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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 24th November, 2017
Pronounced on: 01st December, 2017

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O.M.P. (COMM) 215/2016 & IA No.15562/2016

RAKESH KUMAR GOSWAMI

..... Petitioner

Through : Mr.C.Mukund, Mr.Mohd. Faris,
Mr.Gaurav Kr. Singh and
Mr.M.B.Elakkumanan, Advocates.

versus

NEELAM KHURANA

..... Respondent

Through : Mr.Manjit Singh Ahluwalia,
Advocate.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. Petitioner by this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') impugnes the arbitral award dated 21.02.2012 passed by the learned arbitrator in favour of the respondent in the case of '*Neelam Khurana vs Rajesh Kumar Goswami*'.

2. Before reverting to the grounds of challenge, the factual matrix may be seen :-

- a) respondent invoked the arbitration process claiming herself to be rightful, absolute, sole and exclusive owner of the property bearing No.J-3/200, Second Floor, Rajouri Garden, New Delhi – 110027 by virtue of the sale deed dated 08.09.2009 registered with

the office of Sub-Registrar-II, Janakpuri, New Delhi vide registration No.15238 in Additional Book Number I, Volume No.17044 at pages No.126-132;

b) this property originally belong to the petitioner and after selling his property to the respondent, the petitioner took on rent the said premises (except a room and bathroom which remained under the possession of the respondent) for a period three months i.e. from 09.09.2009 to 08.12.2009 on a monthly rental of ₹50,000/- vide rent agreement dated 09.09.2009, excluding of water and electricity charges. The rent of three months was also paid in advance;

c) after completion of three months the petitioner again requested the respondent to extend the rent agreement for a further period of two months as he could not arrange for an accommodation for his family and was going under financial constrain, unable to pay rent on time but assured to clear it shortly. The agreement was thus extended for another two months i.e. till 07.02.2010. The petitioner however, failed to hand over the vacant and peaceful possession of the premises, but paid the rent for extended period by cheque. It was a month to month tenancy so by operation of law it was terminable by giving a 15 days notice;

d) respondent then sent a termination notice dated 07.12.2010 terminating the tenancy per clause No.7 of the rent agreement dated 09.09.2009: Clause No.7 envisage *'That after the expiry of said tenancy period, the tenant shall vacate the said premises peacefully and hand over the same to the landlord in vacant*

condition'. Despite the legal notice petitioner failed to vacate the premises and was liable to pay use and occupation charges @ ₹ 50,000/- per month since was in unauthorized use and occupation and had even trespassed into the portion of property, which was in possession of the respondent viz., a room and bath room by breaking open the lock. Police complaint was thus lodged with the Deputy Commissioner of Police, West District, Rajouri Garden, New Delhi on 11.03.2011 and later a complaint under Section 156 (3) Criminal Procedure Code for the offences punishable under Section 447/448/379/415/420/506 Indian Penal Code was filed before the Court of learned Additional Chief Metropolitan Magistrate for registration of the FIR, which is still pending adjudication;

e) on coming to know of filing of complaint under Section 156(3) of the Criminal Procedure Code, the petitioner approached the respondent and had agreed to vacate the premises and hand over its possession by 16.08.2011 and to continue pay use and occupation charges @ ₹ 50,000/- per month. A memorandum of understanding dated 25.04.2011 was also executed between them. The petitioner agreed to pay use and occupation charges @ ₹ 1.00 Lac per month in case he fail to hand over the possession after 16.08.2011. The petitioner also agreed not to create any third party interest, right or title over the said premises. However, despite various requests, the petitioner neither paid user and occupation charges nor vacated the premises and rather failed to comply with the terms of MOU dated 25.04.2011;

f) the MOU dated 25.04.2011 contained clause No.7 viz., *“in case any dispute arise between the parties and the parties have agreed to resolve the same through Arbitration and Conciliation Act, 1996 and therefore parties agreed to appoint Shri Narinder Pal Singh Sahni s/o Shri Jaswant Singh Sahni, r/o J-9/17-G, First Floor, Rajouri Garden, New Delhi as sole Arbitrator whose decision shall be final and binding on both the parties and shall be irrevocable.”*;

g) the respondent invoked the arbitration clause vide notice dated 19.09.2011 and referred the matter to Shri Narinder Pal Singh Sahni, the nominated arbitrator in the MOU. The copy of notice was sent to the petitioner and was delivered to him on 21.09.2011 vide the proof of the postal authority attached;

h) learned arbitrator initiated the proceedings and gave a notice dated 11.11.2011 to both the parties of his appointment and fixed the next date of hearing as 21.11.2011. The parties were informed about the venue and time of the proceedings. The said notice was sent to the petitioner via speed post and courier and was delivered to the petitioner;

i) on 21.11.2011, the respondent though appeared before the arbitrator, but the petitioner failed to appear and the matter was adjourned to 05.12.2011 at the same venue and the respondent was directed to file statement of facts. The arbitrator sent a letter dated 24.11.2011 to the petitioner informing him about the next date and the venue. It was delivered to the petitioner on 26.11.2011, per speed post tracking report. However, the petitioner failed to appear

even on 05.12.2011 and was proceeded ex parte and the matter was adjourned to 17.12.2011.

j) The petitioner also sent a letter dated 26.11.2011 but posted on 05.12.2011 to the learned arbitrator through Mr. Narener Kalra, his counsel, disputing his appointment. However vide a letter dated 13.12.2011, the arbitrator apprised Mr.Narender Kalra, Advocate that he is an independent and impartial person and further apprised him about the arbitration clause and pendency of the proceedings before him and the next date of hearing;

k) despite service of letter dated 13.12.2011 upon Mr.Narender Kalra, learned Advocate of the petitioner, none appeared before the arbitrator on the date fixed. During the course of arbitral proceedings original documents were filed; respondent produced her evidence and her claim of obtaining possession of the premises as also damages was allowed by the impugned award on the ground the respondent has a registered sale deed in her favour; petitioner occupies premises on a rent agreement dated 09.09.2009; police complaint dated 11.03.2011; complaint under Section 156 (3) Criminal Procedure Code were filed; and the MOU dated 15.04.2011 was executed between the parties; and

l) the arbitrator noted the tenancy was terminated vide a legal notice dated 19.09.2011 and hence both her claims were allowed with interest @ 12% on the due amount and costs of proceedings.

3. The learned counsel appearing on behalf of the petitioner has challenged the impugned award on the ground the petitioner was never

served with the notice by the learned arbitrator and was not aware of the proceedings pending against him and hence no opportunity was given.

4. This is contrary to the documents placed in the arbitral proceedings viz., a letter dated 24.11.2011 served upon the petitioner on 26.11.2011 informing the petitioner of the appointment of an arbitrator and the venue and date fixed. The petitioner rather through his advocate sent a letter dated 26.11.2011 to the arbitrator asking him not to proceed with the arbitral proceedings which was duly replied by the arbitrator vide his letter dated 13.12.2011 wherein the petitioner was once again informed about the venue and the next date. Despite that the petitioner failed to participate in the proceedings hence cannot allege no opportunity was given to him or the award is bad on principles of natural justice. The petitioner even did not file any petition before this Court for intervening or challenging or for change of arbitrator if was not inclined to join arbitration proceedings or if he had any issue with the arbitrator. .

5. The second plea is the petitioner was never served upon with the copy of arbitral award, I may here refer to a postal receipt dated 25.02.2012 addressed to the petitioner after passing of the impugned award. The award was being sent by the learned arbitrator to the petitioner, delivered upon the petitioner on 26.02.2012, per proof of service at page No.113 of arbitral record. Thus, the copy of the award was duly served upon the petitioner herein on 27.02.2012 and hence the petitioner ought to have moved the application under Section 34 of the Act for setting aside of the award dated 21.02.2012 within 90 days plus

30 days by showing cogent reasons for delay, per Section 34 (3) of the Act, which notes as under:-

“34.Application for setting aside arbitral award.—

(1) xxx xxx

(2) xxx xxx

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.”

6. Lastly the learned counsel for the petitioner urged the transaction between the parties was vitiated by fraud as is depicted from the documents viz the undertaking dated 07.02.2010 allegedly given by the respondent to the petitioner stating inter alia she had taken a loan of ₹ 18.00 Lac from the petitioner which was to be returned on vacation of the flat and she allegedly executed a receipt dated 08.12.2009. The receipt dated 08.02.2009 notes :-

‘UNDERTAKING

I, Smt.Neelam Khurana wife of Shir B.S.Khurana owner of property bearing No.J-3/200, Second Floor, (without roof rights), Rajouri Garden, New Delhi-110027, do hereby undertake that Sh.Rakesh Kumar Goswami son of late Sh.Kharaiti Lal Goswami, is the tenant in my above said property. I have received a sum of Rs.18,00,000/-

(Rupees Eighteen Lacs only) from Mr.Rakesh Kumar Goswami, as a friendly loan, which shall be returned to him at the time of vacation i.e. 08.12.2009 of the said premises, subject to clearing loan amount through cheque No.717503 dated 08.12.2009 drawn on Bank of Maharashtra, Rajouri Garden, New Delhi after deducting house-tax, electricity and water charges or any other dues of the said property.”

7. The undertaking/receipt (*supra*) also show the rent agreement was extended only till 07.02.2010. The documents did not dispute the sale deed in favour of the respondent or the rent agreement executed between the parties. It simply talked of an alleged loan transaction for which an alleged receipt/undertaking was executed. These two documents are denied by the respondent to be genuine. Though, these documents were allegedly executed on 08.12.2009 but strangely do not find a mention in the MOU dated 25.04.2011 executed between the parties and hence the respondent alleges these documents being created later by the petitioner to confuse the real issue. Further the respondent alleges no such cheque of ₹ 18.00 Lac was ever handed over to the respondent nor it was ever encashed. The money never entered into the account of the respondent and neither the petitioner has filed his own bank statements to prove the same. Even otherwise, if we take such documents to be genuine, at the most it could be a separate loan transaction having no bearing on the dispute herein.

8. The MOU dated 25.04.2011, admittedly, was executed in the presence of two witnesses. Admittedly, no action was taken by the

petitioner relying upon these two alleged documents till date and were sought to be produced for the first time by filing IA No.15562/2016.

9. Hence, on all the three counts the petitioner had failed **a)** viz., affording opportunity to plead his case before the learned arbitrator; **b)** being allegedly not served with the award, and **c)** documents alleged now relied upon by the petitioner having not seen the light of the day till an application IA No.15562/2016 was filed. No action was taken on the basis of such documents ever.

10. The petitioner has failed to make out a case of fraud to prick the conscience of the Court to set aside the impugned award passed by the learned arbitrator, more particularly when the petitioner himself has been careless throughout. There being no illegality in the impugned award the petition along with pending application, is dismissed.

11. No order as to costs.

YOGESH KHANNA, J

DECEMBER 01, 2017

M/RS