

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11.2017

CORAM

THE HONOURABLE MR. **JUSTICE M.M.SUNDRESH**

**O.P.No.253 of 2017
& Application No.1822 of 2017**

M/s Pacifica (India) Projects Pvt. Ltd.,
No.33, Amrapalsh Bungalow,
Behind Fun Republic
Ramdevanagar, Satellite,
Ahmedabad-380 015.
(name changed from Pacifica Infrastructure Private
Ltd., to Pacifica (India) Projects Pvt. Ltd.,
Vide Amendment ordered on 27.06.2016 ...Petitioner

Vs.

M/s Oriental Cuisines (P) Ltd.,
Represented by its Director Mr.Srinath Raghavan,
No.74, Cathedral Road,
Chennai-600 086. Respondent

Original Petition filed under Section 34 of the
Arbitration and Conciliation Act, 1996, to set aside the
Award dated 11.11.2016 passed by the sole Arbitrator.

For Petitioner : Mr.Ravikumar Paul, S.C., for
Mr.Paul and Paul

For Respondent : Mr.Prahalad Bhat for
Mr.R.Parthasarathy

ORDER

By consent, the main original petition itself is taken

up for final disposal.

2. A lease deed was executed between the petitioner and the respondent on 18.01.2008, which was preceded by a Term Sheet dated 23.10.2007. The petitioner is the lessor and the respondent, lessee. The Lease Deed is with respect to the space to be used for the Food Court catering to the employees of the companies involved in the Information Technology Field in the park owned by the petitioner.

3. Clause 25 of the Terms Sheet dated 23.10.2007 is reproduced hereunder.

"25.Entirety and Severability

This Term Sheet including the attached Annexure, along with the Lease Deed, constitutes the entire agreement between the intending Lessor and the intending Lessee with respect to the Demised Premises and supersedes any other prior oral or written communications, representations or statements with respect to the transaction contemplated in this Term Sheet. This Term Sheet may not be modified, altered or amended in any

manner except by an agreement in writing executed by both parties. If a court finds any provision of this Term Sheet to be invalid, the remainder of the Term Sheet will be valid, enforceable and effective."

4. It appears that the petitioner was not able to comply with the above terms and conditions, which according to the respondent, is inclusive of obtaining completion certificate followed by possession. Therefore, the notice of termination of lease was issued on 30.07.2008. Thereafter, Ex.C4 dated 13.08.2008 came into being, which inter alia states as follows.

"This has reference to our letter dt. 30th July 2008 and your subsequent visit to our office. We thank you for visiting us and clearing the issues. Accordingly, we withdraw our previous letter based on your assurance of the following.

1. We will not need to pay any rent/maintenance till we begin operations of the food court.

2.As food court operations are totally depended on no. of employees we would start the work once you confirm atleast 4000 employees permanently working in the IT park.

3.Post your confirmation and handing over the site to us we would require 4 months to complete the work and start operations of the food court. These 4 months would constitute the rent free fit out period also.

Kindly do let us know once you have 4000 employees and are in a position to progress further."

5. A perusal of the above said document would show that there was a discussion between the parties in pursuant to the earlier termination notice dated 30.07.2008. Ex.C-4 is the reference to the assurance said to have been given by the petitioner. Now, there is no dispute on the existence and reliance upon Ex.C4, which was admittedly received by the petitioner, as seen from the evidence adduced. However, in the examination, the petitioner has stated that the terms and conditions mentioned under Ex.C4

were not accepted, which was accordingly replied to. The learned Arbitrator found that no such reply was neither filed nor stated to have been received by the respondent. Thus, the learned Arbitrator drew an adverse inference and accordingly passed an award. Inasmuch as Ex.C4 was relied upon and proved, the counter claim made by the petitioner was accordingly rejected.

6. The learned Senior Counsel appearing before this Court made only one submission. It is submitted that Ex.C4 is contrary to Clause 25 of the Term Sheet referred supra. Inasmuch as there is no written agreement between the parties executed by them, the award passed cannot be sustained. In support of his contention, reliance has been made on the following decisions.

1. UNION OF INDIA VS. IBRAHIM UDDIN AND ANOTHER ((2012) 8 Supreme Court Cases 148);
2. M/S PRATHYUSHA ASSOCIATES V. RASTRIYA ISPAT NIGAM LIMITED AND ANOTHER (CDJ 2006 APHC 944);
3. KUONI TRAVELS (INDIA) PVT. LTD., V. PHARMACO FLAVOURS AND FRAGRANCES PVT. LTD., (CDJ 2015 BHC 1421);
4. JOSHI TECHNOLOGIES INTERNATIONAL INC. V. UNION OF INDIA & OTHERS (CDJ 2015 SC 453)

7. The learned counsel appearing for the respondent

would submit that this plea has never been taken before the learned Arbitrator, though Ex.C4 was relied upon in extenso by the respondent. Therefore, under Section 34 of the Arbitration and Conciliation Act, 1996, the same cannot be raised for the first time. Not only that, even there was no reply to Ex.C4, the legal notice issued on 18.07.2009, and the claim made in this regard. In the statement of defence made, it has been merely stated that the terms mentioned in Ex.C4 were not agreed upon. Thus, the scope and ambit of Clause 25 of the Terms Sheet was never raised and therefore, there was no occasion for the learned Arbitrator to go into the same. Even the said term can be waived by consent and therefore, Section 62 of the Indian Contracts Act, 1872, has come into play as there is a novation of contract involved. In support of his contention, the learned counsel has made reliance on the following decisions.

1. GOVIND RUBBER LIMITED V. LOUIS DREYFUS COMMODITIES ASIA PRIVATE LIMITED ((2015) 13 Supreme Court Cases 477);
2. GLOBE MOTORS INC. V. TRW LUCAS VARITY ELECTRIC STEERING LIMITED, TRW LIMITED (2016) EWCA Civ. 396); and
3. GOPAL KRISHNAJI KETKAR V. MOHAMED HAJI LATIF & OTHERS ((1968) 3 SCR 862).

8. As rightly submitted by the learned counsel appearing for the parties, we are not concerned with the other issues, including the question of limitation. In other words, once the terms and conditions as found in Ex.C4 are found to be correct and binding on the petitioner, then there is no question of considering the counter claim, which is based upon the Term Sheet,

9. This Court finds the objection raised by the learned counsel for the petitioner over the issue raised deserves to be sustained. The scope of Section 34 of the Arbitration and Conciliation Act, 1996, which paves way for the Court to interfere with an award is rather limited. This is a conscious intention imposed upon by a Court by legislature. Therefore, this Court, on being asked to exercise its statutory power, cannot go beyond it. The facts would reveal that the petitioner has never raised this issue before the learned Arbitrator, rather, as rightly found by the learned Arbitrator, the petitioner has agreed by not giving a reply. The legal notice was also not replied and so is the contention raised in the claim petition. Thus, the objection raised by the learned counsel for the respondent is accordingly upheld.

10. Nevertheless, this Court is inclined to go into the issues. Clause 25 of the Term Sheet stands on a

different footing than the clauses, which have been incorporated in the cases including the one before the Apex Court relied on by the petitioner.

11. If one sees Clause 25 of the Term Sheet, it uses the words "may not be modified, altered or amended". When a Court is required to go into the words used in the agreement, nothing more is needed to interpret than the words used. In all the decisions relied upon by the learned Senior Counsel appearing for the petitioner, there is a clear mandate, which prohibits a party to modify or vary in agreement than in writing. There is a marked difference in the word "shall" and "may". In the case on hand, Clause 25 of the Term sheet merely states that "Term Sheet may not be modified". Apart from being a negative covenant, the word "may" assumes more sequence. It only means that by consent, the parties need not stickle to it. After all, this clause is only a procedural one and thus, not substantive. Inasmuch as, Ex.C4 is not in dispute, the petitioner cannot go beyond it. Therefore, the decisions relied upon by the learned Senior Counsel appearing for the petitioner do not have any application to the case on hand. After all, this is not an oral agreement *per se*. Ex.C4 in clear terms states that there was an oral agreement. Hence, Ex.C4 is only an expression of agreement

entered into between the parties. That is the reason why the learned Arbitrator has given a finding that by its conduct and behaviour, the petitioner has accepted Ex.C4. There is nothing wrong in drawing an adverse inference. The adverse inference has to be seen on the facts and circumstances of the case. When Ex.C4 is not in dispute, to contend to the contrary, the petitioner has to adduce sufficient evidence. Therefore, even on merits, this Court does not find any reason to find fault with the award passed by the learned Arbitrator.

12. Thus an issue, which has never been put to the Tribunal and which is not on a conscious consideration before it, the same cannot be taken up for the first time in exercise of the power under Section 34 of the Arbitration and Conciliation Act, 1996. No ground is made out and accordingly, the original petition stands dismissed. Consequently, connected application also stands dismissed. No costs. सत्यमेव जयते

Sd/.M.M.S.J

21.11.2017

//Certified to be true copy//

Dated at Madras this the day of 2018.

COURT OFFICER(O.S.)

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