

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

Date of decision: March 20, 2015

+ **OMP No. 180/2015**

SHRI SUDHAKAR TIWARI Petitioner

Through: Mr.S.K.Goyal, Advocate

versus

DELHI DEVELOPMENT AUTHORITY Respondent

Through: Mr.Anupam Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

IA 3534/2015

This is an application filed by the petitioner seeking exemption from filing the original copies of the documents.

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

OMP No. 180/2015 & IA 3533/2015 (stay)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (Act, in short) lay a challenge to the award dated November 13, 2014 whereby the learned Arbitrator has granted an amount of Rs.22,63,361/- as the outstanding licence fee along with interest of Rs.8,13,150/- along with pendente lite interest @ 15% p.a. till the

publishing of the award in favour of the respondent DDA and in the eventuality the said amount is not paid within 60 days of the publishing of the award, the petitioner has to pay future interest @ 15% p.a. till the date of payment. The earnest money of Rs.2,62,000/- granted in favour of the petitioner was directed to be adjusted against the awarded amount.

The facts:-

2. The petitioner, vide possession/allotment letter dated May 16, 2011 granted a licence with respect to a parking site. The allotment letter stipulated that the petitioner would pay an amount of Rs.1,31,000/- per month as licence fee by 10th of every month from May, 2011. The petitioner took over the physical possession of the parking site on May 25, 2011 and signed the possession slip in token of his taking over the parking site.

3. The petitioner did not pay the licence fee and therefore, the respondent-DDA issued show cause notice dated August 4, 2011, directing the petitioner to pay an amount of Rs.2,62,000/- being outstanding licence fee up to July 2011. The aforesaid notice was followed by second notice dated September 2, 2011 directing the petitioner to pay Rs.4,10,000/- plus service tax @ 2% being outstanding licence fee upto August 2011. A further show cause notice dated August 7, 2012 was issued to the petitioner to pay Rs.3,93,000/- on account of

licence fee upto August 2012. Yet another show cause notice dated January 18, 2013 was issued calling upon the petitioner to pay the outstanding licence fee. For more than one year till January 18, 2013, the respondent did not take any action. A final show cause notice dated April 5, 2013 showing Rs.24,07,900/- as outstanding licence fee upto March 31, 2013 was issued.

4. The petitioner vide his letters dated April 8, 2013 and April 18, 2013, replied to the show cause notice dated April 5, 2013 wherein, the petitioner had stated that there are encroachments in the parking area and request for an appointment of the learned Arbitrator. Thus, disputes have arisen between the parties which led to the appointment of the learned Arbitrator.

5. It is noted that the respondent DDA cancelled the licence on May 17, 2013 and it is the case of the respondent DDA that it had taken over the physical possession of the parking site.

6. The claimant/petitioner filed an OMP No. 669/2013 in this Court seeking stay of operation of show cause notice dated April 5, 2013. This Court while issuing notice to the respondent DDA granted stay till the next date of hearing i.e. September 2, 2013. It is the case of the respondent-DDA that the petitioner did not inform the Court about the fact that the respondent had taken back the physical possession of the

parking site. In any case, it is noted that vide letter dated August 29, 2013, the respondent DDA restored the licence and handed over the physical possession of the parking site whose possession was taken over by the petitioner on September 3, 2013. The petitioner had, in all, raised, seven claims apart from the interest. The claim No. 1 was a claim for Rs.28,29,600/- on account of remission/refund at 60% of the licence fee paid (in excess) along with interest @ 18% per annum on the premise that only 40% area was serviceable and thus, claimant is entitled to remission of 60% licence fee. It must be stated here, the petitioner did accept that he had not paid the licence fee regularly.

7. The learned Arbitrator was of the view that petitioner after taking physical possession on May 25, 2011 did not complain of any problem till April 8, 2013. In other words, it is for the first time, after the receipt of the show cause notice dated April 5, 2013, the petitioner vide his letter dated April 8, 2013 raised an issue that 40% of the area was only serviceable. The learned Arbitrator was of the following view:-

“..... for almost two years, the claimant was running his business without paying monthly licence fee as per the terms and conditions of the agreement. It is only after the show cause notices issued to him, when the claimant came up with plea that only 40% area is serviceable as in 20% of the occupants of the tower are not paying parking

charges. The claimant submitted that he was working in 40% area. Therefore, the issues raised by the claimant that the entire area is not serviceable are an after-thought and does not merit consideration. A claim of remission/refund at 60% of the licence fee amounts to diminution of the licence fee and the same is not allowed on the ground cited above”.

8. Insofar as the other claims for loss of business; three months’ licence fee amounting to Rs.3,93,000/- along with interest; refund of loss amounting to Rs.1 lakh with interest; Rs.1 lakh for mental agony/torture; Rs.1 lakh for litigation expenses; have been denied by the learned Arbitrator. It may be stated here, one claim of Rs.2,62,000/- for refund of earnest money was allowed by the learned Arbitrator in favour of the petitioner.

9. Eight counter claims were filed by the respondent herein. The learned Arbitrator has granted an amount of Rs.22,63,361/- as outstanding licence fee along with interest of Rs.8,13,150/- along with pendente lite interest at 15% per annum and future interest, in the eventuality the amount is not paid within 60 days at 15% per annum till payment.

10. The only submission made by the learned counsel for the petitioner is that the learned Arbitrator has denied a reasonable

opportunity to the petitioner by not agreeing with the petitioner to produce the witnesses and cross examination of the respondent witnesses.

11. It is noted that the petitioner moved an application to lead evidence through the following witnesses:

(i) Mr.Sudhakar Tiwari, the petitioner himself.

(ii) Manager of the parking site.

(iii) any other witness.

12. The case of the petitioner was that since 100% site was not available, he would like to lead evidence to show that only 40% of the area was serviceable.

13. The respondent opposed the application on the ground that the evidence cannot be allowed beyond the subject matter, documents and pleadings and the case could be decided on the basis of the documents and there is no need to lead oral evidence.

14. The learned Arbitrator in para 1.24 has given the following reasons for rejecting the application:

“1.24. I had heard both the counsel and I am of the considered opinion that since the claimant had neither stated the relevance of the witnesses sought to be produced by him and except for the claimant himself he had not even submitted the particulars or details of the witnesses their

name, address, relevance to the case, therefore, the application was vague and lacks material particulars. The sole purpose of pleadings is to bind the parties to a stand. When claimant makes certain allegations or stakes claim, the responder is supposed to disclose his defence or counter claims to each and every averments made by claimant. It is settled law that parties can lead evidence limited to their pleadings and parties while pleading, evidence cannot travel beyond pleadings. Further, the Manager is the agent of the claimant and there is no document filed by the parties in dispute which was signed or written by Manager. Nor in pleadings or statement of claims anything has been attributed to Manager by the Claimant. Thus Manager is not a material witness. As regard to the evidence of claimant, he cannot state anything beyond the pleadings already submitted by the claimant on affidavit wherein he had in detail stated all the facts, which by itself can be taken in evidence. The Claimant has not submitted in his application what evidence he actually wanted to lead and on what claims. He had also not stated the particulars of the witnesses hence cannot be left open for him to call any witness at his whims and fancies. The basic documents which are general terms and conditions, licence deed, possession letter, possession slips are admitted by both parties and receipt of show cause notices sent by DDA and the reply thereof sent by the claimant has also not denied by either party. Accordingly, the application was dismissed”.

15. The learned counsel for the petitioner would state that the reasoning by the learned Arbitrator in dismissing the application was totally untenable. He states that the learned Arbitrator did not allow the petitioner to prove his case and this petition need to be allowed on this short ground and remanded back to the learned Arbitrator.

16. On the other hand, Mr. Anupam Sharma, learned counsel appearing for the respondent DDA on advance notice would submit that the application for leading the evidence was only a dilatory tactic to hold on to the site which was in his physical possession.

17. Having heard the learned counsel for the parties, I note the basic reason for the petitioner to lead evidence was to show that 40% of the site was only serviceable. The learned Arbitrator has rejected this stand of the petitioner by noting that between May 25, 2011 to April 8, 2013, the petitioner did not raise an issue of 40% of the area was serviceable. According to the learned Arbitrator, such a plea was an after-thought. Such a finding was arrived at by the learned Arbitrator in the absence of the petitioner placing on record anything contrary to prove that he had actually raised the issue that 40% of the area was only serviceable before the receipt of show cause notice dated April 05, 2013. Surely, the petitioner could not have been allowed to lead evidence on an aspect

which was not even his case before the learned Arbitrator. Even in this petition, the petitioner has not placed on record that prior to April 8, 2011, he had raised an issue with the respondent that only 40% area was serviceable. I am of the view that the learned Arbitrator was right in rejecting the application of petitioners to lead evidence. This being the only issue urged before me, I do not think, there is any merit in the petition.

18. The petition is dismissed. No costs.

(V.KAMESWAR RAO)
JUDGE

MARCH 20, 2015

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