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

+ **O.M.P. 508/2014**

Judgment reserved on: 09.12.2014

Judgment pronounced on: 12.12.2014

M/S SKY ASSOCIATES

..... Petitioner

Through: Mr.Jasmeet Singh and Mr.Saurabh
Tiwari, Advocates

versus

DELHI STATE CIVIL SUPPLY CORPORATION

..... Respondent

Through: Ms.Anju Bhattacharya and
Mr.Elgin Matt John, Advocates

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. The petitioner has assailed the award dated 02.04.2014 on the ground that the award is patently illegal and shocks the conscience and thus against the public policy and that the arbitrator has not passed the award on the basis of the terms of agreement between the parties and has also not answered all the claims and contentions raised by the parties during the arbitral proceedings and thus it is an incomplete award.

2. The respondent has filed its reply and has denied the

contentions of the petitioners submitting that the award cannot be challenged on the ground that the arbitrator has reached to a wrong conclusion or has failed to appreciate the facts. The jurisdiction of this court under Section 34 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act') is limited and this court does not sit in appeal over the findings of the arbitrator by examining and re-examining the material produced before the arbitrator. It is submitted that the arbitrator has passed the award in terms of the agreement between the parties and has applied its judicial mind and that there is no ground to set aside the said award. It is submitted that the agreement dated 08.11.2010 between the parties was a business agreement and though it was given the name of Rent Agreement and the arbitrator has correctly interpreted that the agreement was a business arrangement. It is submitted that since it is not a rent agreement that is why the document was not registered. It is further submitted that in terms of clause 4 of the business arrangement, the profits from the shop was to be shared on the basis of gross profit though these profits were given the name of rent. The property in occupation of the respondent was always under the

control of the petitioner and the respondent were permitted to use it only for limited purpose and this fact further shows that the agreement between the parties was not a tenancy agreement. On these facts, it is submitted that since there is no error apparent on the face of record, the award does not suffer from any infirmity and the petition is liable to be dismissed.

3. I have heard the argument of the parties and perused the relevant record.

4. The admitted facts of the case are that the parties had entered into an agreement dated 08.11.2010. This agreement was titled as a rent agreement. Under this agreement, the petitioner had agreed to give on rent the shop on ground floor at property bearing Municipal Nos.4865 and 4866, Phoota Road, Sadar Bazaar, Delhi-110006 admeasuring approximately 62 square yards for the purpose of running a wine shop for a period of 11 months starting from 01.10.2010. The license to run the bar shop was already granted to the respondent by the government of N.C.T., Excise Department for the year 2010-2011 to the respondent. It is also the admitted fact that this agreement was for a period of 11 months and the tenancy

was extendable further in writing with mutual consent of the parties on the agreed terms and conditions. The rent was to be calculated on the basis of 12.5 % of the gross profit to be calculated on the basis of the difference in the whole sale price inclusive of excise duty and retail sale price exclusive of VAT fixed for bottles of IMFL/Beer by the Commissioner of Excise, Delhi. Under this agreement, as per clause 9 each party i.e. petitioner and the respondent were at liberty to terminate this agreement without assigning any reason after giving three months notice in writing to the other party. The agreement had expired by efflux of time on 31.08.2011. The petitioner had admittedly received the payment under this agreement for the month of September and October, 2011. The petitioner had also issued the termination notice dated 23.10.2011 terminating the tenancy with effect from 30.11.2011 and asking the respondent to hand over the vacant possession of the premises on or before 01.12.2011. The respondent did not vacate the premises. Since the dispute had arisen between the parties pursuant to the arbitration clause under this agreement, matter was referred to the arbitrator. Initially, the respondent had appointed

Sh.Arun Bansal, Sr.Manager as Arbitrator vide order dated 02.01.2012 which is subsequently changed and Sh.R.P.Sehgal was appointed as Arbitrator on 04.06.2012 and thereafter on 21.01.2013 Sh.Vinod Sharma, Sr.Manager of the respondent corporation was appointed as an arbitrator in the present case. It is this arbitrator who has given the arbitral award.

5. The legal position is quite clear. This court has limited jurisdiction under Section 34 of the Act to interfere with the award only on the ground enumerated under Section 34 (2) of the Act. The scope and power of the court under Section 34 of the Act has been explained by the Supreme Court in *Oil & Natural Gas Corporation Ltd. vs. SAW Pipes Ltd.* reported in (2003) 5 SCC 705: 2003(2) R.A.J. 1. The relevant paragraph of the judgment is reproduced as under:

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is

likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case 1994 Supp (1) SCC 644 it is required to be held that the award could be set aside if it is patently illegal. The result would be -- award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

6. The award against the public policy can be set aside under Section 34 of the Act. An award which is patently illegal or contrary to the terms of the contract and if the award does not determine the rights of the parties arising out a contract is also an award which can be said to be patently illegal. In the present case, the claim statement was submitted by the petitioner. As discussed above, the petitioner is the owner of the property in dispute which has been handed over by them to the respondent for a limited use i.e. for running a liquor shop under a valid liquor license which

at the time of entering the present contract was valid for the year 2010 and 2011 and the agreement between the parties was determinable by a notice by either of the party to this agreement. The agreement was for 11 months extendable further in writing with mutual consent of the parties on the agreed terms and conditions. The petitioner by way of statement of his claim, claimed the possession of this property along with a sum of Rs.50,000/- towards rent for the month of November, 2011 and a sum of Rs.1 lakh per month from the date of filing of the claim till the handing over of vacant possession. The arbitrator on the basis of pleadings of the parties formulated the dispute between the parties as under:

“(i) Whether the relationship between the parties is landlord/tenant relationship or a business arrangement.

(ii) In case it is landlord/tenant relationship is the rent agreement is terminated as per the terms and conditions of agreement.

(iii) In case it is a business relationship is the claimant can demand possession of premises.

(iv) To what amount is the claimant entitle for unauthorised occupation by respondent alongwith interest and cost of proceedings.”

7. After analysing the evidence, learned arbitrator has reached to the following conclusion:

“After going through the clauses of agreement dated 08.11.2010 and evidence produced it is observed that although the agreement is called rent agreement and the word of tenant and landlord is used for respondent and claimant respectively in the agreement however, it cannot be treated as lease agreement since as per Section 105 transfer of property Act lease is define as below:

A lease of Immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of price paid or promised, or of money, a share of Crops, service or any other thing of value, to be rendered periodically or on specified occasions to be transferor by the transferee, who accepts the transfer on such terms.

In the present dispute “No transfer of right to enjoy” is transferred to lessee (i.e. respondent) since no exclusive possession of property is handed over to respondent as appears from clause no.(ii), (vi), (vii) & (viii) of the agreement, therefore the agreement cannot be considered as a rent agreement, thus the provision of transfer of property Act, 1882 is not applicable in this case. Therefore, the claimant cannot demand the possession of property and damages for authorised use of property by the respondent.”

8. The arbitrator has given his findings on the premise that since the agreement was not a rent agreement, the provisions of Transfer of Property Act is not applicable and, therefore, the petitioner is not entitled for the possession of the property and damages for the unauthorised use of

property by the respondent. It is also pertinent to mention that the arbitrator has also formulated the issue to the effect “*whether the relationship between the parties was of landlord-tenant relationship or a business arrangement*”. When the arbitrator has reached to the conclusion, that agreement was not a tenancy agreement, he was required to give the findings whether it was a business arrangement between the parties if so, whether petitioner was entitled for possession of property on determination of contract that is the business agreement. He just left the entire dispute between the parties open by giving the findings that since it was not a landlord-tenant relationship under Section 108 of Transfer of Property Act, the petitioner was not entitled to the possession and also for the damages.

9. Findings of the learned arbitrator are in clear contravention of the terms of the contract wherein either of the party was entitled to terminate this agreement. It was immaterial if the contract be construed as landlord-tenant agreement or a business arrangement. The respondent had acquired the right to enter into possession of the property in dispute which admittedly is owned by the petitioner, under this agreement. Under this agreement petitioner is authorised to terminate the said agreement. The

petitioner has terminated the agreement. Moreover, the agreement was valid only for the period ending 31.08.2011 which was further extendable as per clause 3 of the agreement. Clause 3 is reproduced as under:

“3. That the period of this tenancy may be extended further in writing with mutual consent of the parties on the agreed terms and conditions.”

10. Clause 3 clearly stipulates that the right to continue in the property by the respondent can be further extended *“only in writing with mutual consent of the parties”*. It is the admitted fact that there was no written agreement between the parties under which the respondent could be said to be permitted to continue in possession of the property when agreement had expired by efflux of time. Clause 3 makes it abundantly clear that the agreement was extendable only in writing with mutual consent. There was no mutual consent. On the other hand, admittedly, a notice for termination of the agreement was served upon the respondent in October, 2011 which clearly shows that the petitioner had not agreed in writing to extent the stay in/occupancy by the respondent in the disputed premises.

11. It is apparent that whether an agreement can be termed as a business arrangement or a tenancy or a lease or license, upon the termination of such an agreement either by afflux of time or by party exercise its rights to

terminate under the terms of that agreement, the person who is occupying the property under the said agreement becomes a trespasser and is bound to vacate it. In the case of *Deep Chand vs. Kulanand Lakhera & Ors.* reported in **140 (2007) DLT 765**, this court has held as under:

“22. Position of a person who lawfully enters upon possession is different than he who gains possession in an unlawful manner. The former would not be a trespasser, the latter would be. When right of the former to continue in possession is extinguished by law or by contract, continued possession is not akin to the possession of a trespasser.”

12. It, therefore, is apparent that in whatever capacity, the respondent was in occupation of the property under that agreement, after determination of the contract between the parties he has no legal right to continue in the possession of the property. The effect of award whereby the arbitrator has held that the petitioner is not entitled to demand the possession of the property amounts to permit a trespasser to continue in the occupation of the property belonging to petitioner.

13. The findings of the arbitrator to the effect that *“claimant cannot demand the possession of the property”*, is, therefore, goes to the root of the case and is an error apparent on the face of the award. The award is thus unfair and unreasonable and against public policy. It also shocks the

conscience of the court as the result of findings is that a trespasser is allowed to continue for an indefinite period. Also bar could be run by respondent under a valid license and there is nothing in findings of arbitrator to suggest if the respondent was holding a valid license for subsequent periods. For the foregoing reasons, I hereby set aside the award and the arbitrator is directed to decide the matter afresh.

DEEPA SHARMA, J

DECEMBER 12, 2014

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