

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

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Judgment Reserved on: 09th October, 2015
Judgment Delivered on: 16th February, 2016

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FAO(OS) 277/2015 & CM 9521/2015 (STAY)

M/s Home Stores (India) Ltd

..... Appellant

Versus

M/S Pacific Maintenance Services Pvt Ltd

...Respondent

Advocates who appeared in this case:

For the Appellant:

Mr Shiv Kumar Suri with Ms Shikhil Suri and Mr
Satendra K. Rai, Advocates.

For the Respondent:

Mr Attin Shankar Rastogi, Advocate.

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. A very limited controversy arises in this appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act).

2. The appellant/petitioner had filed objections to the arbitral award dated 21.11.2014. The challenge to the award was two-fold.

First of all, with regard to the Arbitrator not having considered the payment made by the sub-lessee of the petitioner as maintenance charges to the respondent and the entitlement to the benefit of those charges to enure to the petitioner. Secondly, with regard to the issue that on account of electricity being disconnected, the appellant could not have enjoyed the property and was thus not liable to pay any maintenance charges.

3. With regard to the first contention raised, the impugned order records that the respondent had shown that the amount paid by the sub-lessee was in respect of the area occupied by the sub-lessee and that amount was not in respect of the area occupied by the appellant and as such the appellant was not entitled to the benefit of the same. The appellant had conceded this point before the learned Single Judge and as such the objections qua this aspect were rejected. The present appeal does not challenge this aspect of the impugned order.

4. With regard to the second objection raised by the appellant before the learned Single Judge, the impugned order rejects the objection on the ground that no such submission appears to have been made before the Arbitrator and the appellant had not taken a specific ground that such a submission was urged and not considered by the Arbitrator. In this view of the matter, the learned Single Judge has rejected the second objection raised by the appellant.

5. The appellant had contended that this aspect of the impugned order is erroneous, in as much as, such a contention was raised before the Arbitrator and has been considered. Our attention was drawn to the part of the award that deals with the same.

6. We find that the award deals with this issue and the learned Single Judge has erred in rejecting the objection on this ground. There were, thus, two courses open to us in this view of the matter. One was to remit the objection to the learned Single Judge to reconsider the same and the other was to consider it ourselves. Since the controversy between the parties is very limited, we have followed the latter course. We have heard parties on the merits of this issue.

7. The objection raised by the appellant is that the Arbitrator had not considered the issue that on account of electricity being disconnected, the appellant could not enjoy the property and was thus not liable to pay any maintenance charges.

8. The appellant was a tenant in respect of premises Nos. G-12 and G-13 in 'Pacific' Multiplex-cum-hotel situated in District Ghaziabad vide lease agreement dated 18.10.2005. The appellant had entered into a maintenance service agreement with the respondent. The appellant vacated the premises 03.11.2010. The respondent filed its claim contending that the appellant had not paid the common area and maintenance charges and also charges towards the electricity dues

for June 2010 to October 2010.

9. The Arbitrator had framed the specific issue as Issue No. 5 as under:

“5. Whether the claimant had disconnected electricity to the retail store on 13.06.2010, if so, its effect?”

10. The issue that on account of electricity being disconnected, the appellant could not have enjoyed the property and was thus not liable to pay any maintenance charges would be covered by the issue 5 framed and considered by the Arbitrator. The Arbitrator after noticing the evidence lead by the parties, with regard to the said issue, has held as under:

“12. It is proposed to deal, firstly, with the issue whether the claimant had disconnected electricity to the tenancy premises of the respondent on 13.06.2010 in his Affidavit in evidence, RW1 Shri Mohit S. Nigam states that electricity remained ‘virtually disconnected’ in the store form the entire period from 13.06.2010 to the end of October 2010 except for temporary restoration on 03.07.2010 and again disconnected on 12.07.2010 and the possession of the premises was meaningless as no sales could take place once the electricity was disconnected. It would be pertinent to note that as per the minutes of the meeting dated 05.10.2010 with the heading “Meeting held with landlord of Home Stores on 05.10.2010” EX. RW-1/K, it was decided that the tenant/respondent shall vacate the premises on or before 15.10.2010 and overdue amounts as on 15.10.2010 to be paid on or before 31.12.2010. The aforesaid minutes of

the meeting are suggestive of the tenant/respondent being in arrears of rent and the obvious anxiety of the landlords to get rent or else the tenant should vacate the premise. These minutes do not suggest that in the said meeting it was decided that CAM would be payable by the respondent only up to 13.06.2010, as is contended by the respondent in support of its plea of alleged disconnection of electricity to the tenancy premise on 13.06.2010 nor do the minutes of the meeting record any complaint by the tenant regarding the alleged disconnection of electricity to the tenancy premises 13.06.2010. On the other hand, the fact that the respondent agreed to vacate by a certain date and to pay the outstanding by a certain date negates the plea of the alleged constraints in carrying on business due to the alleged disconnection of the electricity. Further, there is no merit in the plea of the respondent that consumption of electricity during June and July 2010 by its sub-tenant Store 99, because under the Lease Deed it is the liability of the respondent to pay for CAM during the subsistence of its lease. The evidential matrix concerning the consumption of electricity, as reflected in the copy of the bills for the period covering the month June 2010 onwards Ex. RW-1/F to Ex. RW1/J filed by the respondent (same as Ex. PW2/A1 filed by the claimant), belies the plea of the respondent that the electricity was disconnected on 13.06.2010 or that it was temporarily restored between 03.07.2010 and 12.07.2010 even otherwise, why would the tenant (respondent here-in) hold on to the tenancy premises till 03.11.2010 and not take any 'proactive steps' in exercise of its rights under the Lease Deed and/or the MSA against the Maintenance Agency, namely, the claimant here-in or against the entity raising the Electricity Bills or the landlord of the premise or to avail of the statutory

remedy for interim measures in the face of an arbitration clause in MSA. The cross examination of CW2 is very significant connection of the respondent was not functional during the month of August 2010 and September 2010 and on the request of the respondent the same was made functional after rectification of the technical defects in around last week of October 2010 and the respondent voluntarily vacated the premises on 03.11.2010. in answer to Q 10 in his cross examination as to what was the technical defect CW2 explain that due to moisture MCB got tripped and in answer to Q11 as to how much time was needed to repair or replace the MCB the witness states that MCB only was required to be upped after tripping by their electrician. In the given evidential parameters, I find no merit in the plea of the alleged disconnection of the electricity to the demised premises by the maintenance agency, the claimant herein, from the material on record, it is not proved that the electricity to the premises had been disconnected on 13.06.2010 by the claimant or that it was temporarily restored between 03.07.2010 and 12.07.2010. The issue is answered accordingly. “

11. The Arbitrator has returned a finding of fact that there was no disconnection of the electricity to the demised premises by the respondent. It is settled law that the Arbitrator is the master of facts. In the present case, the Arbitrator has considered the evidence both – oral and documentary brought on record to return the finding of fact that the electricity was not disconnected by the respondent. This being a pure finding of fact the same cannot be interfered with in a petition under Section 34 or an appeal under section 37 of the Act.

The arbitrator is the master of the factual arena and may even go wrong while deciding the factual issues. Unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice, no interference would be called for.

12. Where the arbitrator has assessed the material and evidence placed before it in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.

13. After appraisal of material and evidence on record, once a categorical finding of fact has been returned by the Arbitrator that the electricity was not disconnected by the respondent, the same cannot be interfered with by this Court in a petition under Section 34 of the Act.

14. Since the Arbitrator has returned a finding of fact that electricity was not disconnected by the respondent, the issue that the appellant could not enjoy the property and was not liable to pay the maintenance charges to the respondent, does not arise for consideration at all.

15. No ground has been made out before us that the finding of fact that the electricity has not been disconnected by the respondent is perverse. No ground has been made out calling for any interference in the view taken by the Arbitrator in the impugned award. The appeal is accordingly dismissed, leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J.

February 16, 2016
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BADAR DURREZ AHMED, J.