

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**ARBITRATION APPEAL NO.43 OF 2015
WITH
CIVIL APPLICATION NO.51 OF 2015
IN
ARBITRATION APPEAL NO.43 OF 2015**

M/s.Pankaj Dyes & Chemicals Ltd.)
 A company registered under the Indian)
 Companies Act, 1956, having its)
 registered office at-Buona Casa,)
 Sir P.M. Roda, Fort, Mumbai - 400 001)
 through its Director-Mrs.Vrinda Sharad Bal)
 age-60 years, occupation-Business,)
 R/at-9, Agarkar Bhavan, LBS Road,)
 Pune - 411 030.) .. Appellant

Versus

M/s.Taco Hendrickson Suspensions Pvt Ltd.)
 A company registered under the Indian)
 Companies Act, 1956, having its)
 registered office at-Taco House,)
 Damle Path, Off. Law College Road,)
 Pune - 411 004.) .. Respondent

Mr.Girish Godbole i/by Mr.Nachiket Khaladkar for the appellant.
 Mr.Sujeet Salkar a/w Mr.Hemant Telkar for the respondent.

CORAM : R.D. DHANUKA, J.
DATE : 2nd May 2016

Oral Judgment :-

. By this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996, the appellant has impugned the order dated 29th June 2015 passed by the learned District Judge-6, Pune dismissing the application under Section 34 of the Arbitration and Conciliation Act, 1996 filed by the appellant herein impugning the arbitral award dated 1st October 2012 passed by the learned arbitrator directing the appellant to refund a sum of Rs.14,90,400/- after deducting the business agreement fees for the months of January and February 2009 with interest @10% p.a. commencing from the notice dated 28th May 2009 and also costs of Rs.1,00,000/- as arbitration expenses. Learned arbitrator has also rejected the counter-claim made by the appellant in toto.

2. The appellant company executed a Business Centre Agreement with respondent company on 6th May 2008 for a period of six years commencing from 15th May 2008 to 14th May 2014 in respect of the premises with terrace admeasuring about 2,326 sq.ft. The actual possession of the said premises was handed over to the respondent on 16th May 2008.

3. It was the case of the respondent that due to industrial decelerating and economic crisis, the respondent decided not to continue the Business Centre Agreement and accordingly terminated the said agreement by issuing a notice by email dated 8th November 2008. The appellant, thereafter, received possession of the said premises from the

respondent on 28th February 2009. Since the appellant did not refund the amount of security deposit paid by the respondent in spite of receiving the actual possession of the said premises, the respondent invoked the arbitration agreement under Clause 9 of the said agreement. Pursuant to the liberty granted by the learned arbitrator, the respondent filed statement of claim before the learned arbitrator. The appellant herein resisted the said claim made by the respondent and also filed counter-claim. Both the parties led oral evidence before the learned arbitrator. Learned arbitrator made an award on 1st October 2012 directing the appellant herein to refund a sum of Rs.14,90,400/- after deducting the business agreement fees for the months of January and February 2009 with interest @10% p.a. commencing from the notice dated 28th May 2009 and also costs of Rs.1,00,000/- as arbitration expenses.

4. Being aggrieved by the said arbitral award, the appellant herein filed Civil Miscellaneous Application (7 of 2013) under Section 34 of the Arbitration and Conciliation Act, 1996 in the Court of District Judge-7, Pune.

5. By an order and judgment dated 29th June 2015, learned District Judge dismissed the said application filed by the appellant herein. This order and judgment is impugned in this appeal filed by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996.

6. Mr.Godbole, learned counsel appearing for the appellant invited my attention to clause 9 of the Business Centre Agreement entered into between the parties. He submits that the respondent had

admittedly issued a notice on 8th November 2008 for termination under the said Clause 9 of the said agreement. He submits that instead of vacating the premises within three months from the date of the said notice dated 8th November 2008, the respondent admittedly vacated the premises on 28th February 2009. He submits that since the said period of three months had expired on 8th February 2009, the respondent ought to have issued a fresh notice under Clause 9 of the said agreement. He submits that since the notice issued by the respondent was not in accordance with the agreement entered into between the parties, learned arbitrator could not have passed an order for refund of the entire amount of security deposit. He submits that even if the period of three months is taken from the date of expiry of notice dated 8th November 2008, three months would have come to an end in the month of February 2009. The said period would have been taken into consideration by the learned arbitrator. He submits that no amount is due and payable by the appellant to the respondent towards security deposit.

7. It is submitted that the learned arbitrator had re-written the contract by rendering a finding that the parties had mutually consented to the date of handing over possession till 28th February 2009 instead of 8th February 2009. He submits that the learned arbitrator has decided contrary to the terms of the agreement, the impugned award is perverse and shows patent illegality.

8. In support of this submission, learned counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.***, reported

in **(2003) 5 SCC 705** and in particular paragraphs 40 and 43 thereof. Reliance is also placed on the judgment of the Supreme Court in the case of **Associate Builders Vs. Delhi Development Authority**, reported in **(2015) 3 SCC 49** and in particular paragraphs 19, 20 and 22 thereof.

9. The next submission of the learned counsel for the appellant is that the intention of the parties while entering into the said Business Centre Agreement was that a license was created in favour of the respondent by the appellant. He submits that the learned arbitrator had, therefore, no jurisdiction to entertain any claim made by the respondent for recovery of the amount of security deposit. He submits that the appellant had also made a counter-claim before the learned arbitrator.

10. In support of this submission, learned counsel placed reliance on the judgment of this Court in the case of **Motabhai Paras Private Limited Vs. Western Paper & Yarn Pvt. Ltd.**, reported in **2012 SCC OnLine Bom 1589**. He submits that since the learned arbitrator had no jurisdiction to entertain the claim made by the respondent, the entire award was without jurisdiction and *void ab initio*. It is submitted by the learned counsel that the appellant was entitled to recover the amount paid by the appellant towards diesel and electricity charges from the respondent.

11. Learned counsel appearing for the respondent, on the other hand, invited my attention to the correspondence exchanged between the parties including possession letter dated 28th February 2009 addressed by the respondent to the appellant according to the discussion held

between the parties on phone recording handing over of possession of the premises on 28th February 2009. He submits that the appellant vide their letter annexed at page 33 of the compilation had requested the respondent to hand over the keys of the suit premises on 28th February 2009 otherwise the respondent could occupy the premises upto 31st May 2009 and pay Rs.19,33,602/- which was already overdue. He submits that on 28th February 2009, admittedly, the appellant received possession of the suit premises from the respondent without the respondent making any payment to the appellant as demanded in the said letter annexed at page 33 of the compilation. He submits that only after receiving the vacant possession of the suit premises from the respondent, the appellant refused to refund the amount of security deposit by raising a false claim of Rs.35 lacs.

12. It is submitted by the learned counsel that the learned arbitrator has rightly rendered findings of facts after considering the oral evidence and after interpreting the terms of the agreement which findings of facts are not perverse and this Court thus cannot interfere with such findings of facts.

13. Learned counsel for the respondent also invited my attention to clause 9 of the said agreement and would submit that the said clause provided for three months prior notice by either party who had intended to terminate the agreement was required to give such notice. He submits that by the notice dated 28th May 2009, the respondent had intended to terminate the agreement and to hand over possession of the suit premises to the appellant.

14. A perusal of clause 9 of the agreement in question clearly indicates that though the period of agreement was for 6 years, either party could terminate the agreement by giving three months prior notice communicating about the intention to terminate the agreement.

15. It is not in dispute that the notice issued by the respondent to the appellant was the notice under Clause 9 of the said agreement. Under Clause 10(d) of the said agreement, it was provided that the appellant shall refund to the respondent the amount of security deposit paid by the respondent and in the event of delay in making such refund, the appellant shall be liable to refund the security deposit with interest @12% p.a. for the period of delay.

16. A perusal of the arbitral award rendered by the learned arbitrator indicates that the parties had led oral evidence before the learned arbitrator. In so far as the issue of jurisdiction raised by the appellant is concerned, the said award indicates that after filing of the written statement by the appellant herein, the appellant had raised an issue of jurisdiction. Under Section 16 of the Arbitration and Conciliation Act, 1996, issue of jurisdiction has to be raised before filing of statement of defence and not after filing the statement of defence. Be that as it may, learned arbitrator has, however, dealt with the issue of jurisdiction and has rejected the said issue by passing a separate order dated 19th September 2011 by recording reasons.

17. A perusal of the record indicates that learned arbitrator has interpreted the provisions of the said Business Centre Agreement and

has come to the conclusion that he had jurisdiction to entertain the said dispute raised by the parties.

18. In so far as the first submission of the learned counsel for the appellant that the respondent not having vacated the suit premises within a period of three months from the date of notice dated 8th November 2008 and thus the said notice had come to an end and unless fresh three months' notice was given by the respondent, the appellant was not liable to refund the amount of security deposit is concerned, a perusal of the correspondence annexed to the paper book which has been considered by the learned arbitrator clearly indicates that it was the case of the respondent that the parties had mutually agreed that the respondent could vacate the premises on 28th February 2009.

19. A perusal of the record indicates that learned arbitrator has also considered the oral evidence led by both the parties while holding that parties by agreement had extended the date of handing over possession of the suit premises from 8th February 2009 to 28th February 2009. In my view, learned arbitrator having considered the oral evidence led by the parties as well as the documentary evidence and having rendered a finding of fact which is not perverse, the learned District Judge while deciding the arbitration application under Section 34 of the Arbitration and Conciliation Act, 1996 was right in not interfering with such findings of fact. There is thus no merit in the submission made by the learned counsel for the appellant.

20. A perusal of the correspondence produced before to this Court by the learned counsel for the respondent clearly indicates that

when the respondent informed the appellant that he wanted to hand over possession of the suit premises on 28th February 2009 as per the discussion on phone, the appellant took the possession of the suit premises on 28th February 2009. The possession letter placed on record before this Court was placed on record before the learned arbitrator. The appellant accepted the possession of the suit premises from the respondent unconditionally. Though the appellant themselves had demanded Rs.35,23,002/- pursuant to the letter dated 27th February 2009 addressed to the respondent, no such demand was raised when the possession of the suit premises was accepted by the appellant from the respondent. In my view, the claim thus made by the respondent for refund of the amount of security deposit under clause 10(d) of the agreement was fully justified and has been rightly allowed by the learned arbitrator.

21. A perusal of the impugned award rendered by the learned arbitrator clearly indicates that the learned arbitrator has permitted the appellant to deduct the business agreement fees for the months of January and February 2009. In my view, the appellant was thus not prejudiced in any manner in view of the business agreement fees having been provided in the impugned award till February 2009.

22. In so far as the submission of the learned counsel for the appellant that the learned arbitrator did not consider the counter-claim in respect of the diesel and electricity charges is concerned, a perusal of the impugned award clearly indicates that the appellant had though filed counter-claim did not produce any proof in support of the counter-claim.

In my view, learned arbitrator has thus rightly rejected the counter-claim made by the appellant.

23. In so far as the judgment of the Supreme Court in the case of *Oil & Natural Gas Corporation Ltd.(supra)* and *Associate Builders (supra)* relied upon by the learned counsel for the appellant is concerned, there is no dispute about the propositions of law laid down by the Supreme Court. Supreme Court has also held that a patent illegality must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the Court. The Court cannot set aside the award on trivial issues. Merely because the respondent handed over possession of the suit premises on 28th February 2009 in view of the understanding arrived at between the parties, in my view, that would not be a ground of patent illegality or perversity in the award as canvassed by the learned counsel for the appellant.

24. In my view, there is no substance in the submission of the learned counsel for the appellant that the learned arbitrator had re-written the contract. Clause 9 of the said agreement clearly provided that if the parties intended to terminate the agreement, the parties had to give three months prior notice. A perusal of the notice issued by the respondent clearly indicates that the respondent had intended to terminate the agreement which was extended by the parties. I do not find any perversity in the impugned award as canvassed by the learned counsel for the appellant.

25. In so far as the judgment of this Court delivered by the learned Single Judge in the case of *Motabhai Paras Private Limited (supra)* relied upon by the learned counsel for the appellant is concerned, a perusal of the said judgment indicates that the licensor had applied for recovery of license fees in the arbitration proceedings. The facts before this Court in the case of *Motabhai Paras Private Limited (supra)* are totally different and clearly distinguishable in the facts of this case. The said judgment does not assist the case of the appellant.

26. In my view, the learned arbitrator has dealt with the evidence, pleadings and has interpreted the terms of the agreement entered into between the parties. Interpretation of the learned arbitrator on the terms of the agreement is a possible interpretation and thus this Court cannot substitute the interpretation of the learned arbitrator by another interpretation.

27. In so far as the judgment rendered by the learned District Judge is concerned, the learned District Judge has independently considered all the crucial aspects in the matter and has rightly not interfered with the impugned award by exercising its jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

28. In my view, the appeal is devoid of merits and is accordingly dismissed. In view of dismissal of the appeal, civil application does not survive and is accordingly dismissed. No order as to costs.

29. At the request of the learned counsel for the appellant, execution of the impugned award as well as the orders passed by the learned District Judge and this Court are stayed for a period of ten weeks from today.

R.D. DHANUKA, J.