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

+ **O.M.P. (COMM) 570/2016**

STORE ONE RETAIL INDIA LIMITED Petitioner

Through: Mr Rajiv Nayar, Senior Advocate
with Mr Sudhir Sharma, Mr Sanjeev
Kumar Sharma, Mr Abhishek
Swaroop, Mr Abhishek and Mr Ritesh
Kumar, Advocates.

versus

**ANNAPURNA INFRASTRUTURE PVT LTD
& ORS.** Respondents

Through: Mr Manish Sharma, Ms Chandni
Mehra, Mr Abhishek Agarwal,
Advocate for R-3.

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

ORDER
19.12.2016

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VIBHU BAKHRU, J

IA No.15671/2016

1. Allowed, subject to all just exceptions.

CAV. No.1065/2016

2. The learned counsel for the respondent no.3/caveator has entered appearance. The caveat stands discharged.

O.M.P. (COMM) 570/2016 and IA No. 15670/2016

3. Store One Retail India Limited (hereafter 'Store One') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 09.09.2016 (hereafter 'the impugned award') made and published by the Sole Arbitrator, Justice Dr Mukundakam Sharma (Retired), a former Judge of the Supreme Court of India.

4. The disputes between the parties relate to the payment of lease rent and fees for facility management, in respect of the premises (hereafter 'the said premises'), which were taken on lease by Store One in a commercial complex known as "Shop in Park (North)". The lease for the said premises was terminated by Store One prior to the expiry of the lock-in period and that had resulted in claims, *inter alia*, for rent/damages being made against Store One.

5. The Arbitrator considered the disputes and awarded rent for the period 01.04.2008 to 22.03.2010 alongwith interest at the rate of 12% per annum up to the date of the award in favour of M/s Annapurna Infrastructure Pvt. Ltd. (hereafter 'Annapurna') and M/s Paliwal Overseas Pvt. Ltd (hereafter 'Paliwal'). Further, the Arbitrator also awarded damages equivalent to the rent for a period of six months from 22.03.2010 in favour of Annapurna and Paliwal along with future interest at the rate of 12% per annum. In addition, the Arbitrator also made an award in favour of M/s Pragya Products Pvt. Ltd. (hereafter 'Pragya') for facility management services and electricity charges alongwith interest at the rate of 12% per annum.

6. Store One asserts that the impugned award is opposed to the Public Policy of India and, therefore, is liable to be set aside under Section 34(2)(b)(ii) of the Act; it, *inter alia*, claims that the Arbitrator has erred in holding that the termination of lease of the said premises was invalid and consequently awarding rentals in favour of parties even for the period it was not in occupation of the said premises.

7. Briefly stated, the necessary facts to consider the aforesaid controversy are as under:-

7.1 Pragma and Store One (then known as Piramyd Retail and Merchandising Pvt. Ltd.) entered into a Memorandum of Understanding (MoU) dated 23.03.2004 whereby Pragma agreed to participate in a public auction of a commercial plot admeasuring 8710 square meters situated at Plot No.2, Block B, Community Centre, Shalimar Bagh, Delhi to be conducted by the Delhi Development Authority (DDA). Store One agreed that if Pragma was declared as a successful bidder, it would lease a covered area admeasuring approximately 70,000 square feet at a rent calculated at the rate of Rs.55 per sq. ft. per month.

7.2 The said auction was conducted by the DDA on 26.03.2004; Pragma was declared as the successful bidder and a perpetual lease deed dated 08.10.2004 was executed in its favour. Thereafter, Pragma commenced construction of a commercial complex on the said plot of land. Pragma also approached Annapurna and Paliwal to sell the said plot on the representation that it had already entered into an arrangement (MOU dated 23.03.2004) for leasing out 70,000 square feet of covered area to Store One. Accordingly, an

Agreement to Sell dated 09.12.2004 was executed between Pragya on one part, and Annapurna and Paliwal on the other part whereby Pragya agreed to sell and Annapurna and Paliwal agreed to purchase the plot in question. Thereafter, a lease deed (hereafter 'the Lease Deed') was also executed between Pragya and Store One on 23.11.2005 whereby Store One agreed to lease approximately 52,000 square feet of space in the Shopping Mall Arcade, Shop in Park (North) - which at the relevant time was under construction -for an initial period of 10 years with an option for extension of two further terms of 10 years and five years respectively.

7.3 Store One also agreed to pay a sum of ₹1,43,00,000/- (One Crore Forty Three Lacs) to Pragya as interest free refundable security deposit. After the mall was constructed, Store One was put in possession of the said premises, admeasuring 67,613 square feet for its outlet. In terms of the Lease Deed between Store One and Pragya, Store One commenced payment of monthly rent of ₹41,78,348.18/- with effect from 20.09.2007 to Pragya.

7.4 Thereafter, on 08.08.2008, Pragya executed sale deeds - sixteen in number - in favour of Annapurna and Paliwal. By virtue of the sale deeds, Annapurna and Paliwal became joint owners of the property in question including the said premises. Although, Annapurna and Paliwal became owners of the property in question, Pragya continued to be liable for providing facilities/services.

7.5 Store One claims that there were deficiencies in the services rendered and, therefore, Store One stopped the payment of Common Area Maintenance (CAM) charges from July, 2008. Thereafter, Store One issued

a notice dated 05.08.2008 under Clause 7.2 of the Lease Deed to Pragya indicating certain deficiencies and called upon Pragya to rectify the same as per Clause 7.2 of the Lease Deed.

7.6 On 01.09.2008 and 04.09.2008, Annapurna and Paliwal sent notices to Store One claiming rent for the said premises with effect from 01.04.2008. Thereafter, on 08.09.2008, Store One sent a notice to Pragya alleging that Pragya had failed to cure the deficiencies as mentioned in the earlier notice dated 05.08.2008 sent under Clause 7.2 of the Lease Deed, and terminating the lease for the said premises.

7.7 Thereafter, Store One also filed a petition (OMP No. 528/2008) under Section 9 of the Act before this Court. Annapurna and Paliwal filed applications (IA No.12982/2008 in OMP 528/2008) seeking impleadment in the Store One's petition under Section 9 of the Act. Subsequently, the said applications were withdrawn and Annapurna and Paliwal filed a suit (being CS (OS) 493/2009) in this Court for seeking recovery of the outstanding rent with effect from 01.04.2008.

7.8 Store One claims that in compliance with the direction passed by this Court, it handed over the keys of the said premises to Annapurna and Paliwal on 22.03.2010. Thereafter, Pragya also filed a suit (CS(OS) 270/2010) against Store One, Annapurna and Paliwal, *inter alia*, seeking recovery of a sum of ₹2,62,36,672/- on account of unpaid CAM charges and electricity charges up to 20.03.2012.

7.9 In view of the aforesaid disputes, Store One filed a petition under Section 11 of the Act (Arb.P.86/2012) for appointment of an Arbitrator. In

those proceedings, this Court - with the consent of the parties - appointed Justice Dr Mukundakam Sharma (Retired) as a sole arbitrator to adjudicate the disputes between the parties. Whereas Annapurna and Paliwal filed a statement of claims, *inter alia*, claiming rent for the period from April, 2008 to September, 2012, Pragya filed a statement of claims, *inter alia*, claiming CAM charges from 08.08.2008 to 19.03.2012 from Store One, Annapurna and Paliwal and electricity charges up to 08.08.2008 from Store One. On the other hand, Store One, *inter alia*, claimed refund of the security deposit of ₹1,43,00,000/-.

8. The Arbitrator held that the notice dated 05.08.2008 served by Store One calling upon Pragya to cure the deficiencies was vague and untenable. Further the notice of termination was not sent to Annapurna and Paliwal. Accordingly, the Arbitrator held that the termination of lease was not valid. The Arbitrator held that Annapurna and Paliwal were entitled to damages equivalent to rent for the unexpired period of the lock-in period but were also obligated to mitigate the damages by letting out the said premises; therefore, the Arbitrator limited the damages to rent equivalent to six months.

9. The operative part of the impugned award is set out below:-

“10. **CONCLUSIONS:**

10.1 In the light of the discussion, analysis and conclusion abovestated, all the issues as framed stand answered.

10.2 **Annapurna is entitled to the following amount from Store One:**

- a. Rs. 2,67,52,283/- on account of rent from 01.04.2008 upto 22.03.2010 along with interest @ 12% per annum w.e.f. 23.03.2010 upto the date of Award. Be it stated that the aforesaid sum is arrived at after deducting the security deposited by Store One and ordered to be paid back in terms of order contained herein.
- b. Rs. 1,11,56,145/- on account of damages equivalent to rent for a period of 6 months from 22.03.2010.
- c. Future interest @ 12% per annum on the amounts, as calculated above, from the date of the Award till the date of realization.

10.3 Paliwal is entitled to the following amount from Store One:

- a. Rs. 2,67,52,283/- on account of rent from 01.04.2008 upto 22.03.2010 along with interest @ 12% per annum w.e.f. 23.03.2010 upto the date of the Award. Be it stated that the aforesaid sum is arrived at after deducting the security deposited by Store One and ordered to be paid back in terms of order contained herein.
- b. Rs. 1,11,56,145/- on account of damages equivalent to rent for a period of 6 months from 22.03.2010.
- c. Future interest @ 12% per annum on the amounts, as calculated above, from the date of the Award till the date of realization.

10.4 Pragya is entitled to the following amount from Store One:

- a. Rs. 27,63,199/- against Store One for Facility Management Services and Electricity Charges upto 07.08.2008 along with interest @ 12% per annum w.e.f. 08.08.2008 upto the date of Award.
- b. Rs.28,08,000/- against Store One for Facility Management Services from 08.08.2008 upto 08.11.2008 along with interest @ 12% per annum w.e.f. 09.11.2008 upto the date of Award shall also be paid.
- c. Future interest @12% per annum on the amounts, as calculated above, from the date of the Award till the date of realization”.

Submissions

10. Mr Rajiv Nayar, learned senior counsel appearing for Store One advanced contentions to assail the impugned award on, broadly, three fronts. First, he contended that the finding of the Arbitrator that notice issued by Store One terminating the Lease Deed was untenable on the ground that it was vague, was palpably erroneous and contrary to record. He contended that the notice dated 05.08.2008 was not vague inasmuch as Store One had specified the deficiencies. He submitted that the finding of the Arbitrator in this regard was wholly perverse and unsustainable.

11. Secondly, he submitted that the Arbitrator had also held the termination of the lease to be invalid on the ground that the notice of termination had not been served on Annapurna and Paliwal, although they were owners of the property. He submitted that Paliwal and Annapurna were always aware of the notice of termination sent by Store One to Pragya

and there was ample material on record to substantiate the same. He contended that this was also clear from the fact that Annapurna and Paliwal had sought impleadment in the petition filed by Store One under Section 9 of the Act (OMP 528/2008).

12. Lastly, he contended that the Arbitrator had grossly erred in awarding rent for a period of six months after Store One had admittedly handed over the possession of the said premises. He submitted that Arbitrator had assumed that six months was a reasonable time for Annapurna and Paliwal to find alternate tenant(s). However, there was no material or evidence on record on the basis of which the Arbitrator could have formed this view. He submitted that since the Arbitrator had accepted Store One's contention that after issuance of the notice of termination, Annapurna and Paliwal were under an obligation to mitigate the loss by leasing out the premises to another tenant, the Arbitrator could not have assumed an arbitrary period for Annapurna and Paliwal to do so. Since Paliwal and Annapurna had not taken steps to mitigate their damages, they would not be entitled to claim the same from Store One. He also submitted that there was no reason to arbitrarily fix 22.03.2010 as the date from which the period of six months would begin.

13. I have heard the learned counsel for the parties at length.

14. In order to appreciate the contention that the notice dated 05.08.2008 issued by Store One was not vague, as held by the Arbitrator, it is necessary to refer to Clause 7.2 of the Lease Deed as well as to the notice issued by Store One.

15. Clause 7.2 of the Lease Deed reads as under:-

“7.2 During the Lock-in-period and the Term of the LEASE DEED, the LESSEE shall have the option to terminate this LEASE DEED with a prior written notice of thirty (30) days on the occurrence of any of the following events:

7.2.1 The LESSEE is unable to run the operations of the STORE from the LEASED PREMISES due to LESSOR's default, act or omission to act.

7.2.2 Any material breach of representations, warranties and other obligations and covenants of the LESSOR, which are not rectified or remedied within a period of thirty (30) days of the receipt of the notice by the LESSEE to the LESSOR; or

7.2.3 The LESSOR being declared bankrupt or insolvent.

The LESSOR shall be entitled to terminate the LEASE DEED in the event the LESSEE is declared bankrupt or insolvent.

In any event of termination, the LESSOR shall be liable to refund the entire amount of Security Deposit to the LESSEE without any delay or demur simultaneous to handing over of possession of the LEASED PREMISES."

16. The notice issued by Store One alleges that there had been frequent breakdown in the supply and efficacy of the facilities and amenities so provided to the Demised Premises and Common Areas. However, no specific instance had been mentioned. Mr Nayar has referred to paragraph 5 of the said notice to contend that the specific deficiencies had been mentioned. Paragraph 5 of the said notice is set out below:-

“5. As you may be aware that we have already planned for the coming season and will soon be commencing the stock takeover very shortly. We have already made our business

plans for our customers. However, with the problems now surfacing, it seems that a permanent solution to the same from your end are required. The problems for the Demised Premises Includes but are not limited to

- (a) Security misdemeanour,
- (b) AC and its standard temperature are not maintained at desired levies and require maintenance.
- (c) Dedicated Chillers not performing and requires maintenance.
- (d) Frequent breakdown of lifts and escalators.”

17. It is apparent from the above that the complaint made by Store One was general in nature and did not specify any particular covenant of the Lease Deed that had been breached. The deficiencies pointed out also lacked the necessary specifics. In view of the above, the Arbitrator’s conclusion that the notice was vague and untenable cannot by any stretch be held to be perverse or patently illegal. The Arbitrator further held that the notice of termination dated 08.09.2008 was also untenable since the same had not been addressed to Annapurna and Paliwal. The Arbitrator had noticed that, admittedly, prior to the issuance of notice of termination dated 08.09.2008, Store One had received legal notices dated 01.09.2008 and 04.09.2008 on behalf of Annapurna and Paliwal respectively wherein Store One was informed that Annapurna and Paliwal had acquired the said premises from Pragya. Thus, the notice of termination was required to be addressed to Annapurna and Paliwal which was admittedly, not done. The conclusion of the Arbitrator that the termination of lease was thus invalid, is also not amenable to judicial review under Section 34 of the Act since the same is neither patently illegal nor perverse.

18. The contention that Annapurna and Paliwal were always aware of the termination of the lease and therefore the termination of the Lease Deed ought to be held valid is also not sustainable. Indisputably, Annapurna and Paliwal had, to the knowledge of Store One, stepped into the lease of Pragya and were the lessors at the material time when the notice of termination was issued by Store One. In view of this, issuance of a termination notice to persons other than the lessors cannot be accepted as a valid termination. This Court cannot accept the view expressed by the Arbitrator in this regard, to be patently illegal or perverse.

19. At this stage, it is also necessary to state that the scope of judicial review under Section 34 of the Act is limited and the Court does not sit in appeal over the decision of the Arbitrator. Thus, unless Store One is able to establish that any of the grounds as specified under Section 34 of the Act are met, the impugned award cannot be set aside.

20. Store One has sought to place its case within the scope of Section 34 (2) (b) (ii) of the Act, that is, the impugned award is opposed to the Public Policy of India.

21. It is relevant to observe that Explanation 1 to Section 34 (2) (b) (ii) of the Act further clarifies that an award would be 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 or 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. In the present case, there is no allegation that the impugned award was affected by fraud or

corruption or is in conflict with the most basic notions of morality or justice. And, this Court is not persuaded to accept that the impugned award is in contravention with the fundamental policy of Indian Law. Clearly, the expression "Fundamental Policy of Indian Law" does not mean violation of any particular statute but the policy of law on which the edifice of Indian law is based. Thus unless the award is in contravention with any of the fundamental principles of Indian law, the impugned award cannot be held to be in conflict with the Public Policy of India.

22. It is also relevant to mention that by introduction of Explanation 2 to Section 34 (2) (b) (ii) of the Act, it has been further explained that the test as to whether there is a contravention of fundamental policy of Indian law would not entail a review on the merits of the dispute. In the present case, the submission that the conclusion of the Arbitrator, that the termination of lease by Store One was invalid, cannot by any stretch be held to be contravening a fundamental policy of Indian law.

23. The contention that the Arbitrator had grossly erred in arbitrarily fixing the period of six months for award of damages is also wholly bereft of any merit. Having held that the termination of the lease was invalid, Store One would be liable to pay rent or damages equivalent to the rent for the entire lock-in period of 54 months as agreed under the Lease Deed. However, the Arbitrator did not make an award for the said period as he was of the view that Annapurna and Paliwal could have mitigated the damages by locating new tenant(s) and assessed six months to be reasonable for the said purpose. The contention that no damages could have been awarded since Annapurna and Paliwal had not taken steps to mitigate the same, is

unmerited. The Arbitrator has merely restricted the award of damages by assessing the reasonable period required by Annapurna and Paliwal to find new tenant(s). This Court is not persuaded to accept that the said view is in any manner unreasonable, perverse or opposed to the Public Policy of India.

24. The petition is, accordingly, dismissed. Pending application stands disposed of. No order as to costs.

DECEMBER 19, 2016
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VIBHU BAKHRU, J

