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

+ O.M.P. 738/2012

KANWAR SINGH PRADHAN Petitioner
Through Mr.Israel Ali, Adv.

versus

M/S OVERNITE EXPRESS LTD Respondent
Through Mr.Rajesh Gogna, Adv. with
Ms.L.Gangmei, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

% **ORDER**
20.07.2016

O.M.P. 738/2012 & I.A. No.21459/2012 (u/s 42 of Arbitration and Conciliation Act, 1996)

The petitioner has filed the present petition under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for setting aside the unilateral appointment of Arbitrator and ex-parte arbitral award dated 14th May, 2012.

It is the admitted position between the parties that the suit property i.e. A-221, First Floor, Gali No.6, Mahipalpur Extension, New Delhi-37 is enjoyed by the respondent on the basis of an unregistered lease deed. It is pertinent to mention that in other disputes the basement and ground floor of the same suit property was involved. When the arbitrator was appointed by the learned Predecessor Bench of Hon'ble Mr.Justice S.Muralidhar in Arb.P. No. 107/2012 on 26th July, 2012 the following order was passed:

“1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“Act”) seeking reference of the disputes of the Petitioner and Respondent to arbitration.

2. The Petitioner entered into two agreements of lease with the Respondent. One dated 31st December 2004 letting out the basement and ground floor and the other dated 1st March 2005 letting out the first floor of the premises at Building No. A-221, Street No.6, Mahipalpur Extension, New Delhi-110037 to the Respondent on monthly rent of Rs.30,000 for each floor, aggregating to Rs.90,000 per month. While the lease agreement dated 31st December 2004 was registered, the lease agreement dated 1st March 2005 was not. It is accordingly contended by the Petitioner that the tenancy as regards the first floor was on a month-to-month basis.

3. The Petitioner states that he issued notices dated 12th May 2011 to the Respondent terminating the lease agreements by giving 15 days advance notice asking the Respondent to vacate and hand over the physical possession of the entire premises under his occupation. This was followed by the Petitioner by filing Suit No. 573 of 2011 in the Court of learned Additional District Judge (“ADJ”), Dwarka, New Delhi seeking eviction of the Respondent from the first floor of the suit premises. In the said suit, the Respondent filed an application under Section 8(1) of the Act referring to an identical arbitration clause in both lease agreements which reads as under:

“Any dispute, difference claim counter claim arising out of, under or in connection with this agreement or any other breach thereof shall be resolved by mutual negotiations by and between the parties. Any unresolved dispute, claim, or difference shall be finally settled by an Arbitrator to be nominated after mutual agreement or both parties has the option to refer the matter/dispute to the jurisdiction of Delhi Court.”

4. By order dated 1st March 2012, learned ADJ allowed the said application and directed the parties to resolve their disputes through arbitration. The learned ADJ was informed by the Respondent that during the pendency of the suit, that it had

already appointed an advocate as an Arbitrator and that the dispute could be referred to her. The Petitioner, who was the Plaintiff in the said suit, submitted before the learned ADJ that he had never consented to the said appointment and that the Respondent had unilaterally appointed the Arbitrator. The learned ADJ in the said order dated 1st March 2012 observed that if the Petitioner had any doubt as to the legality of the appointment of the Arbitrator, the Petitioner was at liberty to seek recourse to the Act and that the Court could not interfere in the process.

5. It is in the above circumstances that the present petition was filed by the Petitioner on 23rd February 2012 seeking the reference of the following disputes arising out of both lease agreements dated 31st December 2004 and 1st March 2005 to arbitration:

“I. Claim of recovery of actual, vacant, physical and peaceful possession of the said entire premises bearing No. A-221, Gali No. 6, Mahipalpur Extension, New Delhi measuring 9000 sq. ft. consisting of Basement, Ground Floor, First Floor and Terrace measuring 3000 sq. ft. each and open area measuring 1200 sq. ft.

II. Claim of damages for the unauthorised use and occupation of the said property @ Rs.1 lac in agreement to lease dated 1st March, 2005 (First Floor) and @ Rs. 2 Lac in agreement to lease dated 31st December, 2004 (basement and Ground Floor) per month from the date when the tenancy were terminated vide notice dated 12.5.2011 till the time respondent vacate and hand over the actual, vacant and peaceful possession of the said entire premises to the Petitioner or is evicted in accordance with law.

III. Interest @ 24% P.A. on the damages mentioned above.

IV. Litigation expenses and cost.”

6. In its reply the Respondent opposed the above prayers and contended that the above disputes could also be referred to the Arbitrator appointed by it. Further it is pointed out that the Petitioner sent a communication on 29th November 2011

objecting to the jurisdiction of the Arbitrator and the continuation of the arbitral proceedings. On 15th December 2011 proceedings were conducted by the said Arbitrator in the absence of the Petitioner. On 4th January 2012 the Petitioner was set ex- parte and the case was adjourned to 2nd February 2012 for ex-parte evidence. Learned counsel for the Respondent has also placed on record a copy of the ex-parte Award dated 14th May 2012 passed by the learned Arbitrator. He places reliance on the decision in Mukesh Kumar Agrawal v. Raj Kumar Agarwal AIR 2000 MP 231 to urge that the unilateral appointment of the Arbitrator by the Respondent ought not to be interfered with.

7. Learned counsel for the Petitioner on the other hand submits that the arbitration clause unambiguously states that the appointment of an Arbitrator had to be by mutual consent. He relies on the decisions in Dharma Prathishthanam v. Madhok Construction (P) Ltd. (2005) 9 SCC 686 and Hyderabad Pollution Controls Ltd. v. M/s. Indure Pvt. Ltd. 2010 (1) R.A.J. 80(Del).

8. The above submissions have been considered. There can be no doubt that the appointment of the Arbitrator by the Respondent was unilateral. Secondly, the said Arbitrator has already passed an Award and has become functus officio. Thirdly, the disputes decided by the said Award are different from the ones of which reference is sought by the Petitioner. It pertained to the question of registration of the lease deed dated 1st March 2005, removal of generator sets located at the roof of the premises and a direction to the Petitioner to receive rent from June onwards. Although, the Petitioner has in his rejoinder sought the setting aside of the Award passed by the Arbitrator on 14th May 2012, this Court cannot grant that relief in the present petition under Section 11 of the Act. It will be open to the Petitioner to seek appropriate remedies available to him under the Act for that purpose.

9. As far as the present petition is concerned, with the

parties failing to agree on the name of the Arbitrator by mutual consent in terms of the arbitration clause in the lease agreements there is no impediment in the reliefs sought by the Petitioner being granted. Consequently, the disputes raised by the Petitioner in respect of the lease agreements dated 31st December 2004 and 1st March 2005 as referred to in para 13 of the Petition, as well as any counter claims that the Respondent may have other than those forming the subject matter of the Award dated 14th May 2012 are referred to the sole arbitration of Mr. Brijesh Kumar, retired Additional District Judge [r/o E-35, Saket (F.F), New Delhi-110017, Mob.9968139955]. The arbitration will take place under the aegis of and as per the rules of the Delhi High Court Arbitration Centre ("DHCAC"). The fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules.

10. The petition is disposed of in the above terms. A copy of this order be communicated to the learned Arbitrator as well as Secretary, DHCAC forthwith."

Admittedly, the lease-deed dated 1st March, 2005 was unregistered whereby first floor of the premises was let out. While rendering the award, the learned Arbitrator has passed the various directions.

The operative portion of the award reads as under:

"I direct the Claimant to draw the agreement of lease as per oral agreement dated 25th February, 2005 on an appropriate stamp paper. And further direct the Respondent to cooperate with the Claimant to get the same registered. In case the respondent fails to cooperate with claimant, the claimant may take adequate steps before competent Court of law to get the same registered through Court of law."

After arguments, when it was confronted to the learned counsel for the respondent about the directions issued by the sole arbitrator which are totally

contrary to law, perverse and bias, learned counsel for the respondent upon instruction agrees that let the award be set aside. I do not want to express any opinion against the respondent or learned Arbitrator as the other petition filed by the respondent under Section 34 of the Act is pending before this Court. However, as agreed by the respondent, the award dated 14th May, 2012 passed by the Ms.Savita Malhotra is set aside.

The petitioner is entitled to cost of Rs.20,000/- which shall be paid by the respondent within four weeks from today.

MANMOHAN SINGH, J.

JULY 20, 2016/vp