

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P. (COMM) 67/2017**

Reserved on: 27.09.2018

Date of decision : 16.10.2018

TODAY HOMES & INFRASTRUCTURE PVT. LTD.

..... Petitioner

Through: Mr.Rahul Sharma & Mr.Jitender
Rath, Advs.

versus

JDS APPARELS LTD. & ANR.

..... Respondents

Through: Mr.Pulkit Deora, Adv. for Official
Liquidator.
Mr.Ajay Kohli & Ms.Bhumika
Kapur, Advs. for R-1.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 03.06.2015 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Lease Agreement dated 08.04.2009 executed between the parties for leasing out certain portion/area in the commercial complex and entertainment centre named as 'North-Orbit Plaza' as also the Memorandum of Understanding (MoU) dated 08.04.2009 executed between the parties with respect to extension of a loan of Rs. 1.50 crores by the petitioner to respondent no. 1.

2. The Petitioner, M/s. Today Homes and Infrastructure Private Ltd. had entered into a Development Agreement dated 27.03.2006 with respondent no. 2, M/s. M.N Securities Private Limited, the original lessee and owner of the land which was used to develop the abovementioned commercial complex.

3. The respondent no. 1 being interested in taking certain portion/area on lease in the said commercial complex, entered into the abovementioned Lease Agreement with respondent no. 2 as the 'lessor', respondent no. 1 as the 'lessee' and the petitioner as the 'confirming party'. The tenure of the lease was for a period of nine years commencing from 08.04.2009 and expiring on 08.04.2018, with the option given to the lessee to renew it for further two periods of nine years each. The area being given on lease had been sold to various allottees who had authorized the petitioner to lease out their respective unit to any retail/brand.

4. A Memorandum of Understanding dated 08.04.2009 was also entered into between the parties stating that the respondent no.1 had approached the petitioner for a loan of Rs. 1,50,00,000/- for carrying out 'fit-outs' in the leased premises and that the petitioner had agreed to extend the said loan on the terms contained in the MoU.

5. The MoU was followed by an Addendum dated 31.03.2010 recording that the petitioner had completed its scope of work as per Clauses 9 and 10 of the Agreement, which involved providing amenities like parking, landscaping, common area operations, security systems, etc., as also laid down the revised manner and mode of release of loan

amount. The Addendum also extended the Rent Commencement Date to 01.07.2010 from 01.10.2009 as had been stipulated in the Lease Deed.

6. Dispute arose between the parties with the Respondent no. 1 terminating the Lease Deed vide its notice dated 16.11.2011 and demanding the refund of the security deposit as also the damages, while the petitioner claimed that the termination of the Lease Deed was illegal and for extraneous reasons and therefore, the petitioner was entitled to refund of the loan amount as also damages from the respondent no.1.

7. The Sole Arbitrator by the Impugned Award dated 03.06.2015 has held the termination of the Lease Deed to be valid and has allowed certain claims of the respondent no. 1, while rejecting the counter claims of the petitioner. The operative portion of the Award with respect to the claims and counter claims is reproduced hereinunder:

“Claim No.1- In respect of refund of security deposit

Claimant is awarded a sum of Rs. 10,46,400/- (Rupees Ten Lakhs Forty six thousand four hundred only) against respondent no. 2 together with interest @12% from 16.11.2011 till realization.

Claim no. 2-

Claimant is awarded a sum of Rs. 24,30,072/- (Rupees Twenty Four Lakhs Thirty Thousand and Seventy Two only) spent by it on the fit outs etc. for the show room against the respondent no. 1 with interest @ 12% from the date of award till realization.

Claim no. 3-

Claim is rejected for the reasons set out in the award.

Claim no. 4-

Claim no.4 for loss of goodwill is rejected for the reasons set out in the award.

Claim no. 5-

Claim is partly allowed for a sum of Rs. 3,65,350/- (Rupees Three Lakhs Sixty Five Thousand Three Hundred Fifty) in favour of claimant and against the respondents for the reasons recorded.

Claimant to be entitled to interest @ 12 %per annum from the date of award till realization in respect of claim no's 2 and 5.

Counter Claims no. 1-5 for the reasons stated in the award are rejected.

Claimant's share of arbitral fee of Rs.12.5 lakhs and litigation costs assessed at Rs. 1.50 lakhs in these proceedings are awarded in favour of Claimant and against Respondents."

8. Learned counsel for the petitioner submits that that the finding of the Arbitrator holding that the termination of the Lease Deed was valid is incorrect and contrary to the terms of the Lease Deed. He submits that Clause 5(i) of the Lease Deed provides for a lock-in period of 24 months. As by way of the Addendum dated 31.03.2010, the 'Rent Commencement Date' had been extended to 01.07.2010, the respondent no.1 could not have terminated the Lease Deed vide its notice 16.11.2011, being within the lock-in period.

9. I have considered this submission of the learned counsel for the petitioner, however, find no force in the same.

10. Clause 5(i) of the Lease Deed is reproduced hereinbelow:

"5. Lock-in period:

(i)Both the parties shall treat the first 24 months from the date of commencement of the present lease, as lock-in period during which neither of the parties can terminate the Agreement except as provided in clause 5(ii). In case, the

Lessee terminates the Lease before the expiry of said lock-in period, for reasons other than as provided in clause 5 (ii) and 5(iii), hereinafter, the Lessee shall be liable to pay only the monthly rent for the remaining lock-in period. It is made clear that in the event of such termination, before the expiry of the lock-in-period, except for the monthly rent payable for the remaining lock-in-period, no other charges whatever including maintenance charges (CAM) etc. shall be payable by the lessee to the lessor.”

11. A reading of the above clause would clearly show that the lock-in period was to be 24 months “from the date of commencement of the present lease”. Clause 2 of the Agreement gives the date of commencement of the Lease Deed as 08.04.2009. The lock-in period, therefore, had expired when the notice of termination was issued by the respondent no.1. The lock-in period has no relation with the ‘Rent Commencement Date’ as defined in Clause 9 of the Lease Deed and as extended by Clause 4 of the Addendum dated 31.03.2010.

12. The Arbitrator has also considered the above submission and has held as under:

“36. A careful perusal of clause 5 of the lease under the heading "Lock in period" shows there is no absolute prohibition for termination under the clause. Exceptions are carved out for termination on grounds given in clause 5 (II) and 5(III) during the lockin period. Even if termination is done during the lock in period, the only liability of the Lessee is to pay the monthly rent for the remaining lock in period. The validity of termination is not affected thereby. Moreover, in this case even though the lease commencement date was 08.04.2009, parties had fixed the rent commencement date as 01.10.2009 initially. There has also been failure and breach of other obligations regarding provisions of amenities and availability of sanctions and

permissions to make the mall operational. In these circumstances, it cannot be said lock in period could be counted from the date by which parties had agreed to defer the rent commencement earlier.”

13. In view of the above, I find no merit in the submission made by the counsel for the petitioner.

14. Learned counsel for the petitioner, relying upon Section 108(e) of the Transfer of Property Act, 1882 submits that even assuming that the leased property could not be used by the respondent no.1 due to the act of sealing by the Municipal Corporation of Delhi (MCD), the same being only temporary in nature would not make the lease void or liable for termination, and the respondent no.1 could at best claim suspension of rent for the period during which the leased premises remained sealed.

15. I do not find any merit in the above submission of the counsel for the petitioner. The Arbitrator has held that the notice terminating the lease was premised on various breaches of the contract by the petitioner. The Mall in question had been booked for unauthorized construction on 20.08.2008 and demolition order was also issued by the MCD. Thereafter, sealing order dated 18.12.2009 was also passed and property was sealed on 23.12.2009. Though, it was de-sealed on 02.02.2010, it was resealed on 01.06.2010. It was again de-sealed on 16.06.2010 but subject to the condition that it would not be occupied. It was resealed on 28.12.2010, culminating in the stay on demolition by the Appellate Tribunal, MCD on 28.01.2011. The Completion Certificate was also rejected on 25.05.2010 and the regularization was finally accepted only

on 09.03.2012, whereafter the petitioner paid the regularization charges. The Arbitrator also summarized these facts and has held as under:

“33. From the evidence on record and the admissions as recorded, the factum of proceedings for initiation for unauthorized constructions against the Respondents as far back in 20.08.2008 and later is established. Claimant has also proved on record the sealing and de-sealing of the property and the fetters on occupation. The public notice put up by the MCD following the Tribunal's direction notifying that the application for regularization of unauthorized construction and excess coverage was pending and anybody dealing or purchasing any shop therein would do so at his own risk is placed on record.

Lack of permission, absence of completion certificate and of occupancy certificate as also sealing and de-sealing of the Mall on 18.12.2009, 01.06.2010 and 20.12.2010. Regularization admittedly being allowed only on 09.03.2012 and completed with payment of regularization charges on 17.04.2012 i.e. more than a year and half later, after the sealing on 18.12.2009 & 01.06.2010.

34. Lease Deed dated 08.04.2009, provided initial rent commencement date as 01.10.2009, it was extended by the Addendum dated 31.03.2010, to 01.06.2010. The Mall itself was sealed on 01.06.2010. In these facts and circumstances, Claimant terminating the lease vide its notice dated 16.11.2011, cannot be said to have acted in haste or without the Respondents getting reasonable time and opportunity to remedy their breach and/or to fulfill their obligation by corrective action. It is accordingly held that the Claimant has succeeded in establishing the breach on the part of Respondent to justify the termination of Lease.

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38. That perusal of the Ex. C-13 i.e. notice of termination dated 16.11.2011, shows that the grounds taken for termination are Respondents representations enumerated therein being found false, failure to complete and

operationalize the Mall and the same being sealed for unauthorized construction and the inordinate delay in regularization of the Mall. Regularization plans were accepted only on 09.03.2012, with charges being paid on 17.04.2012. The Claimant accordingly terminated the Lease under Clause 5 (iii) r/w Clause 24. Alternatively and without prejudice notice to be treated as one under clause 16 (i) of the Lease. The facts as proved on record and noted in preceding paras clearly fall within the ambit of the numerous grounds that are provided under clause 5 r/w Clause 24. There is no merit in the contention that the termination under clause 5 r/w Clause 24 is not legally sustainable or valid and is rejected.”

16. The above finding of the Arbitrator cannot be faulted. The termination of the Lease Deed having been done by the respondent no.1 in terms of the Lease Deed, reliance of the petitioner on Section 108(e) of the Transfer of Property Act, 1882 cannot be accepted.

17. Learned counsel for the petitioner further submits that even if it is assumed that the Lease Deed had been properly terminated, the respondent no.1 having not utilized the loan amount for the purpose of “fit-outs”, was liable to be directed to refund the said amount alongwith interest as provided in the MoU.

18. I do not find any merit in the submission made by the counsel for the petitioner. The loan amount is governed by Clauses 5 (ii) and 5(iii) of the Lease Deed, which are reproduced hereinbelow:

“(ii). In consideration of the lessee agreeing to take the demised premises on lease, the confirming party has also agreed to advance certain monetary facilities to the lessee

*for carrying out the fit out in the demised premises as per terms of a duly executed **Memorandum Of Understanding of the even date**. Hereinafter called "**MOU**". It is clearly understood between the parties herein that in case the confirming party herein, fails to pay the same to the lessee, in terms thereof, the lessee, in addition to its claims under the said **Memorandum of Understanding**, shall be at liberty to terminate the present lease immediately forthwith and in that eventuality the lessee shall be entitled to refund of the entire security deposit, as stated in clause 4 herein, and shall be further not liable to pay any amount to the lessor and or the "Confirming party", whatsoever, under the terms of this agreement and the "**MOU**" including but not limited to monthly rent, maintenance charges etc.*

*(iii). It is also understood that in the event of the Lessor not being able to provide the amenities, as stated in clause 10 hereinafter, even for a period till 31.03.2010, and the Lessee has spent all the loan amount after the fitout then in that case, the lessee shall be at liberty to terminate the present lease immediately forthwith and in that eventuality the lessee shall be entitled to refund of the entire security deposit, as stated in clause 4 herein, and shall be further not liable to pay any amount to the lessor and or the "Confirming party", whatsoever, under the terms of this agreement and the "**MOU**". In case Lessee has not spent the full loan amount for fitout on the demised premises in that case Lessee has to refund the balance amount to the confirming party herein immediately."*

19. The Arbitrator on consideration of the evidence led before him has held that the respondent no.1 has been able to prove that in addition to the loan amount of Rs.1.50 crore it has spent a further sum of Rs.25,25,616/- making a total of Rs.1,75,25,616/- towards the fit-outs. In fact, the Arbitrator holds that the expenditure of this excess amount demonstrates

the commitment of the respondent no.1 to the project and improvisation of the outlet by *bona fide* incurring expenses of its own in addition to the loan amount.

20. The respondent no.1 before the Arbitrator had also filed bills raised by the concerned vendors/professionals for such work and the payment proof thereof. The respondent no.1 had also examined Mr.Nitin Mitra, its Finance Head to produce on record Statement of Account maintained by the respondent no.1 with the UCO Bank, ING Vysya Bank and HDFC Bank Limited to demonstrate the payment to the vendors pertaining to the showroom.

21. The Arbitrator in light of the above finding has held as under:

“(vii) This aspect has been considered and examined in detail on the basis of evidence on record while considering claim no. 2. For reasons set out there, it has been held that M/s JDS Apparels had duly expended total amount of Rs.1,75,25,616/- including Rs.1.50 Crores as loan on the fit outs etc., in the show rooms. Accordingly, the basis on which the counter claim is founded i.e that the loan amount has not been spent for the purpose it was given and is therefore liable to be returned, no longer exists. The respondent no. 1 in the counter claim has placed reliance on Clause no. 5 of the lease deed providing that the part of loan which is not spent when the lease is terminated is liable to be returned. In the instant case, the entire amount has been expended. It has also been held that the lease agreement has been validly terminated due to the breaches of the respondents. In the normal course, the loan was repayable under the lease agreement, MoU and the addendum in 51 installments upon Mall becoming operational. However, after the termination of the lease, M/s JDS Apparels have withdrawn from the premises,

leaving interior fit outs etc., i.e. the building with whatever value additions done by expending of the loan amount of Rs.1.50 crores in possession of the respondent to enure to its benefit. In view of the foregoing discussions, the claim is held to be not admissible and rejected.”

22. I do not find any infirmity in the above finding of the Arbitrator. In any case, the above being a finding of fact arrived at by the Arbitrator on appreciation of evidence led by the parties before him, cannot be interfered with or re-appreciated by this Court as if it is sitting as a Court of Appeal.

23. In **Associate Builders v. DDA** (2015) 3 SCC 49, the Supreme Court, after analyzing the provisions of Section 34 of the Act, has held as under:-

“33. 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 [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows:

“General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as

your head and your heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong”.

It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to

re-examine the facts to find out whether a different decision can be arrived at.”

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood.”

24. I therefore find no merit in the present petition and the same is dismissed with costs quantified at Rs.25,000/-.

NAVIN CHAWLA, J

OCTOBER 16, 2018/Arya



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