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

\+ O.M.P. (COMM) 310/2016

M/S MILESTONES GAMES PVT. LTD ..... Petitioner

Through: Mr Aaditya Vijay Kumar and Ms Liza M. Baruah, Advocates.

versus

ANIL KUMAR MEHTA (HUF) & ANR. ..... Respondents

Through None.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **12.07.2016**

IA No.7924/2016

Allowed, subject to all just exceptions.

IA No. 7925 of 2016 (Delay)

1. This is an application seeking condonation of delay of three days in filing the petition under Section 34 of the Arbitration and Conciliation Act, 1996. The award in question was received by the petitioner on 16.02.2016 and the petition under Section 34 was filed on 17.05.2016, that is, after the period of 90 days but before the expiry of 120 days.

2. For the reasons stated in the application, the same is allowed.

O.M.P. (COMM) 310/2016 & IA Nos.7923 (Stay)

3. The petitioner has filed the present petition (O.M.P. (COMM) 310/2016) under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia,* praying for setting aside of the award dated 12.02.2016 passed by the Sole Arbitrator, Shri Siddharth Khattar.

4. The disputes involved between the parties relate to leasing of the premises bearing no. LG-64, Lower Ground Floor, MGF Metropolis Mall, M. G. Road, Gurgaon, Haryana.

5. Admittedly, the petitioner and respondents entered into a lease agreement dated 15.03.2012 wherein the petitioner agreed to take on lease the aforesaid property for a period of three years at a monthly rent of Rs.2,62,960/- (Rupees Two Lacs Sixty Two Thousand Nine Hundred and Sixty Only). The petitioner also paid a sum of Rs.10,51,840/- (Rupees Ten Lacs Fifty One Thousand Eight Hundred and Forty Only) - a sum equivalent to four month's rent - as interest free security deposit. Admittedly, the said agreement also contained an arbitration clause.

6. The petitioner took possession of the property in question on

10.04.2012 and commenced work for renovation, interior decoration, fit outs etc. in order to suitably furnish the property to commence operations.

7. The petitioner paid rent for the month of May 2012 at the agreed rate but failed to pay the same thereafter. In the circumstances, the respondents (hereafter referred to as 'claimants') served a notice dated 01.08.2012 on the petitioner demanding the arrears of rent for the month of June and July 2012 alongwith service tax and interest at the rate of 18% p.a. for delayed payment. The petitioner responded to the said notice claiming that the petitioner was misled into believing that the Mall would have an official launch by mid of December, 2011; that all anchor stores were in operation; the Mall had good footfalls; and 35% of the Mall had been acquired by anchor stores.

8. The petitioner asserted that the aforesaid representations were not correct and this had resulted in the petitioner suffering a loss of approximately Rupees Four Lac each month. The petitioner stated that it had proposed that the rent be reduced to Rs.1 Lac per month, and a revenue share clause of 10% of net sales be agreed to till 70% of the Mall occupancy is achieved.

9. The claimants by a notice dated 20.09.2012 terminated the lease agreement and called upon the petitioner to vacate the demised premises. The claimants also invoked the arbitration clause and appointed the Sole Arbitrator. The petitioner disputed that the claimants were entitled to the possession of the premises or any damages. The petitioner denied that any rent was due to the claimants and further asserted that the lease agreement, being an unregistered and under stamped agreement, could not be relied upon for any purpose including for appointing of a Sole Arbitrator.

10. This led the claimants to file a petition under Section 11 of the Act in this Court (being Arb. Petition 106 of 2013). By an order dated 06.11.2013 passed by this Court, the unregistered lease agreement dated 15.03.2012 was impounded and sent to Collector of Stamp, Gurgaon for imposition of stamp duty and penalty. The claimant paid the requisite stamp fees as assessed and the agreement dated 15.03.2012 was registered. Thereafter, by an order dated 24.04.2014 passed in **Arb. Petition 106 of 2013** captioned "***Anil Kumar Mehta (HUF) & Anr. V. M/s Milestone Games Pvt. Ltd.***", Mr Siddharth Khattar was appointed as a Sole Arbitrator for adjudication of the disputes between the parties.

11. The claimants filed the statement of claims which was responded to

by the petitioner. The petitioner also filed a counter claim for a sum of Rs.1,56,28,630/- on account of alleged losses suffered by the petitioner.

12. The Arbitrator found that the petitioner was in the possession of the demised premises till 29.09.2014 and awarded a sum of Rs.1,11,65,234/-. The aforesaid sum is the aggregate of the following:-

(i) Rs.1,03,32,033/- which comprised of a sum of Rs.1,30,008/- as rent till 30.09.2012 after adjustment of security deposit of Rs.10,51,840/-; Rs.44,118/- being interest on delayed payment for the month of June 2012 to September 2012 payable till 30.09.2012; Rs.70,91,088/- being rent alongwith service tax for the period of 24 months from October 2012 till September 2014; and a sum of Rs.30,66,819/- as interest on the monthly rent, user charges due from October 2012 till September 2014.

(ii) Rs.98,701/- being 50% of the stamp duty, registration charges and penalty.

(iii) Rs.5,27,500/- (3,07,500+2,20,000) as costs and litigation expenses.

(iv) Rs.1,97,000/- being deposited as fees of the arbitrator and administrative cost.

13. The Arbitrator rejected the claim for damages at the rate of Rs.50,000/- per day after termination of the lease. However, the Arbitrator awarded interest at the rate of 15% p.a. from the date of passing of the award till realisation.

14. The counter claim made by the petitioner was rejected as the petitioner failed to pay its share of the Arbitrator's fee in respect of the counter claims filed by it; the Arbitrator's fee in respect of counter claims was fixed at Rs.3,54,000/- and although the claimants paid their share being half of the aforesaid amount, the petitioner failed to do so. Accordingly, the Arbitrator terminated the proceedings relating to the counter claim by an order dated 31.10.2015.

15. The learned counsel for the petitioner submitted that the claimants had induced the petitioner to take on lease the said premises by playing a fraud and misrepresenting that 70% of the shops in the said Mall had been leased out to major retail brands. He submitted that the petitioner was located in Mumbai and, therefore, had no occasion to verify the correctness of the representations so made. He further submitted that the petitioner had filed an

affidavit affirming the same and the contents of the said affidavit had not been rebutted. He submitted that although the deponent had been cross-examined, no suggestions to contest the above statements had been made. In the circumstances, the Arbitrator was bound to accept the said averments as true and proceed accordingly. The learned counsel has also referred to the decision of this Court in ***J. C. Enterprises (Regd) v. Ranganatha Enterprises*** : ***178 (2011) DLT 689*** in support of his contention that in the event an affirmation made is not denied, the same must be deemed to be accepted.

16. Next, the learned counsel contended that the Arbitrator had erred in not considering the counter claim filed by the petitioner as the requisite fees had not been paid. He submitted that by virtue of Section 38 of the Act, it was incumbent upon the Arbitrator to call upon the claimant (respondent herein) to pay the petitioner's share of Court fees on the failure of the petitioner to do so.

17. I have heard the learned counsel for the petitioner and also perused the Arbitral Award.

18. It is seen that the Arbitrator had examined the contentions advanced

by the petitioner. The petitioner had contended that the claimants had fraudulently induced the petitioner to take the premises on lease. The petitioner had further contended that such issue of fraud was not arbitrable. The Arbitrator held that the petitioner's contention that the dispute was not arbitrable on account of allegations of fraud was unsustainable. The Arbitrator further observed that there was a distinction between a false representation and a case of fraud. He further held that; *"In the facts of the present case there is no such substantiated allegation of fraud much less serious fraud of a grievous, aggravated or egregious nature"*.

19. The Arbitrator also held as under:-

> "28. The present case is a simplicitor recovery proceedings arising out of disputes between the landlord and tenant where the landlord is claiming rent, possession and damages subsequent to the termination of the Lease. The present arbitral tribunal was constituted by the Hon'ble Delhi High Court and apparently the Respondent made no objection qua "fraud" to the same nor assailed the said Order on the question of "arbitrability of fraud". In fact the judgments referred by the Respondent relate to cases where there are question of serious fraud of egregious nature which is not so in the facts of the present case as is apparent from the instances of alleged fraud mentioned in Point No. 1 of the written submissions filed by the Respondent.
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> 29. In view of the aforesaid it is apparent that the objection qua "arbitrability of fraud" raised by the Respondent is devoid of any merits and has been taken as an afterthought to somehow delay the course of justice. The Respondent has completely

> failed to substantiate the alleged "fraud" much less fraud of serious nature and hence the said objection of the Respondent is dismissed."

20. The Arbitrator further found that the petitioner could have made enquiries on its own and by exercise of reasonable diligence could have known the correct state of affairs. Insofar as the petitioner's contention that the claimant had misrepresented that the Mall was 70% leased out to major retail brands is concerned, the Arbitrator found that the petitioner was unable to place on record any document containing the alleged misrepresentations and had also not been able to elicit anything from the claimants' witness by cross-examination. The Arbitrator further noted that both the parties had paid brokerage to one Mr Gurpreet Ratra who is stated to have made the aforesaid representation. The Arbitrator held that Mr Gurpreet Ratra was an independent professional and could not have been considered to be the agent of the claimants.

21. The Arbitrator took note of the following relevant clauses of the lease agreement dated 15.03.2012:

> **"1. TERM OF LEASE:**
>
> (a) xxx xxx xxx xxx
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> (b) That in consideration of the monthly rent herein fixed

and the other covenants herein contained, the Lessor hereby agrees to grant to the Lessee a lease in respect of the Demised Premises for an initial period of 3 (Three) years ("The Term") commencing after the fit out period of 60 (Sixty) days from the date of the handing over of the possession of the said premises for the purpose of fit outs. The lease rent shall commence wef 61st day from the date of possession or from the date of the commencement of operations by Lessee whichever is earlier.

(c) That in the event the rent / maintenance charges remaining unpaid by the lessee for a period of 2 (Two) consecutive months from the date when the same is due, the Lessor shall have the right to terminate this agreement provided the Lessor has given a written notice calling upon the Lessee to pay the lease rent and the Lessee has not paid the rent/charges within 15 (Fifteen) days of receipt of such written notice. This right is without prejudice to all or any other right available to the Lessor under this agreement or under laws or otherwise and the lessee shall have no objection to it.

The Lessee shall have the option to renew the lease in respect of the premises for a further 2 (Two) terms of 3 (Three) years each on the same terms and conditions and subject to escalation of Lease rent. That the rent shall be subject to an escalation of 15 (Fifteen percent) every 3(Three) years over the last corresponding rental period. However, on each renewal a fresh least deed shall be executed between the parties on the payment of the stamp duty if any, leviable, as per the applicable facts as per the provisions of Indian Stamp Act, 1899 and be registered, if so required under the then applicable provisions of Registration Act, 1908.

2 RENT, SECURITY DEPOSIT & MAINTENANCE CHARGES:

(a) That the Lessee shall pay to the Lessor the rent of Rs.2,62,960/- (Rupees Two Lakhs Sixty Two Thousands Nine Hundred Sixty only) per month @ Rs.190/- (Rupees One Hundred and Ninety Only) per Sq. Ft. per month, of Super Area ("The Rent") in advance by the 7th (Seventh) of each claendar month by account payee cheque favour "ANIL KUMAR MEHTA HUF" subject to deduction of tax at source and such other statutory deduction as shall be applicable from time to time.

(b) The Lessee also agrees to pay the service tax or any other tax as applicable on the rent.

(c) The Lessee agrees that in case of rent not being paid for more than period of 2 (two) consecutive months, the Lessor shall be entitled to charge an interest @ of 18% (eighteen percent) per annum for the delayed period. However, this liberty is given to the Lessee for only once during the term of the Lease and on subsequent default of this nature the Lessor shall on the expiry of 15 days notice be entitled to terminate this Lease Agreement in the manner stated hereinafter.

(d) That the Lessee shall pay to the Lessor an interest free refundable security deposit of Rs.10,51,840/- (Rupees Ten Lakhs Fifty One Thousand Eight Hundred Forty Only) equivalent to 4 (Four) months lease rent in the manner hereinafter stated ("The Security Deposit").

i. Out of the aforesaid security deposit, the Lessee has paid an amount of Rs. 100,000/- (Rupees One Lakh only) vide cheque No.507917 dated 10.01.2011 drawn on HDFC Bank on the date of signing of LOI (Letter of Intent).

ii. The balance security deposit amount of Rs.9,51,840/- (Rupees Nine Lakh Fifty One Thousand Eight Hundred Forty only) at the time of hand over of possession and signing of Lease Agreement vide cheque No.273937 dated 12.03.2012 drawn on HDFC Bank, Mumbai.

The aforesaid security deposit shall be refunded to the Lessee on the expiry of this Lease Agreement or earlier termination thereof and on simultaneous vacation of Demised Premises and after adjustment of mutually ascertained dues, if any, against arrears of Rent, Electricity charges, Water charges, Common Maintenance / Mall Management charges and / or other dues, charges etc. which may be due and payable by the Lessee for and or in connection with the premises. In the event the Lessor fails or unable to refund the Security Deposit after adjustments, if any, the Lessee shall be entitled to hold possession and use the said premises without the payment of any consideration till the date of repayment of Security Deposit in addition the Lessor shall be entitled to hold possession and use the said premises without the payment of any consideration till the date of repayment of Security Deposit in addition the Lessor shall be entitled to charge interest at the rate of 18% on the amount from the date when the refund has become due till the date of actual payment of the same.

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18. Registration and Stamp Duty

That the cost of stamping and registration of this agreement will be borne equally by the Parties."

22. A bare perusal of the award indicates that it is in terms of the agreement entered into between the parties and I find no infirmity in the same.

23. The petitioner's contention that the Arbitrator had erred in terminating the Arbitration proceedings with regard to the petitioner's counter claim is also unsustainable. Concededly, this ground had never been raised by the petitioner before the Arbitrator and no objection in this regard was taken by the petitioner at the relevant stage. In any view, the petitioner could not have expected the claimants to pay the petitioner's share of fees for the petitioner's counter claim.

24. The scope of interference under Section 34 of the Act is limited. The only ground sought to be made out by the petitioner is that the impugned award is "*in conflict with the public policy of India*". Explanation 1 to Section 34(2) which explains the scope of the expression "conflict with public policy of India" reads as under:-

> "Explanation 1.— For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 of section 81; or
> (ii) it is in contravention with the fundamental policy of Indian law; or
> (iii) it is in conflict with the most basic notions of morality or justice."

25. It is at once apparent that the ground on which the arbitral award is

challenged by the petitioner do not fall within the scope of Section 34(2)(b)(ii) of the Act.

26. Plainly, the impugned award is neither in contravention of the fundamental policy of Indian law nor in conflict with the basic notions of morality or justice. As explained by the Supreme Court in a recent decision in ***Associate Builders v. Delhi Development Authority***: ***(2015) 3 SCC 49*** the court while applying the public policy test to an arbitration award does not act as a court of appeal.

27. In view of the aforesaid, the petition under Section 34 of the Act (O.M.P. (Comm) 310/2016) and IA No.7923 (Stay) are dismissed.

VIBHU BAKHRU, J

JULY 12, 2016
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