

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 157 OF 2013

Globsport India Private Limited)
A company incorporated under the)
Companies Act, 1956, having its office at)
444, The Corporate Longue,)
401-B, Linking Road, Khar (West),)
Mumbai – 400 052)
Through its Authorised Representative)
Ms.Purva Sane) **..... Petitioner**

VERSUS

Mayfair Housing Private Limited)
A Company incorporated under the)
Companies Act, 1956 having its office at)
Mayfair Meridian, Near St.Blaise Church)
Caser Road, Andheri (West),)
Mumbai – 400 058) **..... Respondent**

Mr.Ajit Kulkarni, i/b. Mr.Hitesh Vyas for the Petitioner.

Mr.Pravin Samdhani, Senior Advocate, a/w. Mr.Nivit Srivastav, Ms.Akshaya Chivilkar, i/b. Maniar Srivastava Associates for the Respondent.

CORAM : R.D. DHANUKA, J.

DATED : 13th MARCH, 2015

JUDGMENT

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996, the petitioner has impugned the arbitral award dated 28th January, 2012 directing the petitioner to pay to the respondent the sum of Rs.3,33,63,745/- with further interest thereon on the principal sum of Rs. 2,85,42,116/- to be calculated at the rate of 15% per annum from 23rd March, 2011 and also directing the petitioner

to pay arbitration cost quantified at Rs.27,53,904/-. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The respondent is the owner of Office No.501, Prima Plaza, Plot No.38/A, S.V.Road, Near Asha Parekh Hospital, Santacruz (West), Mumbai – 400054.

3. On 14th October, 2008, the parties entered into a leave and licence agreement as well as amenities agreement in respect of the said office. It is the case of the respondent that the amenities agreement was supplementary, co-terminus and in conjunction with the leave and licence agreement. It is not in dispute that the duration of the agreement was 59 months. The parties had agreed that the lock in period under the said agreement was for a period of 36 months i.e. from 3rd November, 2008 to 2nd November, 2011.

4. On 3rd November, 2008 the petitioner occupied the said office as a licensee under the said leave and licence as well as amenities agreement dated 14th October, 2008.

5. On 4th June, 2009 the petitioner requested for reduction in licence fees due to adverse market condition. On 20th October, 2009 the petitioner terminated the said leave and licence agreement as well as amenities agreement before expiry of lock in period. The respondent vide their reply dated 28th October, 2009 denied the allegations made by the petitioner in letter of termination dated 20th October, 2009 and informed the petitioner of their intention to recover liquidated damages from the petitioner for termination of the said agreement before expiry of the lock in period. On 9th November, 2009 the petitioner refused to pay any amount to the respondent as demanded.

6. On 3rd December, 2009 the respondent invoked arbitration agreement and called upon the petitioner to confirm the name of the arbitrator suggested by the respondent in the said notice. The respondent sent a reminder to the petitioner on 10th December, 2009. The petitioner however did not appoint any arbitrator. On 17th December, 2009 the petitioner handed over possession of the said office to the respondent. On 17th December, 2009 the respondent returned the security deposit amount to the petitioner without prejudice to their rights and contention to claim liquidated damages. A copy of the said letter of 17th December, 2009 from the respondent to the petitioner is on record of the arbitral proceedings as well as in this proceedings.

7. At the time of hearing of the Arbitration Application No.47 of 2010 filed by the respondent for seeking appointment of the arbitrator, the petitioner herein was absent. By an order dated 10th October, 2010, the learned designate of the Hon'ble Chief Justice appointed an arbitrator on behalf of the petitioner and directed for composition of the arbitral tribunal. The learned nominee arbitrator appointed by the respondent and the arbitrator nominated by the learned designate of Hon'ble Chief Justice appointed the presiding arbitrator.

8. Pursuant to the directions issued by the arbitral tribunal, the respondent filed statement of claim inter alia praying for a declaration that the purported termination of the leave and licence agreement and amenities agreement both dated 14th October, 2008 were illegal and unlawful. The respondent also applied for an order and direction against the petitioner to pay a sum of Rs.3,35,46,779/- as per particulars of claim with interest on Rs.2,85,42,116/- from the date of filing of statement of claim till payment and/or realization and cost.

9. The petitioner resisted the said claim by filing written statement and filed on application under section 16 raising an issue of jurisdiction before the arbitral tribunal. By a separate order passed by the arbitral tribunal on 20th April, 2011, the arbitral tribunal after rendering detailed reasons, rejected the said application filed by the petitioner under section 16 of the Arbitration and Conciliation Act, 1996 holding that the arbitral tribunal had jurisdiction to adjudicate the subject matter of the arbitral reference. The arbitral tribunal held that the claims made by the respondent herein was not relating to possession of the premises and thus would not fall under section 41 of the Presidency Small Cause Courts Act, 1882. It is not in dispute that the said decision of the arbitral tribunal rendered on 20th April, 2011 under section 16 of the Arbitration and Conciliation Act is not impugned by the petitioner in this petition filed under section 34.

10. The parties had examined witnesses before the arbitral tribunal. By the impugned award dated 28th January, 2012, the arbitral tribunal allowed part of the claims made by the respondent which has been impugned by the petitioner in this petition under section 34.

11. Learned counsel appearing for the petitioner submits that the arbitral tribunal has no jurisdiction to entertain the claims made by the respondent as the claim was for recovery of rent which would fall within the exclusive jurisdiction of Small Causes Court under section 41 of the Presidency Small Cause Courts Act, 1882. It is submitted that in any event the dispute was under leave and licence agreement and thus arbitral tribunal could not have entertained such dispute.

12. The next submission of the learned counsel for the petitioner is that the petitioner had rightly terminated the leave and licence agreement. Upon such

termination, the respondent having refunded the security deposit amount to the petitioner the respondent had accepted the lawful termination of the leave and licence agreement by the petitioner. He submits that in view of the refund of the security deposit, the arbitral tribunal could not have directed the petitioner to pay the rent for the remaining period of the lock in period.

13. The next submission of the learned counsel for the petitioner is that under clause 26 of the leave and licence agreement, there was a provision for liquidated damage which provision was not invoked by the respondent. Clause 9 of the said leave and licence agreement did not contemplate any payment of liquidated damages. The arbitral tribunal has awarded claim for liquidated damages which is contrary to clauses 9 and 26 of the leave and licence agreement.

14. Mr. Samdhani, learned senior counsel on the other hand would submit that the issue of jurisdiction raised by the petitioner across the bar has been already rejected by the arbitral tribunal by passing a separate order. The petitioner has not impugned the said order in this proceedings under section 34 and thus cannot be allowed to agitate the said issue across the bar. Learned senior counsel submits that clause 26 of the leave and licence agreement which provides for payment of liquidated damages was admittedly not invoked by the respondent. He submits that in any event the said clause would have been attracted provided the petitioner would have continued to occupy the leave and licence premise beyond the contractual period and not otherwise.

15. In so far as submission of the learned counsel for the petitioner that clause 9 provides only for recovery of rent and not liquidated damages is concerned, learned senior counsel submits that the expression 'rent' provided in clause 9 would

not indicate payment of rent for use of premises but was in the nature of compensation which was agreed upon by both parties and required to be paid in the event of the licensee terminating the contract during the lock in period. Learned counsel submits that the arbitral tribunal has interpreted the terms of the leave and licence agreement and has rendered a finding of fact that the termination of the leave and licence agreement as well as amenities agreement by the petitioner was totally illegal. The petitioner was not in a position to pay the licence fee and had requested the respondent for reduction of licence fee. The arbitral tribunal has considered the oral evidence as well as documentary evidence led by both parties and has rendered a finding of fact. He submits that in so far as interpretation of the terms and conditions of the leave and licence and amenities agreement by the arbitral tribunal is concerned, the said interpretation is a possible interpretation and cannot be substituted by any other interpretation by this court under section 34 of the Act.

REASONS AND CONCLUSIONS

16. In so far as first submission of the learned counsel for the petitioner that the arbitral tribunal had no jurisdiction to entertain the claims made by the respondent on the ground that the dispute was under the leave and licence agreement and in any event was for recovery of rent is concerned, in my view the petitioner cannot be allowed to raise this issue across the bar. Though such specific issue has been already rejected by the arbitral tribunal by passing a separate order under section 16 of the Arbitration and Conciliation Act 1996, admittedly the petitioner has not impugned the said decision in this proceedings. Since the said decision has not been impugned in this proceedings, the petitioner cannot be allowed to raise that issue across the bar for the first time. Mr. Samdhani learned senior counsel fairly invited my attention to the ground raised under para 19 of the arbitration petition

to the effect that the claim made by the respondent was not arbitrable.

17. Be that as it may, a perusal of the statement of claim filed by the respondent before the arbitral tribunal clearly indicates that the respondent had prayed for recovery of the damages/compensation arising out of the wrongful termination of leave and licence and amenities agreement during the lock in period. In my view the claim for recovery of compensation/damages would not fall under section 41 of the Presidency Small Cause Courts Act, 1882 and thus Small Causes Court will have no jurisdiction to entertain such claim. There is no dispute that the arbitration clause existed in the leave and licence agreement between the parties as well as in amenities agreement. The arbitral tribunal has thus rightly rejected the plea of jurisdiction by holding that the claims were not relating to possession of the licence premises and would not fall under section 41 of the Presidency Small Cause Courts Act, 1882. In my view even otherwise the view taken by the arbitral tribunal on the issue of jurisdiction is in accordance with law and is in accordance with section 41 of Presidency Small Cause Courts Act, 1882.

18. In so far as the second submission of the learned counsel for the petitioner that dispute under clause 9 of the leave and licence agreement was even otherwise for recovery of rent and would fall under section 41 of the Presidency Small Cause Courts Act, 1882 is concerned, in my view though the expression 'rent' is used in clause 9 of the leave and licence, a perusal of the said clause makes it clear that the licensee had agreed to pay compensation in case of premature termination of leave and licence agreement during lock in period and was not by way of rent which was payable during the existence of the leave and licence agreement. In my view there is thus no merit in this submission of the learned counsel for the petitioner that the claim was for recovery of rent. A perusal of the statement of claim clearly

indicates that the claim was not for recovery of the rent but was for the compensation.

19. In so far as submission of the learned counsel for the petitioner that there being a separate provision for liquidated damages agreed upon by the parties under section 26 of the leave and licence agreement and the respondent not having invoked the clause 26, the arbitral tribunal could not have granted liquidated damages under clause 9 is concerned, in my view this submission is totally without any merits. A perusal of the clause 26 of the leave and licence agreement clearly indicates that the said clause could have been invoked by the respondent only if the petitioner would have not vacated the premises beyond the contractual period. It is not the case of the petitioner that the petitioner continued to occupy the premises beyond the contractual period. It was the case of the petitioner that the petitioner had vacated the premises during the lock in period.

20. A perusal of the award clearly indicates that the arbitral tribunal has considered the evidence led by both the parties and have rendered a finding that the termination of the licence during the lock in period by the petitioner was illegal. In my view the findings rendered by the arbitral tribunal are not perverse and thus cannot be interfered with under section 34 of the Arbitration and Conciliation Act, 1996.

21. In so far as applicability of clause 9 of the agreement as well as interpretation that the amenities agreement has to be read with leave and licence agreement and was co-terminus with the leave and licence agreement is concerned, in my view the arbitral tribunal has interpreted the terms of both the agreements which interpretation is a possible interpretation and thus such possible

interpretation cannot be substituted by another interpretation by this court under section 34 of Arbitration and Conciliation Act, 1996.

22. In so far as submission of the learned counsel for the petitioner that since the respondent has refunded the security deposit amount to the petitioner which would indicate that the respondent had accepted the validity of the termination of the agreement effected by the petitioner is concerned, learned senior counsel for the respondent invited my attention to the letter dated 3rd December, 2009 addressed by the respondent to the petitioner which clearly records that the said amount of security deposit was returned to the petitioner without prejudice to the rights and contentions of the respondent that the agreement was wrongfully terminated and without prejudice to the rights of the respondent to claim the compensation and other claims permissible in law. I am thus not inclined to accept the submission of the learned counsel for the petitioner that the security deposit was unconditionally returned by the respondent or would indicate that the respondent has accepted the fact that the termination of the leave and licence and amenities agreement was validly terminated.

23. Learned counsel for the petitioner did not urge any other submission.

24. The petition is devoid of merits and is accordingly dismissed. There shall be no order as to costs.

[R.D. DHANUKA, J.]