

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 1352/2014

GOLDEN INDIA EXPOTRADE PVT. LTD. Petitioner
Through: Mr. S.D. Ansari, Advocate with
Mr. I. Ahmed, Advocate.

versus

TIRUPATI BUILDING & OFFICES PVT. LTD. Respondent
Through: Mr. Gaurav Sarin, Advocate with
Ms. Veera Angrish and Mr. Ajitesh K. Kir,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
29.01.2015

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an Award dated 26th August 2014, requiring the Petitioner to pay to the Respondent amounts for the use and occupation of the premises, arrears of dues in respect of electricity and Common Area Maintenance ('CAM') charges and the interest incurred on the said amounts arising out of the work undertaken by the Respondent/Claimant in respect of the premises i.e. 'SAVEMAX' a retail outlet at Sector-10, Dwarka City Centre, New Delhi.

2. The Respondent is the owner of the property bearing No. 3, Sector-10, Dwarka City Centre, New Delhi. The ground floor and half of the first floor of the building on the property was earmarked for a shopping mall. According to the Respondent, the Managing Director of the Petitioner company approached it in January 2012 stating that they have requisite

expertise in running a multi-brand retail outlet under the trade name 'SAVEMAX'. They requested for space in the building.

3. The parties signed a letter of intent dated 27th January 2012, a Memorandum of Understanding (MOU) dated 31st January 2012 and finally an agreement dated 30th March 2012 captioned as “Lease Deed” whereby the Respondent agreed to provide to the Petitioner 10,000 sq. ft. of area on the ground floor on profit sharing basis for running the retail outlet initially for a period of six months. In the said agreement the Petitioner assured to the Respondent a minimum pay out package of Rs.42 lakhs towards the Respondent’s share of profit for the initial period of six months, failing which the Respondent was given the right to review the profit sharing model. In addition the Petitioner agreed to pay the CAM charges at Rs.36 per sq. ft. of the covered area from the date of the operation of the outlet inclusive of direct or indirect taxes, towards housekeeping, maintenance of common area, running and maintenance of air conditioners, manpower costs etc. This was not to be taken into account while calculating the operating profit. The electricity and water charges were to be paid separately. The expenses along with the staff salaries were not to exceed Rs.8 lakh per month.

4. According to the Respondent, the retail outlet functioned for about six months from 1st April to 30th September 2012. The Petitioner is stated to have paid only Rs.5,58,592 towards the operating profit to the Respondent during the said period. According to the Respondent, the Petitioner also defaulted in paying the electricity, water and CAM charges. When after a meeting of the parties in the middle of September

2012, the Respondent realized that the arrangement would not work out any longer, it recalled the profit sharing model with effect from 1st October 2012. It gave the Petitioner an alternative offer to lease out the premises at a monthly rent of Rs.15 lakhs excluding the charges. This was not accepted by the Petitioner.

5. The Respondent issued a notice on 3rd October 2012 terminating the profit sharing arrangement. According to the Respondent, the Petitioner agreed to vacate the premises after settling the outstanding dues. The premises was then put under the joint locks of the parties in the evening of 5th October 2012. The Respondent was given the right of lien on the stock for recovery of the outstanding dues.

6. The Petitioner initially filed a suit CS No. 361 of 2012 in the Court of the learned Civil Judge. On 8th October 2012, the learned Civil Judge appointed a Local Commissioner ('LC') to ascertain the status as to possession. In his report dated 12th October 2012 the LC observed "During my inspection, it was represented by both the parties that the above outlet was closed and locked by both the parties on or about 5.10.2012". The Respondent filed an application under Order 7 Rule 11 of the Code of Civil Procedure ('CPC') for dismissal of the suit on the ground that there was an arbitration clause. However, the learned Civil Judge dismissed the said application on 4th December 2012. The Respondent then filed a Civil Revision Petition No. 55 of 2013 in which the order was passed by this Court on 15th March 2013 holding that the observations to the effect that the arbitration clause could not be invoked by the Respondent would not affect the trial.

7. In the above circumstances, the Respondent filed OMP No. 308 of 2013 under Section 9 of the Act, *inter alia* praying for the appointment of a receiver to take stock of the goods from the premises, dispose them of at the best market price and grant liberty to the Respondent to utilize the premises pending adjudication of the claims of the each of the parties. On 30th May 2013 the Court disposed of the petition recording the consent terms of an interim arrangement which was to be operational during the pendency of the arbitration proceedings. Under the said arrangement, the Petitioner was to pay the Respondent Rs.30 lakhs calculated @ Rs.10 lakhs per month for a period of three months and also pay the electricity and water charges for the said period. The parties agreed that an Arbitrator could be appointed who would deliver an Award within a period of three months.

8. Before the learned Arbitrator, the Petitioner filed a counter-claim in the sum of Rs. 2,75,35,448 towards the loss and damages suffered by it on account of the Respondent having wrongfully put its lock on the premises. A preliminary objection was raised by the Petitioner that the claim of the Respondent in the arbitral proceedings was “premature and without cause of action”. Another preliminary objection was that the claim was beyond the scope of the arbitration clause. These were framed as Issues 5 and 6 and were dealt with together by the impugned Award. It was held by the learned Arbitrator that the claims of the Respondent were neither premature nor without a cause of action.

9. The learned Arbitrator then considered the central issue as to whether the agreement dated 30th March 2012 was a profit-sharing arrangement

or a lease deed? The learned Arbitrator concluded that it was a profit sharing arrangement and not a lease deed. On analysing the clauses of the lease deed, the learned Arbitrator held that the Respondent was assured that it would have a minimum profit of Rs.7 lakhs pm, excluding expenses and that the Respondent could review the profit sharing model if during the first six months its share of profit was less than Rs.42 lakhs. It was held that the rights of the parties under the profit sharing arrangement could be governed by the general rules which were available to the partners.

10. The learned Arbitrator then considered whether the review of the lease deed by the Respondent and making of the alternative offer to the Petitioner was binding on the parties. The learned Arbitrator held that the review offer was indeed binding and the Petitioner could either accept the alternative offer and reject the same and vacate the premises on the expiry of the arrangement between the parties on 30th September 2012. The learned Arbitrator further concluded that in the absence of the fresh agreement and the refusal of the petitioner to accept the alternative offer, the earlier profit sharing arrangement between the parties stood automatically terminated by efflux of time.

11. The learned Arbitrator then considered the legality of the act of the Respondent in putting locks in the premises. After discussing the oral evidence and the report of the LC, the learned Arbitrator concluded that the premises was jointly locked by the parties by mutual consent on 5th October 2012.

12. The learned Arbitrator then considered whether the Respondent was entitled to Rs.2,68,69,382 along with *pendente lite* and future interest @18% per annum. The learned Arbitrator, after discussing the evidence and the documents upheld the following claims of the Respondent:

(i) Rs.17,09,692 towards the arrears of dues in respect of the electricity, water and CAM charges for the period during which the outlet was functioning.

(ii) Rs.2,50,000 for use and occupation of the premises from 1st October to 5th October 2012.

(iii) Rs.13,25,845 towards the refund of the actual expenditure incurred for which two invoices dated 2nd May 2012 were duly received by the Petitioner. All other items of claims were rejected.

13. The learned Arbitrator further held that while CAM charges for the period upto the conclusion of the interim arrangement was not payable by the Petitioner. It had to pay the Respondent CAM charges for the period from 1st June 2013 onwards till the premises was in its occupation at Rs.3,60,000 per month and that the Respondent would also be entitled to the interest thereon at 12% p.a. Further the Petitioner was directed to vacate the premises and hand over the possession to the Respondent within one month from the date of the Award during which time the Petitioner would remain bound by the terms and conditions of the interim arrangement as put in place by this Court by its order dated 30th May 2013.

14. In the absence of any independent corroborative evidence the Petitioner's counter claim was rejected by the learned Arbitrator.

15. This Court has heard the submissions of Mr. S.D. Ansari, learned counsel for the Petitioner and Mr. Gaurav Sarin, learned counsel appearing for the Respondent.

16. It was first submitted by Mr. Ansari that the learned Arbitrator erred in rejecting the preliminary objection of the Petitioner that the claim was itself premature and beyond the scope of the agreement. He submitted that the disputes raised by the Respondent were not in relation to the lease deed. The claims that were raised before the Arbitrator were not raised earlier.

17. The learned Arbitrator in discussing the above issue referred to the order dated 30th May 2013 passed by this Court in OMP No. 308 of 2013 permitting all the disputes between the parties to be referred to arbitration. Indeed, that was a consent order. Para 2 of the said order of the Court specifically records the consent of both the parties to the appointment of the sole Arbitrator "to adjudicate all the disputes between the parties". At the stage of the petition under Section 9 of the Act, it was clear that the disputes would not be limited to the clauses in the document dated 30th March 2012 but "all disputes between the parties". Accordingly, no error can be found with the conclusion reached by the learned Arbitrator that the claims were neither premature nor without a cause of action.

18. Mr. Ansari then urged that the procedure of serving a notice on the Petitioner in terms of the MOU was not followed. As rightly observed by the learned Arbitrator, having consented to the appointment of an Arbitrator to adjudicate all the disputes between the parties, as recorded in the Court's order dated 30th May 2013, the above objection did not really survive.

19. Mr. Ansari then made an elaborate submission on the nature of the document itself. He submitted that it was essentially a lease deed and in fact was titled as such. There was a lock-in period of 18 months and therefore there was no question of requiring the Petitioner to vacate the premises prior to the lock-in period. There was no clause as such assuring the Respondent a minimum pay out package of Rs.42,00,000 for the initial period six months. He submitted that since the Respondent had unilaterally and illegally placed its lock on the premises on 5th October 2012, it was the Respondent which made it impossible for the Petitioner to perform its obligations under the lease deed.

20. The scope of interference by the Court with the impugned Award is confined to the grounds set out under Section 34 of the Act. The Supreme Court in several decisions reiterated the legal position that on the question of interpretation of clauses of the contract and on findings of fact, the Award of an Arbitrator is final. It will not be open to the Court, while exercising jurisdiction under Section 34 of the Act, to re-appreciate the evidence only to come to a different conclusion. This holds equally good for the interpretation of clauses of contract. In its recent decision in **Associate Builders v. Delhi Development Authority**

215 (2014) DLT 204 (SC), the above legal position has been reiterated by the Supreme Court in the following words:

“An arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.”

21. The Court finds that the learned Arbitrator has discussed the clauses of the agreement dated 30th March 2012 in great detail. On analysing the Clauses 1(iii)(v) to (vii) (a), the learned Arbitrator concluded rightly that it was a profit sharing arrangement between the parties. “If during the first six months the cumulative profit to the lessor is less than Rs.42 lakhs” then the lessor i.e. the Respondent would have right to review the profit sharing model. It was held in **Associate Builders** (supra) “once it is found that the Arbitrator approach is not arbitrary or capricious, then he is the last words on facts”.

22. The learned Arbitrator also noted that at the earliest point of time when the suit was being heard by the Civil Court the statement of the parties were recorded under Order 10 CPC on 4th December 2012. Mr. Vaibhav Singhal, Managing Director of the Petitioner had himself stated “That arrangement between the parties was only profit sharing and not lease as reflected in the agreement. The parties met and reviewed the arrangement on or about 15.9.2012”. Even before the learned Arbitrator Mr. Vaibhav Singhal was examined. He confirmed that two days before

the opening of the store, an agreement was signed in which it was clearly stipulated that the payments were to be made by the Petitioner to the Respondent. The stipulation of a lock-in period of 18 months applied to the Petitioner. It did not control the right of the Respondent to review the profit sharing model if its share of profit was less than Rs.42 lakhs in the first six months.

23. The Court is unable to find any error having been committed by the learned Arbitrator in analysing the clauses of the contract or in the conclusion reached as to the tenability of the claim of the Respondent therein. The Court does not find any error also having been committed in the conclusion of the learned Arbitrator that rights of the parties under the agreement would be governed by the general rules applicable to the partners. This flowed from the very reading of the clauses of the contract which specify the definition of a partnership in terms of Section 4 of the Partnership Act, 1932.

24. It was then submitted by Mr. Ansari that the learned Arbitrator has failed to deal with the counter-claim of the Petitioner. The Court does not find any merit in this contention. Para 16 of the Award discusses in great detail the counter-claim of the Petitioner. The learned Arbitrator has discussed the evidence of the witness of the Petitioner Mr. Vaibhav Singhal and noted that the answers given by him in cross-examination to many questions were “totally evasive and vague”. The learned Arbitrator further found that his evidence was not corroborated by any other independent evidence. The Petitioner failed to produce any attendance register or examine any employee to show that during the period when

the outlet remained closed the Petitioner continued to disburse the salaries. Even the statement of account of the Petitioner for the relevant period was not produced despite a specific order being passed by the learned Arbitrator. The Petitioner also did not lodge any report regarding articles going missing when the premises was opened on 31st May 2013.

25. Mr. Ansari has been unable to show that there was any evidence produced by the Petitioner in support of its counter-claim which was overlooked by the learned Arbitrator. The Court is unable to discern any illegality in the reasons and conclusions reached by the learned Arbitrator in regard to the counter-claim of the Petitioner.

26. No grounds have been made out for interference of the impugned Award of the learned Arbitrator. The petition is dismissed.

S. MURALIDHAR, J

JANUARY 29, 2015
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