

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

% *Judgment Reserved on : January 29, 2016*
Judgment Delivered on : February 04, 2016

+ **FAO(OS) 285/2015**

SUDHAKAR TIWARI Appellant

Represented by: Mr.A.S.Chandioke, Sr.Advocate
instructed by Ms.Sweta Kakkad,
Ms.Monika, Mr.B.L.Wali and
Mr.Jibran, Advocates

versus

DELHI DEVELOPMENT AUTHORITY Respondent

Represented by: Mr.Anupam Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. As per the award dated November 13, 2014, the appellant has been awarded a sum of ₹2,62,000/- (Rupees Two Lacs and Sixty Two Thousand only); being the earnest money lying deposited with the Delhi Development Authority. The Delhi Development Authority has been awarded a sum of ₹22,63,361/- (Rupees Twenty Two Lacs Sixty Three Thousand Three Hundred and Sixty One only) towards outstanding license fee payable by the appellant + pre-claim interest in sum of ₹8,13,150/- (Rupees Eight Lacs Thirteen Thousand One Hundred and Fifty only). Pendente lite interest till publication of the award in favour of the Delhi Development Authority has been awarded @ 15% per annum. The earnest money payable by the Delhi Development Authority to the appellant has been directed to be adjusted. Challenge thereto before the learned Single Judge has failed vide impugned order dated March 20, 2015.

2. Responding to a notice inviting tender, which vide clause 1(vii) clearly indicated to the prospective bidders that *‘Before giving tender, the intending tenderer may inspect the site and satisfy himself about the location, area and its business prospects as also ‘The parking site is being tendered on As is Where is Basis. It is presumed that the intending tenderer has inspected the parking site and familiarized himself/herself with the prevailing conditions in all respect before submitted the tender. No claim/dispute about condition/capacity of the parking site shall be entertained by DDA. The tenderer cannot put any condition with his/her tender’*, for taking on license and operating a parking site for a period of three years, the appellant’s bid being the highest bid was accepted and since he deposited the earnest money in sum of ₹2,62,000/- (Rupees Two Lacs and Sixty Two Thousand only) being two months’ advance license fee payable as security, on May 16, 2011 the possession letter was issued requiring appellant to take possession of the parking site which is in front of plot No.25-26, Rajender Place within 10 days. On May 25, 2011 physical possession of the parking site was taken over by the appellant as recorded in a possession slip which was duly signed by the appellant and the concerned Assistant Engineer.

3. A license-deed was executed between the parties; and regretfully we note that the space kept in the license-deed where the date of its execution was intended to be inserted by hand has not been filled up and while signing the same neither party has recorded the date. But apparent from the fact that the license-deed has been notarized on May 09, 2011, one can safely say that the license-deed was executed on or before May 09, 2011. The license-deed obliges appellant to pay license fee in sum of ₹1,31,000/- (Rupees One Lac

and Thirty One Thousand only) per month. The duration of the license is three years. In case of any dispute, the same had to be resolved through arbitration as per Clause 24 of the license-deed. Since an argument was advanced with reference to the jurisdiction of Sh.Vivin Ahuja, appointed as the Sole Arbitrator, to decide the dispute we note Clause 24 of the license agreement. It reads:-

“24. That in case of any dispute arising between the licensor and the licensee in respect of interpretation or performance of any terms of conditions of the license, the same shall be referred to the sole arbitrator of the Vice Chairman DDA whose decision thereon shall be final and binding on both the parties. The licensee shall not object to the Vice Chairman’s of the Delhi Development Authority’s action as sole arbitration on the ground that he had dealt with case or has at some stage expressed opinion in any matter connecting herewith.”

4. The appellant did not pay the monthly license fee and continue to reap the benefit of the license. He managed the parking lot and pocketed the parking fee charged from the owners of the motor vehicles who used the parking lot. On August 04, 2011 the respondent issued a show cause notice to the appellant intimating that he had not paid the license fee for two months and reminded him that as per the license-deed the monthly license fee was payable in advance, calling upon the appellant to respond as to why the license be not cancelled. Appellant did not respond to the show cause notice nor pay the license fee. On September 02, 2011 another show cause was issued informing that license fee payable had accumulated till the month of August, 2011. There was no response from the side of the appellant to this show cause notice as well. On January 18, 2013 another show cause

notice was issued intimating the appellant that till said date not a penny had been paid towards the license fee. This notice was also not responded to. Repeat notice was issued on April 05, 2013 pursuant where to the appellant paid in instalments ₹3,93,000/- (Rupees Three Lacs and Ninety Three Thousand only) but failed to clear the entire arrears of license fee. Threatened with dispossession of the licensed site, the appellant invoked the arbitration clause and filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 seeking to restrain the respondent from taking possession of the parking site, in which petition it was directed that upon 50% of the license fee being paid the appellant would not be dispossessed from the site. It was in that petition that the appellant raised an issue of the utilizable licensed area being much less than what was indicated in the notice inviting tender. For record it may be noted that possession of the site which was resumed on May 17, 2013 but was regained by the appellant on July 09, 2013 because he did not disclose in the petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 that he had been dispossessed from the site and managed an interim stay in his favour on the strength of which he re-occupied the site. In view of the final order passed in the petition the illegally gained possession was retained by the appellant till the arbitrator decided the dispute.

5. The appellant also filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 which was disposed of by a learned Single Judge of this Court on September 02, 2013 directing that in view of clause 24 of the license-deed the Vice-Chairman DDA should appoint an Arbitrator.

6. The Arbitrator was appointed. The appellant filed a claim pleading therein that 60% of the licensed space was unusable on account of

encroachments and no repairs being effected to the site and shopkeepers and occupants of the multi-storeyed building adjacent to the site were claiming part of the site as free parking for them. He claimed damages in sum of ₹20,00,000/- (Rupees Twenty Lacs only) on account of compensation for loss of business. ₹2,62,000/- (Rupees Two Lacs and Sixty Two Thousand only) towards refund of earnest money. ₹3,93,000/- (Rupees Three Lacs and Ninety Three Thousand only) which he had paid in instalments after the third show cause notice was issued. Refund of ₹1,00,000/- (Rupees One Lac only) statedly spent in augmenting infrastructure at the parking lot. ₹1,00,000/- (Rupees One Lac only) for mental pain and ₹28,29,600/- (Rupees Twenty Eight Lacs Twenty Nine Thousand and Six Hundred only) towards 60% refund of the license fee. The total amount would thus be ₹57,84,600/- (Rupees Fifty Seven Lacs Eighty Four Thousand and Six Hundred only).

7. DDA filed a reply highlighting that the parking site was allotted on 'As is Where is Basis' and thus the appellant could not raise an issue that 60% of the allotted site was unusable especially for the reason clause 1(iv) and clause 18 of the Notice Inviting Tender obliged the prospective bidders to inspect the site and specifically prohibited any claim or a dispute concerning the condition or the capacity of the parking site. DDA pleaded facts which we have noted hereinabove concerning show cause notices issued to the appellant and the appellant being a defaulter in payment of the license fee, and therefore DDA claimed the arrears of license fee after giving adjustment of ₹3,93,000/- (Rupees Three Lacs and Ninety Three Thousand only) paid in instalments by the appellant in partial liquidation of the license fee payable.

8. With reference to the pleadings of the parties the appellant desired the learned Arbitrator to decide four issues as preliminary issues, and in respect of which the learned Arbitrator recorded so in the order dated March 25, 2014. The four issues raised by the appellant were:-

“(1) Whether the learned Sole Arbitrator is having independent status and is having independent authority to adjudicate the dispute referred?”

“(2) Whether the learned Sole Arbitrator is empowered only to decide the quantum of license fee that the petitioner and be called upon to pay? Or to adjudicate the entire disputes per se?”

“(3) If so, the said appointment of the learned Sole Arbitrator and reference to him for his adjudication is not in terms of the orders passed by the Hon’ble High Court in the aforesaid petitioner and therefore reference and appointment itself is defective?”

“(4) Why the appointing authority has not adopted the option while making appointment of an arbitrator, like has done in other matter where appointment of independent outsider arbitrator have been made to inspire the confidence in the learned Arbitrator about fair and reasonable adjudication following the principles of natural justice.”

9. Thereafter the appellant filed an application to examine, besides himself, the Manager deputed by him at the parking site and any other witness with the permission of the Arbitrator. In the said application no reason has been given as to why the appellant wanted to lead evidence. The four paragraphs of the application read as under:-

“1. That the above proceeding is pending adjudication before this Hon’ble Arbitral Tribunal and is listed on

05.06.2014.

2. *That in similar types of matters where the arbitration proceedings are in progress before the learned Sole Arbitrator appointed by Hon'ble the Vice Chairman, DDA and the proceeding pending before the Delhi International Arbitration Centre, in terms of the directions issued by the Hon'ble High Court, had adopted the process of holding arbitral proceedings by way of conducting admission and denial of the documents of the respective parties, framing of issues in dispute and leading evidence in order to complete disposal of the dispute under reference.*

3. *That on the same way in order to administer the complete justice it is necessary to adopt the similar type of process as stated above. Otherwise also the principles of natural justice warranted to hold the proceeding giving proper, adequate, ample opportunity of hearing so that the interest of justice could be achieved.*

4. *That in the present matter, the complicated issues involved about the claims and counter claims and conflicting interest could be resolved only by way of the adopting the process as described above and the witnesses could be cross examined by the opposite parties for revelation of truth."*

10. Without deciding the application or the four issues settled as per the order dated March 25, 2014, the learned Arbitrator pronounced the award on November 13, 2014 in which he noted the four preliminary issues which he had settled in the order dated March 25, 2014. He noted that the application was filed by the appellant to permit the appellant to lead evidence. He then proceeded to hold that in his opinion, since appellant had not stated the relevance of the witnesses, there was no need to examine any witness (refer

para 1.24 of the award). Noting that in the notice inviting tender the site was offered on 'As is Where is Basis', noting the decisions reported as (1994) 1 SCC 575 United Bank of India Vs. Official Liquidator & Ors. and (2011) 7 AD Delhi 104 MSTC Ltd. Vs. Jain Trader & Ors. wherein an invitation to offer concerning a site or a property, open for inspection, and on 'As is Where is Basis' was the subject matter of dispute, the learned Arbitrator held that the appellant cannot urge the plea that the utilizable area of the site was only 40%.

11. Giving adjustment of the money received by DDA, the award is in favour of DDA applying the license fee payable as the basis for the duration of the license. Adjustment of security deposit has been granted.

12. Challenge to the award before the learned Single Judge has failed. The reasons given by the learned Single Judge are that no reasons were given in the application before the Arbitrator as regards the relevance of the witnesses and thus the application was rightly dismissed. On merits the learned Single Judge has held that the appellant was liable to pay the full license fee.

13. Arguing the appeal, Sh.Amarjit Singh Chandhioke learned senior counsel urged : (i) As per clause 24 of the licensed agreement the Vice-Chairman DDA alone could be the Arbitrator; (ii) The four issues settled by the learned Arbitrator as per the order dated March 25, 2014 being not decided, the learned Arbitrator could not make the award inasmuch as the four issues related to his jurisdiction; and (iii) By denying the appellant the opportunity to lead evidence the learned Arbitrator had violated the principles of natural justice. Learned senior counsel argued that it was irrelevant that in the notice inviting tender the site was offered on 'As is

Where is Basis' because the encroachments took place in the form of shopkeepers and owners of office case in the multi-storeyed buildings nearby claiming a right to park their cars on a substantial path of the parking lot and this could not be seen or known till when these cars were parked and additionally that a part of the parking space was claimed by the shopkeepers as a municipal street.

14. Pertaining to the four issues settled by the learned Arbitrator on March 25, 2014, which we have reproduced in paragraph 7 above, it is apparent that the learned Arbitrator wrote unintelligible things, probably whatever was dictated by learned counsel for the appellant. To make the case intelligible, as was conceded to by learned senior counsel for the appellant, the only issue raised was to the jurisdiction of the arbitrator in the context of the language of Clause 24 of the license deed, which clause we have reproduced in paragraph 3 above. Learned senior counsel urged that as per the clause it was the Vice Chairman DDA alone who could act as the Arbitrator because the clause referred to the Arbitrator as a persona designata.

15. The worth of the argument is the grammatical error in Clause 24 which records *the same shall be referred to the sole arbitrator of the Vice Chairman DDA whose decision thereon shall be final and binding on both the parties.*

16. The words *referred to the sole arbitrator of the Vice Chairman DDA* are obviously the result of a syntax error in the sentence. If the words were *referred to the sole arbitration of the Vice Chairman DDA*, the argument of learned counsel for the appellant would have merited some consideration. So, some meaning has to be given to the sentence. As noted above the

appellant had filed an application under Section 11 of the Arbitration and Conciliation Act which was decided by the learned Single Judge on September 02, 2013 directing that in view of the Clause 24 of the license deed the Vice Chairman DDA should appoint an Arbitrator. The appellant did not urge before the learned Single Judge that the clause has to be read as parties agreeing to the Vice Chairman DDA alone to be the Arbitrator. The appellant would therefore be estopped from arguing that the Vice Chairman DDA was the named Arbitrator.

17. The four issues which were settled on March 25, 2014, as were conceded to by learned senior counsel for the appellant required it to be decided whether the Vice Chairman DDA was the Arbitrator or that the Vice Chairman DDA could appoint the Arbitrator, therefore for the reasons given above dealing with the first submission urged by learned senior counsel for the appellant, it has to be held that nothing turns on the learned Arbitrator not deciding the four issues.

18. Concerning denial of natural justice by not permitting appellant to examine the witnesses, we have noted in paragraph 8 above the pleadings in the application. Not a word has been spoken as to why the witnesses were proposed to be examined.

19. Learned senior counsel for the appellant, short of conceding that the application was vague, argued that the relevance was implicit in the application if one looked at the pleadings in the claim petition. The pleadings were that only 40% of the site was utilized and for which evidence had to be recorded.

20. Sections 18 and 19 of the Indian Contract Act, 1872 read as under:-

“18. Misrepresentation defined. –

'Misrepresentation' means and includes –

- (1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, through he believes it to be true;*
- (2) Any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to be prejudice of any one claiming under him;*
- (3) Causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.*

19. Voidability of agreements without free consent.-

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception. – If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation. – A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.”

21. Assuming that there was a mismatch between the utilizable area in the site vis-a-vis what was represented as the utilizable area, it would at best be

a case of a misrepresentation of a fact. Assuming that the misrepresentation was of the kind, truth whereof was not capable of being discovered with ordinary diligence, and thus the exception to Section 19 of the Indian Contract Act, 1872 was not attracted, the appellant would have known the same, and as per his pleadings in the statement of claim became aware of the same the day he took charge of the car parking. As per the appellant he did not pay the license fee because the utilizable area was only 40%. If this be so, the contract became voidable at the option of the appellant and it was his duty to elect to either abide by the contract or avoid the same. If the appellant chose to elect for avoiding the contract he was obliged to restore the benefit which he had received under the contract i.e. vacate the licensed site. He did not do so. On the contrary he filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 to restrain DDA from taking over possession of the site.

22. In the pleadings before the Arbitrator there is no reference to the appellant intimating DDA that the utilizable area in the parking site was only 40% and that there was misrepresentation by DDA to the appellant. No letter was filed before the Arbitrator. Even before the Arbitrator it was not the case the of the appellant that he avoided the contract. For the first time in the appeal, annexing the same as Annexure D, the appellant claims of having informed DDA that the utilizable area was 40%. We have no hesitation in trashing the said letter dated April 15, 2013 for the reason there is no proof that said letter was ever delivered to DDA and further said letter was never pleaded in the statement of claim nor was filed before the learned Arbitrator. Lastly for the reason merely writing that the utilizable area is less is neither here nor there because case of the appellant is that there was a

misrepresentation of a fact by DDA and induced by the same he entered into the contract. The appellant had thus to elect whether he wanted to avoid the contract or affirm the same. He did not avoid the contract and on the contrary affirmed the same by retaining possession and resisting resumption thereof.

23. In the decision reported as (1871-72) L.R. 7 Ex.26 Clough Vs. The London and North Western Railway Company it was held that lapse of time without rescinding a voidable contract will furnish evidence that the party had determined to affirm (not rescind) the contract; and when the lapse of the time is great, it probably would in practice be treated as conclusive evidence to show that the party has so affirmed.

24. The ratio of law declared therein would squarely apply in the instant case. Having taken physical possession of the site on May 25, 2011 and having executed the license-deed on or before May 09, 2011, the appellant never determined the contract on the ground that there was a misrepresentation of a fact made to him. Assuming that the utilizable site was only 40% of the licensed space, the appellant was aware of the same because this is his justification not to pay the license money. The parties were referred to arbitration pursuant to the order dated September 02, 2013. The appellant never determined the contract evidenced by the fact that he clung on to the site, it was his obligation to restore the benefit if he determined the contract, which he did not do.

25. Under the circumstances we hold that the learned Arbitrator was fully justified in not permitting the appellant to lead any evidence.

26. From the fact that the appellant claimed ₹28,29,600/- (Rupees Twenty Eight Lacs Twenty Nine Thousand and Six Hundred only) towards 60%

refund of the license fee we have proof of a fact of the appellant being a speculative litigator. He forgot that he had paid only ₹3,63,000/- (Rupees Three Lacs and Sixty Three Thousand only) and that too in dribblets when a repeat show cause notice was issued to him on April 05, 2013. Where was the question of the appellant receiving back 60% of the license fee?

27. We need not elaborate upon the decisions of the Courts of the effect of offers being made under tenders where a site is offered on 'As is Where is Basis' because it would all depend on the facts of each case as to what is the nature of controversy concerning a site.

28. But for the simple legal principle applicable, that assuming there was a misrepresentation of a fact concerning the utilizable area at the site, since the appellant learnt of the same as per his own case pleaded in May, 2011 itself, when encroachers and other persons did not let him use the full site, it became obligatory upon the appellant to elect to affirm or determine the contract. The appellant had to return the site if he determined the contract. The appellant did not do so. He retained the benefit. When DDA attempted to resume possession of the site alleging default in non-payment of the license fee, the appellant clung on to the site. He never determined the contract and therefore the principle of law declared in the decision in Clough's case (supra) would make it a case of conclusive evidence being reached against the appellant.

29. The appeal is dismissed. Ordinarily we would have imposed heavy cost against the appellant and in favour of DDA, but do not do so because learned counsel for DDA gave no assistance when we heard arguments of learned senior counsel for the appellant and even could not show to us the document when for the first time the appellant raised the issue of the

utilizable space being less. Therefore, there shall be no order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 04, 2016

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