

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.11.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

O.P.No.366 of 2017

Mr. S.Anbazhagan

... Petitioner

-VS-

1. Mrs.Bhamari Bai
2. Mrs.Pushpa B.Jain
3. Sohan
4. Mrs.Prasanna
5. Mrs.Heena
6. Mrs.Rekha
7. Mrs.Sheetal Hundia
8. Mrs.Neetu
9. Mr.Babinpal
10. Mr.Lalith Kumar
11. Mr.Rajkumar
12. Mr.Mahaveer

... Respondents

Prayer: This Petition is filed under Section 34 of The Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 04.02.2017 in Arbitration Case No.1 of 2015.

For Petitioner
For R2 to R12

: M/s.S.Manohar
: Mr.Omprakash
For Mr.M.Jawahar

ORDER

The Original Petition has been filed, seeking to set aside the

Arbitral Award dated 04.02.2017 passed in Arbitration Case No.1 of 2015, by

which the petitioner herein was directed to vacate and hand over the possession of the premises to the 1st respondent herein.

2. The sum and substance of the issue on hand is as to whether the petitioner, who was the respondent before the learned Arbitrator was a tenant or a licensee. Though the petitioner has raised an objection that the Arbitrator has no jurisdiction to determine the issue in question and that the tenancy dispute has got to be resolved in accordance with law under the Tenancy Laws.

3. It is not in dispute that there was an agreement entered into between the parties as early as on 20.06.2006, by which the petitioner was permitted to occupy the premises with the payment of advance of Rs.3,00,000/- and also on payment of License Fee of Rs.23,000/-per month. The agreement is said to have expired in the year 2007 and that there is no dispute regarding the quantum.

4. A reading of the agreement would make it very clear that there was arbitration proceedings in case of dispute and that the license has been granted for a period of 11 months, which would be extended for further period of five more terms at the option of the second party, who is the respondent herein.

5. It was also stated in the agreement that the petitioner, who is

the party, has to execute a Power of Attorney to run the business in the name and style of H.Mahavirchand to avoid third party objection. The petitioner was paying license fees from 2006 upto 2015 and thereafter the amount was not paid and belatedly a sum of Rs.18,000/- was paid towards arrears for a period of six months. The petitioner has also moved the Civil Court and contended that he shall not be evicted except in accordance with law and pursuant to the application filed by the respondent herein that there is an arbitration clause, the application filed by the respondent was allowed and the suit was dismissed. Thereafter appeal and revision were filed by the respective parties and in the meantime, the respondent has approached this Court with regard to commencement of Arbitration proceedings in terms of the agreement by filing O.P.No.665 of 2013, in which, this Court, on 23.03.2015, had passed the following order:

“5. The suit filed by the respondent is one for permanent injunction. Even assuming that on appeal the said suit is decreed for the argument sake, it will not take away the jurisdiction of the arbitrator. The parties are governed by the arbitration clause. The existence of the arbitration clause is not in dispute. The issue of maintainability of arbitration can very well be raised before the learned arbitrator. The agreement merely states that it is one of licence.

6. Considering the above, this Court is inclined to appoint an arbitrator. Accordingly, Mr.M.sambasivam, District Judge (Retd.), residing at No.10, First Street, First Floor / Flat No.G.2, Temple View Apartment Temple Colony, Adambakkam, Chennai - 600 088 (Mobile No.944410264) is appointed as a sole arbitrator to go into the claims made by the petitioner as against the respondent to resolve the dispute between the parties, after issuing notice to the parties and upon hearing them. It is made clear that it is well open to the respondent to make his counter claim. It is further made clear

that all the issues are left open for adjudication by the learned Arbitrator including the question of jurisdiction, as the observations made in this order are prima facie in nature. The arbitrator shall pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix the remuneration and other incidental expenses, which shall be borne by the parties equally.”

6. Liberty was given to both parties to raise all the objections before the learned Arbitrator and the learned Arbitrator has raised several questions, including the one framed as Issue No.3. The learned Arbitrator, in terms of the agreement dated 20.06.2006 marked as Ex.P1 and after going through the evidence, came to the conclusion that the respondent, who is the petitioner herein was a licensee, even though the other terminology, namely, tenancy was invoked. From the pleadings and the findings rendered by the learned Arbitrator, it could be seen that Ex.P1 / Agreement gives right to use the property in a particular way and that the petitioner was put in possession only on those terms and hence, he can be termed only as a licensee. That apart, the petitioner herein was only a permissive occupier.

7. Learned counsel for the petitioner has submitted that the Arbitrator has no jurisdiction to decide the issue regarding possession of the premises, for which, he has relied upon a judgment of the Hon'ble Supreme Court in the case of Himangni Enterprises vs. Kamaljeet Singh Ahluwalia, reported in CDJ 2017 SC 117 to distinguish the term “arbitrable and non-arbitrable”, wherein it has been observed as follows:

“23. Yet in another case of *Booz Allen & Hamilton Inc.* (supra), this Court (two Judge Bench) speaking through R.V.Raveendran J. laid down the following proposition of law after examining the question as to which cases are arbitrable and which are non-arbitrable:

“36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.” (emphasis supplied)

8. Per contra, learned counsel for the 1st respondent has vehemently contended that there is no necessity to interfere with the Award of the Arbitrator, unless the same is in conflict with public policy of India as per Section 34(2)(b)(ii) of the Act and such question does not arise in this case at all. In support of his submission, he has relied upon the judgment of the Hon'ble Supreme Court in the case of *Associate Builders vs. Delhi Development Authority*, reported in (2015) 3 SCC 49, wherein it has been pleased to observe as under:

“12. In as much as serious objections have been taken to the Division Bench judgment on the ground that it has ignored the parameters laid down in a series of judgments by this Court as to the limitations which a Judge hearing objections to an arbitral award under Section 34 is subject to, we deem it necessary to state the law on the subject.

Section 34 of the Arbitration and Conciliation Act reads as follows-

"Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of **Section 75** or **Section 81**.

(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.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

This Section in conjunction with [Section 5](#) makes it clear that an arbitration award that is governed by part I of the Arbitration and [Conciliation Act](#), 1996 can be set aside only on grounds mentioned under [Section 34](#) (2) and (3), and not otherwise. [Section 5](#) reads as follows:

"5. Extent of judicial intervention.-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

It is important to note that the 1996 Act was enacted to replace the 1940 [Arbitration Act](#) in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimize the supervisory roles of courts in the arbitral process.

It will be seen that none of the grounds contained in sub-clause 2 (a) deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances."

9. On going through various evidences, more particularly, Ex.P1,

adduced before the learned Arbitrator, it could be seen that the petitioner was put on enjoyment of the shop on payment of necessary license fee and therefore, it cannot, at any stretch of imagination, be construed that there was a Tenancy agreement between the parties, but it can be easily construed that the petitioner was given possession only in the capacity of licensee. It could be further seen that the person, who has entered into an agreement with the petitioner, had passed away and the 1st respondent was substituted in the place of the deceased person and only with the concurrence of the said respondent, the petitioner, as a Tenant, was carrying on business. During the pendency of Original Petition before this Court, the wife of the deceased, namely, 1st respondent also passed away and therefore, the respondents 2 to 12 were brought on record as legal heirs.

10. At this juncture, it is worthwhile to refer to the judgment of the Hon'ble Apex Court in the case of W.M.Agnani vs. Badri Das reported in (1963) 1 LLJ 684, wherein, the Industrial Tribunal put one interpretation upon the resolution of the Management and the High Court thought it better to put another. The Apex Court held that it cannot be said to introduce an error apparent on the face of the record in the order of the Industrial Tribunal and if it can be said that the view taken by the Tribunal is not even reasonably possible, perhaps an argument can be urged that the error is apparent on the face of the record. In the said case, the High Court exceeded in its writ jurisdiction in interfering with the finding of the Industrial Tribunal based on the

construction put by it upon the resolution of the Management.

11. For better appreciation, relevant portion of the judgment rendered in **Agnani's** case (cited supra) is extracted hereunder:

"11....The Tribunal took the view that this resolution clearly showed that the enquiry had to be held about the incident which took place on November 16, 1959 and it thought that the reference to his previous conduct was incidental and may have been necessary for determining the question of sentence, but it was not intended to be the subject matter of the enquiry. The High Court has taken a different view. Apart from the correctness of one view or another, it seems to us plain that in a matter of this kind, if the Tribunal put one interpretation upon the resolution and the High Court thought it better to put another, that cannot be said to introduce an error apparent on the face of the record in the order of the Tribunal. If it can be said that the view taken by the Tribunal is not even reasonably possible, perhaps an argument may be urged that the error is apparent on the face of the record; but, in our opinion, it would not be possible to accept Mr.Setalvad's argument that the construction placed by the Tribunal is an impossible construction. On the other hand, while conceding that the view taken by the High Court may be reasonably possible, we are inclined to think that the construction put upon the resolution by the Tribunal is also reasonably possible; in fact, if we had to deal with the matter ourselves, we would have preferred the view of the Tribunal to the view of the High Court."

12. It is pertinent to state here that when the learned Arbitrator has rendered a finding on the basis of the records available before him, which could be considered as a finding of fact, this Court cannot simply substitute its view in the place of Arbitrator, even assuming that another view is possible. For the sake of brevity, it is once again held that a scrutiny of Ex.P1 would make it very clear that the petitioner was a permissive occupier and he was permitted

to continue for a maximum period of six terms, including the first period, which was agreed upon into as per the agreement dated 20.06.2006 and beyond that the petitioner has no locus to stay in the premises, except with the consent of the respondents herein.

13. It is a settled law that where a finding is based on no evidence, or an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at or ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

14. In this case, no such perverse finding has been rendered or arrived at by the learned Arbitrator. Since the learned Arbitrator has rendered a clear finding that the petitioner / permissive occupier was only a licensee, I find that there is no error on the face of record to interfere with the said finding.

15. In the result, this Original Petition is dismissed. No costs.

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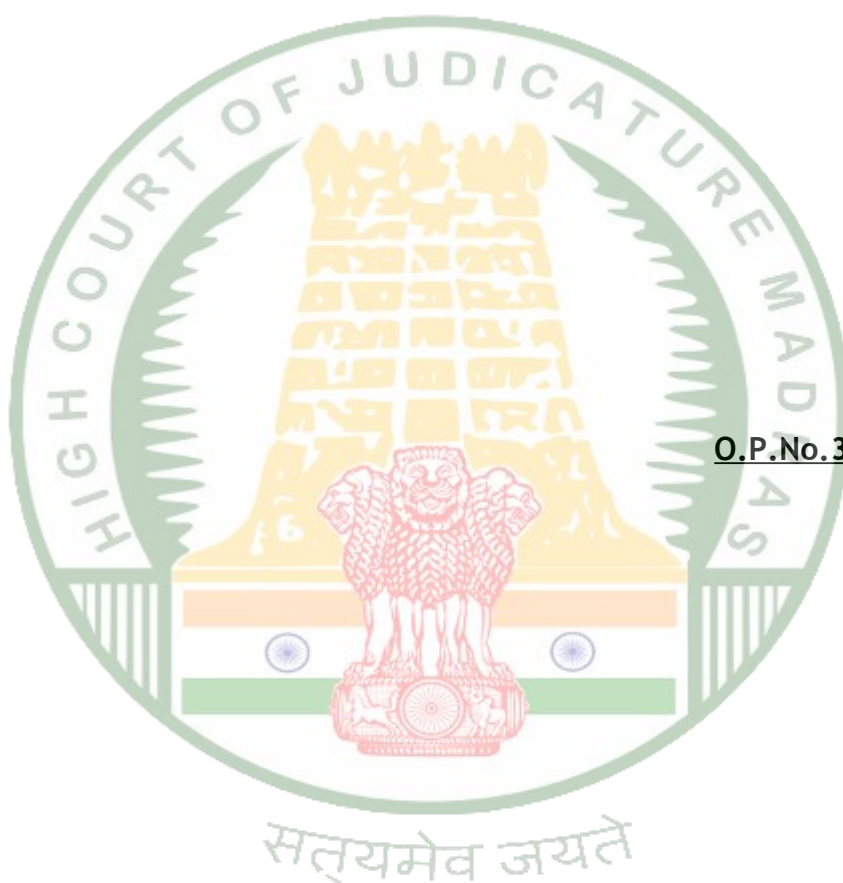
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S. VAIDYANATHAN,J.

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