

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 29TH DAY OF AUGUST 2018

THE HON'BLE MR.JUSTICE P.D.AUDIKESAVALU

A. No.6201 of 2018

in

A. No.6465 of 2017

in

C.S. No.763 of 2017

Mrs.Rajul R.Jain,
rep. by its Proprietrix,
M/s.1st Lap,
New No.50 (Old No.842/5),
Opp.Anna Statue, Mount Road,
Chennai-600 002.

... Plaintiff

-Versus-

Express Infrastructure Private Ltd.,
rep. by its Authorised Signatory & CFO,
Mr.R.R.Aroon Kumar,
No.2, Club House Road,
Mount Road (Anna Salai),
Chennai-600 002.

... Defendant

A. Nos.6465 of 2017 & 6201 of 2018:-

M/s.Express Infrastructure Private Ltd.,
rep. by its Authorised Signatory & CFO,
Mr.R.R.Aroon Kumar,
No.2, Club House Road,
Mount Road (Anna Salai),
Chennai-600 002.

... Applicant/Defendant

-Versus-

Mrs.Rajul R.Jain,
rep. by its Proprietrix,
M/s.1st Lap,
New No.50 (Old No.842/5),
Opp.Anna Statue, Mount Road,
Chennai-600 002.

... Respondent/Plaintiff

A. No.6201 of 2018:-

<https://hcservices.ecourts.gov.in/hcservices/> Application praying that this Hon'ble Court be pleased to extend the timeline for the arbitral tribunal to continue and conclude the arbitral proceedings within such extended time.

This application coming on this day before this Court for hearing the court made the following order:-

The Defendant in C.S. No.763 of 2017 is the Applicant in this Application. The parties are hereinafter referred to as per their description in the suit for the sake of convenience.

2. The Defendant is administering the Mall, viz., Express Avenue in Chennai. The Plaintiff entered into a Leave and License agreement dated 19.09.2013 with the Defendant to run a specified business of retailing mobile phones and the related accessories under the name of M/s.Samsung Smart Cafe to an extent of 936 sq. ft., of super built up area in the said Mall and in furtherance thereto, Common Area Maintenance Agreement and Facility and Utility Agreement was also executed between the parties on the same day, which are co-terminus and co-existing. The Defendant by notice dated 16.06.2017 invoked Clause 34.1 of the Leave and License agreement and directed the Plaintiff to cease operation of the licensed area by removing all fittings, fixtures, false ceiling, if any, etc., and hand over the vacant licensed area in a bare shell condition within 15 days.

3. Aggrieved thereby, the Plaintiff instituted this Suit for Declaration that the said letter of termination dated 16.06.2017 issued by the Defendant threatening the Plaintiff to vacate and hand over possession was illegal and not binding on the Plaintiff and for consequential injunction restraining Defendant from interfering or disturbing the peaceful possession and enjoyment of all amenities in respect of that property, thereby forcing the eviction/ejectment of the Plaintiff other than by adopting due process of law. The

Defendant on entering appearance filed the Application No.6465 of 2017 under Section 8 of the Arbitration and Conciliation Act, 1996, relying on the arbitration clause in the agreement between the parties and sought for referring the dispute to arbitration. Recording the statement made by the learned Counsel appearing for the Plaintiff as well as the Defendant that a retired Judge may be appointed as Arbitrator, this Court by order dated 07.03.2018 in that application appointed Hon'ble Mr. Justice K.N.Basha, retired Judge of this Court, as Arbitrator to decide the disputes between the parties in accordance with the terms of agreements between them and the rules of the Arbitration and Conciliation Act, 1996, and further held that the Arbitrator may fix the arbitral charges, and the arbitral proceedings were required to be completed by 29.06.2018.

4. It is noticed from the minutes of the first preliminary sitting held on 27.03.2018 that the Arbitrator had given the calender for completing the pleadings and with the consent of parties, the fees and expenses for the arbitral proceedings was fixed as follows:-

- (i) The Arbitrator shall be paid a sum of Rs.1,00,000/- per sitting of 2 1/2 hours/per day or part and the same shall be equally shared by both parties and shall be paid in advance of four sittings, including the present sitting.
- (ii) The Arbitrator shall also be paid a reading fee of Rs.1,00,000/-

- (iii) Both the parties also have to pay a sum of Rs.25,000/- towards secretarial expenses which has to be shared by both the parties. (No TDS to be deducted)
- (iv) The parties also has to pay travelling expenses at the rate of Rs.500/- per sitting which shall be shared by both the parties.
- (v) The fees for the Arbitrator for two sittings, reading fees and the secretarial expenses and travelling expenses shall be paid within three weeks. Both Plaintiff and the Defendant each have to pay Rs.1,63,500/- in cheque and each a sum of Rs.12,500/- in cash/cheque or demand draft for secretarial expenses.
- (vi) The fee for preparation of the award will be intimated at the conclusion of the arguments.

5. In the proceedings of the Arbitrator dated 02.05.2018, it is noticed that the Plaintiff had filed the Claim Statement and the Defendant had filed the Counter Statement cum Counter Claim on 23.04.2018 and the Plaintiff was required to file Reply to Counter claim by 10.05.2018 and any Rejoinder by the Defendant was to be filed by 16.05.2018. That apart, statement of admission and denials, draft issues after exchanging between the parties had to be filed by 23.05.2018 and the sitting of the Arbitral Tribunal for framing issues was fixed on 30.05.2018 at 11 a.m. at Madras High Court Arbitration Centre.

6. Thereafter, on 09.05.2018 M/s. Chennai Law Associates, the Counsel for the Plaintiff by letter dated 09.05.2018 informed the Arbitrator that they had not received any further instructions from

the Plaintiff including payment of fees to the Arbitrator, and the said Counsel were ceasing to appear on behalf of Plaintiff. This was followed by another letter dated 11.05.2018 from the Plaintiff to the Arbitrator stating that the Plaintiff can participate in the further arbitral proceedings only if the entire cost for the same is borne by the Defendant and that the time for filing Rejoinder may be extended by 10 days and that too, only if arbitration fees and expenses is directed to be fully paid by the Defendant and the Counsel for the Plaintiff made an endorsement in that letter that they were continuing to appear on behalf of the Plaintiff.

7. The Counsel for the Defendant by letter dated 21.05.2018 pointed out that the request of the Plaintiff that the Defendant should bear the expenses of the entire cost of the arbitration was unacceptable especially when both the parties have agreed to bear the costs equally. The Arbitrator by proceedings dated 31.05.2018 informed that after receiving the reply of the Plaintiff, further course of action would be decided. The Plaintiff by letter dated 04.06.2018 once again repeated its request to pass appropriate orders directing the Defendant to bear the entire cost of arbitration.

8. While the matter stood as narrated supra, the time period for completing the arbitration by 29.06.2018 had lapsed and the Defendant has filed the present application on 30.07.2018 to extend the time for the Arbitrator to continue and conclude the arbitral proceedings. The Plaintiff has filed a counter affidavit on 21.08.2018 and has sought for the dismissal of this Application for extension of time.

9. Heard Mr.G.Kalyan Jhabakh, learned Counsel for the Defendant and M/s.K.Subhashini for M/s. Chennai Law Associates, learned Counsel for the Plaintiff and perused the pleadings and supporting documents produced by both parties.

10. During the course of arguments, the learned Counsel for the Plaintiff opposed the extension of time for continuing and concluding the arbitral proceedings for the following reasons:-

- (i) The Plaintiff is not in a sound financial position to bear the cost of arbitration and hence the Defendant ought to have been directed by the Arbitrator to bear the same.
- (ii) The claims made by the Defendant in the counter claim could not be decided through arbitration.
- (iii) As per the requirement of Section 29-A(5) of the Arbitration and Conciliation Act, 1996, sufficient cause has not been shown for extending time for the conclusion of the arbitral proceedings.

11. Coming to the question of costs of the Plaintiff in the arbitral proceedings to be directed to be borne by the Defendant, it requires to be stated at the outset that normally one party to the arbitration cannot require the other party to bear his share of costs and more so, when there is also specific agreement between them, which has been recorded. It is evident from the aforesaid conduct of the Plaintiff that she has been acting in a irresponsible manner by not co-operating to conduct and complete the arbitral proceedings within the agreed period. At the same time, it is noticed that the Defendant is holding a sum of Rs.14,74,200/- as advance deposit and another sum of Rs.2,25,000/- as additional

security deposit from the Plaintiff, which the Plaintiff is claiming for refund and the Defendant seeks to set-off that sum towards the dues claimed from the Plaintiff. Having due regard to the necessity that the arbitral proceedings should be expeditiously completed without any further delay, it would be appropriate to direct the Defendant to pay the share of the Plaintiff towards the arbitral fees and expenses, as and when required by the Arbitrator, from the aforesaid advance deposit and additional security deposit at the first instance and at the time of passing arbitral award, the Arbitrator shall provide for deduction of those sums from the advance deposit and additional security deposit while ordering its refund by the Defendant to the Plaintiff.

12. In respect of the contention that the claims made by the Defendant in the counter claim could not be decided by arbitration, it only needs to be pointed out that once a matter is referred to arbitration and the Arbitrator enters upon the reference, questions relating to the jurisdiction of the Arbitrator including ruling on any objections with respect to the existence and validity of the arbitration agreement to decide the dispute would have to be decided by the Arbitrator in terms of Section 16 of the Arbitration and Conciliation Act, 1996. As such, the Plaintiff has to raise those contentions only before the Arbitrator who would have to decide the same.

13. The last contention of the Plaintiff in that the extension of time for conclusion of arbitral proceedings could be granted only for sufficient cause as provided in Section 29-A(5) of the Arbitration and Conciliation Act, 1996, and in instant case, the Arbitrator had not passed any orders after the reply of the

Plaintiff sent on 04.06.2018 till 29.06.2018 and the application for extension of time has been filed by the Defendant belatedly on 30.07.2018. As noticed earlier, the Plaintiff had not paid her share of the initial arbitral fees and expenses and was insisting that the Defendant should bear the same, which had placed the Arbitrator in a piquant situation, when the Defendant was also unwilling to accede to that unreasonable demand of the Plaintiff. The Plaintiff had not been co-operating to get the disputes resolved by carrying out her obligations of paying the arbitral fees and expenses in time and has been protracting the proceedings. The object of providing for arbitration is to ensure that the parties get their disputes resolved expeditiously and as such, if time for completing the arbitral proceedings is not extended, it would only lead to a stalemate, which is neither in the interests of the parties nor advance the cause of justice. The refusal to pay arbitral fees and expenses by the Plaintiff that had derailed the arbitral proceedings till 30.07.2018, when the application for extension of time was filed by the Defendant, would constitute sufficient cause for extending time for completing the arbitral proceedings.

14. In the result, the following order is passed:-

(i) The Defendant shall pay the share of the Plaintiff towards arbitral fees and expenses fixed by the Arbitrator, from the advance deposit and additional security deposit of the Plaintiff held by the Defendant, under acknowledgement. It is needless to add here that such payment made by the Defendant shall not include the share of the Defendant towards arbitral fees and expenses, which shall be borne by the Defendant from its own funds.

(ii) The share of the Plaintiff towards arbitral fees and expenses that had been directed to be paid by the Arbitrator in the first preliminary sitting held on 27.03.2018 shall be paid by the Defendant directly to the Arbitrator by 05.09.2018.

- (iii) The Learned Arbitrator is requested to ensure that the total amount of arbitral fees fixed does not exceed the maximum amount of model fee provided for the value of claim and counter claim in terms of the Fourth Schedule read with Section 11(14) of the Arbitration and Conciliation Act, 1996.
- (iv) The Plaintiff shall file its Reply to the counter claim of the Defendant before the Arbitrator on or before 15.09.2018.
- (v) If such Reply is filed by the Plaintiff, the Defendant shall file its Rejoinder thereto by 30.09.2018.
- (vi) The Arbitrator shall fix the dates of sittings and intimate the same to the parties and conduct further proceedings of the arbitration and complete the same on or before 31.12.2018.
- (vii) While passing arbitral award, the learned Arbitrator shall ensure that necessary deductions from the advance deposit and additional security deposit, that would have to be refunded by the Defendant to the Plaintiff towards the share of the Plaintiff towards arbitral fees and expenses, is specifically provided.

15. The Application is ordered on the aforesaid terms.

WEB COPY

Sd/-P.D.A.J

29/08/2018

//Certified to be a true copy//

Dated this the day of 2018

JJ 25.09.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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