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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 507/2015

FITNESS FIRST INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr. Suman Doval, Mr. Suveer Dhyani
and Mr. Akshay Dhoundiyal, Advocates.

versus

SACHIN JAIN

..... Respondent

Through: Mr. A.K. Thakur and Mr. R.K. Mishra,
Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

09.01.2017

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by Fitness First India Private Limited ('FFIPL') is to an Award dated 12th June, 2015 passed by the sole Arbitrator in the disputes between the parties.

2. The background of the present petition is that the Petitioner and Respondent entered into a lease deed dated 13th August, 2007 whereby the Petitioner took on rent from the Respondent landlord half of Flat Nos. N-61 and N-62 on the First Floor and half portion of N-94 and N-95 on the Second Floor in Munshi Lal Building, Connaught Place, New Delhi for a period of nine years extendable by three years.

3. In terms of the said lease deed which was a registered lease deed, the rent

was Rs. 195 per sq. ft. per month for the first two years. Thereafter, the rent payable was increased to Rs. 200 per sq. ft. per month for one year, to Rs. 236 per sq.ft. per month for the next 3 years and to Rs. 278 per sq. ft. per month for the next 3 years. In terms of Clause 3 there was a 'lock in' period of five years from the commencement of the lease. Under Clause 4 of the lease deed there was an option to renew the lease after nine years. Clause 10 provided for an interest-free refundable security deposit ('IFRSD') which was to be refunded within seven days from the date of handing over of the vacant possession. Under Clause 24, an option was given to the lessee i.e., the Petitioner herein to terminate the lease after giving three months' notice or payment of rent for the notice period. The date of commencement of the lease was 27th December, 2007.

4. The Petitioner wrote to the Respondent requesting for reduction of the rent on account of financial issues. Consequently, the parties entered into a supplementary lease agreement ('SLA') on 18th March, 2011. Admittedly, this was not a registered document. In terms of Clause 1 of the SLA, the rent was reduced to Rs.172.55 per sq. ft. per month up to 30th April, 2012 and thereafter increased to Rs.203.61 per sq. ft. per month up to April, 2014. Clause 3 permitted both the Lessor and the Lessee to terminate the lease any time after the 'lock-in period' by giving the other party a notice of three months. Clause 5 of the SLA provided that the other clauses of the original lease deed not contrary to the SLA would continue to bind the parties. Although Clause 6 of the SLA provided that the SLA would be registered at the cost of the Lessee i.e., the Petitioner herein, it was in fact not registered.

5. On 5th March, 2013, a Memorandum of Understanding ('MOU') was entered into between the parties. This MOU provided for a lock-in period of two years i.e., up to 28th February, 2015 within which neither party had the right to terminate the lease. It was stated that the MOU would be subject to the approval of the Board of Directors of the Petitioner herein and that this approval would be communicated to the Respondent. Till that happened, the rent was to be paid in terms of the SLA.

6. The Petitioner issued to the Respondent a notice dated 1st August, 2013 of termination of the lease deed with effect from 1st November, 2013 giving three months' time for vacating the premises on the ground that the Board of Directors of the Petitioner did not approve the terms of the MOU. Admittedly, the vacant possession of the premises was handed over by the Petitioner to the Respondent on 3rd January, 2014.

7. By a letter dated 6th January, 2014, the Petitioner claimed a sum of Rs. 49,02,980 from the Respondent which was the interest-free refundable security deposit minus adjustments for rent payable etc. By a letter dated 11th January, 2014, the Respondent raised a claim in the sum of Rs.1,20,16,998 on the basis of the MOU. Alternatively, a sum of Rs.96,53,035 was claimed by the Respondent from the Petitioner under the registered lease deed dated 13th August, 2007. This led the Petitioner to invoke the arbitration clause by letter dated 5th March, 2014 seeking reference of the disputes to arbitration.

8. The two alternative claims of the Respondent, as noticed hereinbefore, formed the subject matter of the amount claimed in the arbitral proceedings

together with interest @ 18% per annum from 1st January, 2014 till its realisation. The Petitioner, however, denied the claim. It was pointed out that the Respondent had conveniently overlooked the SLA which would govern the jural relationship between the parties. Since the MOU was not approved by the Board of Directors, it had no effect and only the SLA would have effect. In the statement of defence, it was contended by the Petitioner that the claim for rent for the unexpired term of the lock in-period up to 28th February, 2015 was without basis since the MOU was not yet approved.

9. The Petitioner also preferred a counter-claim to the extent of Rs.49,02,980 as against the refund of the security deposit claimed by the Respondent in the sum of Rs.73,98,725. It is pointed out that water charges amounting to Rs.1,73,556 and the differential rent in the sum of Rs.26,69,301 were adjusted and the balance sum worked out to Rs.49,02,980.

10. By an order dated 15th July, 2014, the learned Arbitrator framed the following nine issues for determination:

“(1) Whether the claimant is entitled to the claim on the basis of the registered lease deed dated 13-8-2007 and or the unregistered and insufficiently stamped Memorandum of Understanding (MoU) dated 5-3-2013?

(2) Whether the unregistered and insufficiently stamped MoU dated 5-3-2013 is admissible in evidence in view of the bar contained in the Registration Act and the Stamp Act?

(3) Whether the MoU dated 5-3-2013 was acted upon by the parties? If so, what is its effect?

(4) Whether the unregistered and insufficiently stamped

supplementary agreement dated 18-3-2011 is admissible in evidence in view of the bar contained in the Registration Act?

(5) Whether the supplementary agreement dated 18-3-2011 was acted upon by the parties? If so, what is its effect?

(6) Whether the Respondent is entitled to its counter-claim on the basis of the unregistered and insufficiently stamped supplementary agreement dated 18-3-2011?

(7) Whether in view of the board resolutions dated 4-4-2007 and 3-8-2007 authorising Mr. Vikram Aditya Bhatia to enter into the lease agreement, which resolutions were not withdrawn, any approval from the board is required for the valid implementation of the MoU in view of the averment to that effect in the MoU?

(8) Whether the parties are entitled to interest, and if so at what rate and for which period?

(9) Whether the claimant is entitled to costs?"

11. In the impugned Award dated 12th June 2015, the learned Arbitrator came to the following conclusions:

(i) The contention of the Petitioner that the SLA did not require registration was negated. It was noticed that a document modifying the essential terms of a lease such as the amount of rent was a fresh lease and had to be registered. Another important change was that while the original lease agreement only envisaged the Lessee having the right to terminate the lease, the SLA gave both the Lessor and the Lessee the right to terminate the lease. However, as the SLA was not sufficiently stamped as required under Section 35 of the Indian Stamp Act, 1899, it could not be 'admitted in evidence'. It

would, however, not affect the position that factually there was no denial that the Respondent received the reduced rent as agreed between the parties in the SLA.

(ii) As regards the MoU dated 5th March, 2013, it was held for the same reason as the SLA, that the MoU also could not be admitted in evidence as it was not registered. The MoU purported to vary the terms of the original lease agreement dated 13th August, 2007. One of the significant changes was the reduction in rent per sq. ft. and extension of the lock-in period up to 28th February, 2015. The Arbitrator, accordingly, held that the MoU was not admissible in evidence for want of registration.

(iii) As far as Issue No. 3 was concerned, the learned Arbitrator returned the finding that the MoU could not be declared to be of no effect since both parties had acted upon its terms. The requirement of Board approval did not form part of the operative portion of the MoU. Even the SLA was acted upon and, therefore, in all, the Respondent was entitled to a sum of Rs.1,20,16,998 in terms of the first alternative proposed by the Respondent. The alternative claim of Rs. 96,53,035 was rejected.

(iv) Although the SLA could not be admitted as evidence, it was acted upon by the parties and the Respondent had accepted the lesser rent on that basis. Till the end of the lock-in period by the end of October 2013, the rent in terms of the original lease deed could not be further enhanced. Further, after obtaining the benefit of lesser rent under the MoU, the Petitioner herein should be held to be bound by the condition therein with regard to the lock-

in period as well.

(v) No argument had been advanced with regard to items at Serial Nos. 2 to 6 of the claim except that with regard to the common area maintenance ('CAM') at serial No. 3. The ultimate amount payable would be subject to reconciliation.

(vi) The calculation of the rent for the lock-in period at Serial No. 1 was also not disputed. Accordingly, the learned Arbitrator upheld the claim of the Respondent based on the MoU and the alternative claim on the basis of the original lease deed dated 13th August, 2007 was rejected. The Respondent was held not to be entitled to any costs.

(vii) Turning to the counter-claims of the Petitioner which was based on the SLA dated 18th March, 2007, the learned Arbitrator held that since the MOU had to prevail and the Petitioner had to pay the rent of the lock-in period in terms thereof, the counter claim had to be rejected.

12. Mr. Suman Doval, learned counsel appearing for the Petitioner, pointed out that the Petitioner had vacated the premises and handed over possession to the Respondent on 3rd January, 2014. In terms of the lease deed dated 13th August, 2007 read with the SLA dated 18th March, 2007, the Respondent was required to refund a sum of Rs.73,98,725 deposited by the Petitioner with the Respondent as security deposit within seven days thereafter. He submitted that after due adjustment, a sum of Rs.49,02,980 was owed to the Petitioner. He submitted that there was a contradiction in the impugned

Award inasmuch as, on one hand, the learned Arbitrator had held that since the SLA was not registered, it could not be admissible but at the same time chose to hold that the MoU which is also not a registered document had the same sanctity as the SLA and thus, could be acted upon. He submitted that the Petitioner had been consistent in paying rent as per the SLA and that since all that the SLA did was reduce the rent and extended the lock-in period, it was not required to be registered.

13. As far as the MoU was concerned, the consistent stand of the Petitioner was that in the absence of any approval thereto by the Board of Directors of the Petitioner, it could not be acted upon. According to him, the learned Arbitrator also ignored the exchange of emails in this regard between the parties. Merely because rent had been paid in terms of the MoU, it did not mean that the Petitioner had accepted it without the approval of the Board. The MoU was not an extension of the lease inasmuch as in terms of Clause 2(h) it actually extended the lease period up till 2018. The learned Arbitrator treated the 'recitals' in the MoU as not forming part of the terms of the MoU.

14. In reply, it is pointed out by Mr. A.K. Thakur, learned counsel appearing for the Respondent that the plea of the Petitioner that the impugned Award is against the public policy of India has not been substantiated by any material placed on record. He drew attention to the decision in ***Renusagar Power Company Ltd v. General Electric Company 1984 (4) SCC 679*** and the recent judgment in ***Associate Builders v. Delhi Development Authority AIR 2015 SC 620***.

15. Mr Thakur pointed out that since the Petitioner had paid the rent as agreed to between the parties even without the approval of its Board of Directors, it in fact acted upon the MoU. The board resolutions dated 4th April, 2007 and 3rd August, 2007 executed by the Petitioner in favour of Mr. Vikram Aditya Bhatia were never withdrawn at any point in time. At every stage when there was a reduced rent, the Petitioner took advantage of that and, therefore, could not wriggle out of the obligations therein. He submitted that no grounds whatsoever were made out by the Petitioner for interference with the impugned Award.

16. The Court would like to preface its decision on the above submissions by recapitulating the law in respect of scope and powers of this Court under Section 34 of the Act. In **ONGC Limited v. Western Geco International Limited (2014) 9 SCC 263** the Supreme Court elaborated on what construes “the fundamental policy of Indian law” for the purposes of Section 34 (2) (b) (ii) of the Act. In the decision of *Associate Builders v. Delhi Development Authority* (supra), the Supreme Court has emphasised that on questions of fact, the view of the learned Arbitrator would be final. The following observations in the said decision are relevant:

“It must clearly be understood that when a court is applying the 'public policy' test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that

the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts.”

17. In *Associate Builders v. Delhi Development Authority* (*supra*) *inter alia* it was observed by the Supreme Court that “an Arbitral Tribunal must decide in accordance with the terms of the contract, but if any arbitrator construes a term of the contract in an unreasonable manner, it will not mean that the Award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.” It was further reiterated that “once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts.” The Supreme Court also reiterated that “an award can be said to be against justice only when it shocks the conscience of the Court.” The Court observed that it is settled law that where a finding is based on no evidence, and the AT takes into account something irrelevant to the decision which it arrives at, or ignores vital evidence in arriving at its decision, such decision would be termed as perverse.

18. A perusal of the impugned Award reveals that the learned Arbitrator has made a distinction between the issue concerning the insufficient stamping of the SLA dated 18th March, 2011 and separately the issue whether it was acted upon by the parties and to what effect. Again, both these issues in relation to the MoU were separately dealt with. The Court, therefore, does not view any inconsistency in the impugned Award as is sought to be made out by the counsel for the Petitioner. The fact of the matter was that the

Petitioner did take advantage of both the SLA as well as the MoU when it came to paying reduced rent.

19. There is a factual finding by the learned Arbitrator that the Petitioner started paying reduced rent as per the MoU from 1st March, 2013 at the rate of Rs. 162 per sq.ft. and this was also accepted by the Respondent. Therefore, the extension of the lock-in period for two years from December 2013 applied. The Petitioner sought to avoid this consequence by pleading that the MoU would have no effect since it was not approved by the Board of Directors. It is in this context that the recital in the MoU which talked of the MoU having to be approved by the Board of Directors was held to be irrelevant. The learned Arbitrator noticed that the said recital did not find mention in the operative portion of the MoU where the terms and conditions were set out. As rightly pointed out by the learned Arbitrator, it cannot be that the Petitioner could reduce rent as per the MoU without the approval by the Board but when it came to extending the lock-in period, it would require approval of the Board.

20. It is not as if the learned Arbitrator did not refer to the emails exchanged. In fact, the learned Arbitrator observed in a reference to the email sent by the Project Director of the Petitioner to the Respondent on 25th February, 2013 as follows:

"This mail may no doubt point to the intention of the Respondent to subject the MoU to the approval of the Board of Directors but it was not translated into a term or condition of the MoU by placing it in the operative part."

21. The learned Arbitrator discussed the legal position relating to the

difference between the recital part and operative part of a document. He further noted that Mr. Bhatia signed the MoU on behalf of the Petitioner and did so with proper authority and, therefore, the Petitioner could not avoid the legal consequences of the MoU.

22. In none of the above findings, the Court is able to discern any legal error much less any of the grounds which would attract Section 34 of the Act.

23. Mr. Doval assailed the Award to the extent it awarded the rent for the notice period of three months and the CAM charges. The Court finds that the impugned Award has proceeded on a logical basis and has set out in detail the calculations for arriving at the sum awarded after making all the necessary adjustments. The Court is unable to discern any legal infirmity therein which attracts any ground under Section 34 of the Act. The Award is a reasoned one and cannot be said to be contrary to the evidence on record or the clauses of the agreements between the parties.

24. It was then submitted by Mr. Doval that each claim and sub-claim was required to be independently decided by the learned Arbitrator. The Court is unable to agree with the submission for the reason that the learned Arbitrator appears to have framed specific issues based on their claims and counter-claims and answered them comprehensively. The learned Arbitrator has also analysed all the individual claims of the Respondent as well as the alternative claim as part of the Award itself. The calculations for the amounts claimed have also been adverted to. The learned Arbitrator has also given valid reasons why he was accepting the first alternative claim of the Petitioner whereby a sum of Rs.1,20,16,998 was claimed after adjusting the

IFRSD in the sum of Rs.73,98,725 and the rent already received for the period between March and November 2013.

25. No ground for interference is made out. The petition is, accordingly, dismissed but in the circumstances with no order as to costs.

S. MURALIDHAR, J

JANUARY 09, 2017
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