a lessee. That the document is a binding contract binding them for the future, when the effective date would come into being i.e. when possession was to be offered; 75 days would be rent free and within 30 days of the effective date the parties would execute and get registered a lease deed.

20. Under the circumstances the reasoning in the award that Ex.C-2 is not a lease deed and thus was not required to be drawn up on a stamp paper treating the same to be a lease deed and did not require registration has to be upheld.

21. The decision reported as 2011 (7) SCALE 747 M/s.SMS Tea Estate Pvt. Ltd. Vs. Ms.Chandmari Tea Co.Pvt.Ltd. cited by learned senior counsel for the appellant is thus not applicable in the facts of the present case for the reason the indenture dated December 21, 2006 considered in said decision was construed by the Supreme Court as creating a right in presenti as a lessee with concomitant obligation of the opposite party as a lessor and since it was not drawn on a stamp paper of adequate consideration it was held that the arbitration clause, which otherwise is treated as distinct from the main agreement, could not be even looked into unless the document was stamped as required by Section 35 of the Stamp Act. Further, the view taken in the said decision that in the absence of it being registered, the indenture could not be looked into for its terms, would not be applicable in the instant case for the reason in the instant case Ex.C-2 does not create any lease.

22. Concededly Ex.C-2 has been breached. The appellant did not agree to execute a lease deed and get the same registered. Rentals appear to have fallen and even the sales. The period in question i.e. 2007-09 was one of low economic growth (though not one of recession). Planned

growth in business was not happening. Futuristic plans did not measure to the time. Appellant's letter dated December 15, 2008 noted by us in paragraph 8 above admits said fact. By then the appellant was in possession of the commercial space since July 07, 2008.

23. This takes us to the next issue concerning the award : what would be the measure of damages to be paid by the appellant to the respondent.

24. The learned arbitrator has found a decision : and to use the language of the learned arbitrator – '*it is pat on the point*'. The decision is reported as AIR 2004 SC 2926 Food Corporation of India & Ors. Vs. M/s. Babulal Aggarwal.

25. In the said case, FCI had floated tenders inviting offers for hiring plinths for storing food grain and had indicated the specifications of the plinths. As per the notice inviting offers, FCI had committed to enter into lease agreements for the plinths in question for a period of three years. M/s.Babulal Aggarwal erected the plinths as per the specifications set by FCI and offered the same indicating the rent it would be charging. The offer was accepted. Pending execution of formal lease deed, possession was taken over by FCI on January 24, 1987. On September 26, 1988, FCI gave 15 days' notice to vacate the plinths and vacated the same on October 10, 1988, paying rent agreed as per offer made by Babulal Aggarwal and accepted by FCI. Babulal Aggarwal sued for damages on the plea that the plinths made were as per specifications of FCI and thus FCI was liable to pay rent for the three years period. The Supreme Court upheld the claim holding that the lease had to be treated as one from month to month, but the termination of the basic agreement would mean that the promise held out that the duration of the lease would be three years being broken, since the plinths were made to the specifications of

FCI for which Babulal Aggarwal had raised loans, damages would be payable.

26. With respect to said decision, learned counsel for the appellant urged that the learned arbitrator in the instant case fell into a fundamental error by overlooking the fact that in Babulal Aggarwal's case (supra) the plinths which were the subject matter of an agreement to lease requiring an agreement of lease to be executed, were made to specifications of FCI (implicit being the finding that the plinths would have no utility for anybody else and hence not being capable of being let) and in contra distinction, in the instant case, the commercial space was a building not made to the appellant's specifications and hence capable of being let to any third party. Learned senior counsel argued that the learned arbitrator has held that possession given pursuant to Ex.C-2 would be permissive in nature i.e. it would be '*permissive possession*'. Counsel argued that this legal premise on which the learned arbitrator has proceeded runs in the teeth of the decision in Babulal Aggarwal's case, where FCI's possession pursuant to an agreement to lease was held to be that of a tenancy month to month.

27. The decision in Babulal Aggarwal's case shows that the issue before the Court was not argued as to what would be the nature of possession of FCI and both parties argued on the presumption that FCI's possession would be that of a tenant, with tenancy being from month to month.

28. But, in the instant case, parties have extensively argued before the learned arbitrator as to what would be the nature of appellant's possession keeping in view the fact that lessor-lessee relationship between the parties as per Ex.C-2 had to come into being only when a written lease deed was

drawn up on stamp paper of adequate value and thereafter registered. The learned arbitrator has held that the possession was permissive.

29. In the decision reported as (1912) 15 Ind. Cas.432 In Re: Kaya Ramakrishnamma & Ors. the facts were that it was orally agreed that for faslis 1313 to 1317 the defendants would be given a khata on lease by the plaintiff and pending execution of an instrument of lease the possession was handed over. Lease deed was never executed. Answering the question as to what was the nature of occupation by the defendants and what would be the liability to recompense the plaintiff, it was held that the possession of the defendants, in the absence of a legal tenancy being created, would be permissive and for which the owner of the land would be entitled to compensation for use and occupation. In the decision in Chandmari Tea Co's case (supra) it was held that possession under a legally inadmissible lease deed would be treated as lawful possession for the reason the legally inadmissible lease deed could be looked into for collateral purpose.

30. The view taken by the learned arbitrator that appellant's possession was permissive is a finding which intermixes the facts with the law and cannot be classified as a finding which is premised on a wrong principle of law.

31. This now takes us to the last issue which needs to be considered. Whether appellant was in breach of Ex.C-2 and if yes to what damages was the respondent entitled to.

32. As regards the first part, the finding of fact returned by the learned arbitrator that the appellant was in breach of Ex.C-2 cannot be even touched upon by us for the reason it would require a re-appreciation of the evidence; and it is not the plea of the appellant that the finding of fact is returned on no evidence or is perverse. That apart, appellant's letter

Ex.C-11, dated December 15, 2008, contents whereof have been noted by us in paragraph 8 above, is sufficient evidence of appellant being in breach of its obligation under Ex.C-2 to execute the lease deed and bear the expenses thereof. Having taken possession of the commercial space pursuant to Ex.C-2, which enjoins upon the lessee to offer and hand over possession of the commercial space pending execution of the lease deed (which had to be executed within 30 days reckoned from the effective date), the appellant took possession of the commercial space and started quibbling with rent to be paid, on the ground that the economy was in a state of slow down.

33. We need to speak a word over here. Documents concerning commercial transactions have to be interpreted to further trade and commerce and in harmony with the facts which existed when the parties struck the bargain. It is trite that in every commercial transaction each party sees a gain to the mutual advantage of each and additionally, in the spirit of reciprocity, agree to terms which are to the mutual advantage of the other. The role of a Judge, and needless to state an arbitrator, would then become akin to the Captain of a ship, to navigate the parties in the sea of law with the document being the ship. The commercial space to be given on lease in the instant case was a huge hall and the parties knew that the appellant would need some time to refurbish the same as per its commercial requirements. Simultaneous with the tenancy being agreed to commence when possession was handed over, the commercial part was kept in view, to the benefit of the appellant by treating 75 days as rent free period. Within this time, the appellant was to refurbish, as per its requirement, the commercial space agreed to be taken on lease. Parties clearly envisage that the possession would be permissive without payment of any rent, to be converted into possession as a tenant

contingent upon the lease deed being executed. The appellant would not be permitted, and estoppel would prevent it, to take advantage under Ex.C-2 and deny its obligations under the same very document.

34. Whilst it may be true that a lock in period clause in a lease deed, being in the nature of a penalty, requiring the tenant to pay the rent for the lock in period cannot be enforced without proof of loss of damages; and additionally for the reason under the law of contract a party wronged by a breach of contract is obliged to mitigate the loss occasioned by the wrong act of the promisor or the promisee (because of the explanation to Section 73 of the Indian Contract Act, 1872), but that would only require the owner of the premises to prove the loss which is occasioned due to breach of the agreement that possession would be retained for the lock in period.

35. The learned arbitrator has noted the fact that the respondent was influenced by the fact that the money which it would pay to Uppal Housing Ltd. i.e. its investment in the commercial space would yield to it a return, being the rent agreed to be paid by the appellant under Ex.C-2. To which fact we may only supplement that it is common business all over the world for builders to offer buildings or parts thereof to buyers on an assurance of a fixed return and for which the builder identifies prospective tenants who enter into written commitments that when the building is completed they would take on rent the building or parts thereof, as the case may be. These prior commitments influence the prospective purchasers of the building or parts thereof. In the instant case the respondent availed loans from the bank to purchase the commercial space in question. There is further evidence before the learned arbitrator that due to the economic global melt down and slow down in the Indian economy rentals had fallen drastically and so meager was the requirement of commercial space that virtually there was no tenant available in the

market. Letter Ex.C-11, dated December 15, 2008, written by the appellant, contents whereof have been noted by us in paragraph 8 above, is proof of said state of affairs in the market. The appellant itself has admitted that rentals have crashed by 40% - 50% in the market. The appellant suggested a revenue sharing model.

36. The assurance by the appellant that for a period of 24 months it would retain possession and pay ₹3,61,600/- per month as rent induced the respondent to purchase the commercial space from Uppal Housing Ltd. This promise by the appellant can be enforced by the respondent against the appellant on the principles of estoppel, as rightly held by the learned arbitrator. Further, for the reason rentals have fallen by nearly 50% and for the further reason there were virtually no prospective tenants in the market. There is evidence that the respondent could not find a tenant.

37. With the concession made to such part of the award which possibly would have been struck down sans the concession, the impugned decision which corrects the award on a concession is unimpeachable and thus we dismiss the appeal with cost against the appellant and in favour of the respondent.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

DECEMBER 09, 2014

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