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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision 13th November, 2018

+ O.M.P. (COMM) 249/2018

ETHOS LIMITED (EARLIER KNOWN AS KAMLA RETAIL
LIMITED (KRL) Petitioner

Through Ms.Neelima Tripathi, Mr.Apoorv
Tripathi and Mr.Akash
Chatterjee, Advs.

versus

GEOFIN INVESTMENT PVT. LTD. Respondent

Through Mr.Rajiv K. Garg, Mr.Ashok
K.Rana and Mr.Ashish Garg,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 02.04.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Leave and Licence Agreements dated 20.03.2012.

2. This Court by its order dated 31.05.2018 had issued only a limited notice to the respondent on the present petition as recorded in paragraph 6 thereof, which is reproduced hereinbelow:

“6. Issue notice on the questions as to computation of property tax and maintenance charges; calculation of the principal amount; award of cost; and computation of interest. Notice shall go by speed post as well as one of the approved couriers, returnable on 26.10.2018. Dasti in addition.”

3. The learned counsel for the petitioner submits that the computation of property tax and maintenance charges is not supported by any evidence led by the respondent. She submits that in terms of Clause 5.2 read with Clause 7.1(c) of the Leave and Licence Agreements the petitioner was liable to pay only an enhanced amount of property tax due to increase in rates. The respondent while making a claim of Rs.9,10,121/- towards the share of property tax, did not lead any evidence to the effect that the same was being claimed due to some increase in the rate of tax and had indeed being paid by the respondent to the relevant authorities.

4. On the other hand, the learned counsel for the respondent submits that barring making a bald denial of this claim, the petitioner has also not led any evidence in support of its denial.

5. Clause 5.2 and Clause 7.1(c) of the Agreement are reproduced herein below:

“5.2 Municipal Taxes

During the term of this Agreement the Licensor agrees to bear and pay the Municipal Taxes in respect of the said Licensed Premises as per the rates assessed as to the date hereof, provided that if the said taxes increase over the prevailing rates then and in such event the Licensee agree and covenant to reimburse to the Licensor the differential increased portion of the tax, within 30 days

from a written demand by the Licensor in that behalf.

xxxx

7. Licensee's Covenants

7.1

xxx

c. To bear and pay the electricity and water charges and the increase in the property taxes as hereinabove provided."

6. A reading of the above Clauses of the Agreement would show that the obligation to pay the property tax was on the respondent. The petitioner was obliged to pay only an increase in the property tax due to increase in the prevailing rates of tax. Therefore, the onus of proof of the increase of rate of tax was on the respondent. It was for the respondent to have proved its claim. In any case, the Arbitral Tribunal has not given any reason for grant of this claim in favour of the respondent. The relevant finding of the Sole Arbitrator on this claim is reproduced hereinunder:-

"56. The respondent owned the responsibility to pay common area maintenance charges as well as share of property tax in respect of the demised premises. During the course of its stay in the demised premises, after expiry of the lease period, the respondent is also obliged to pay common area maintenance charges for the said period, which has been quantified by the claimant at Rs. 13,14,477/-."

7. In terms of Section 31(3) of the Act, the Arbitrator is mandated to give reasons for his Award. In my view the present Award is liable to be set aside as being unreasoned as far as the claim of property tax is concerned.

8. Similar is the assertion made by the counsels for the parties in relation to the Common Maintenance Charges. In terms of Clause 5.1 read with Clause 8 of the Leave and Licence Agreements it was the obligation of the petitioner to have paid the maintenance charges. The respondent raised its claim making the following assertion:-

(ii) Pay the share of property tax Rs. 9,10,121/- as per agreements, Common Area maintenance charges paid on behalf of the respondent till 15th Nov, 2015 for Rs.2,29,516/-, debit notes towards repair maintenance paid to CBRE South Asia Pvt. Ltd, Maintenance Agency on behalf of the respondent for Rs.66,368/- & debit note raised by Mall i.e. Peninsula Cross-roads Pvt. related to Repair Maintenance of the year 2009 paid on behalf of Respondent for Rs.1,08,472/- aggregating to Rs. 13,14,477/-."

9. The said claim was denied by the petitioner asserting as under:-

"4 (ii) That the contents of para 4(ii) as stated are wrong, incorrect and denied in toto. It is denied that the respondents have to pay the share of property Tax, Common Area maintenance charges, debit notes towards repair maintenance paid to CBRE South Asia Pvt. Ltd., Maintenance Agency & debit note raised by Mall i.e. Peninsula Cross-roads Pvt. It is submitted that the Respondents have already paid the bills and taxes upto the time the Respondents were occupying the premises of the Claimants. It is further submitted that Claimants have concocted a false and frivolous story so as to exert undue pressure on the respondent and to extort money from the respondent."

10. The finding of the Arbitrator has been reproduced hereinabove. The same suffers from disclosure of any reason for grant of this claim. I

may only note that it is not denied by the learned counsel for the respondent that apart from the above assertion in the Statement of Claim, no documentary proof in support thereof was filed by the respondent before the Sole Arbitrator. The assertion that it was for the petitioner to have disproved this claim cannot be accepted.

11. As far as the calculation of the principal amount is concerned, the Arbitrator in paragraph 54 of his Award has granted damages/mesne profits in favour of the respondent at the rate of Rs.8,00,000/- per month for the period between 01.10.2013 till 15.11.2015. While calculating the said amount, he has directed a payment of Rs.2,12,00,000/- to be paid by the petitioner to the respondent. The rate and period is undisputed. The principal sum should, therefore, be only Rs.2,04,00,000/- (Rs.8,00,000/- x 25.5 months). This being an arithmetical error in the Award, is corrected accordingly.

12. As far as the Award of cost of the arbitration proceedings is concerned, the Arbitrator in paragraph 61 of the Award has directed as under:-

“61. The claimant seeks cost of arbitration too. Since the respondent withheld the payment as referred above, the claimant is entitled to the cost of proceedings also, which comes to Rs. 4,50,000/- (Rs.Four Lacs Fifty Thousand). An Award is accordingly passed.”

13. The learned counsel for the petitioner submits that as the petitioner had paid its share of 50% of the arbitration costs, the costs of proceedings awarded by the Arbitrator should also be halved.

14. The costs of the arbitration proceedings are governed by Section

31A of the Act. Explanation to Sub-Section (1) of Section 31A of the Act defines the terms “cost” as under:

“Explanation.—For the purpose of this sub-section, “costs” means reasonable costs relating to—

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.”

15. The arbitral cost, therefore, includes not only the fee and expenses of the Arbitrator but also the legal fee and expenses, administration fee etc. In any case, this is a matter of discretion of the Arbitrator. The cost awarded by the Arbitrator cannot be said to be unreasonable or perverse, warranting any interference of this Court under Section 34 of the Act. I, therefore, find no merit in this objection.

16. The challenge on the computation of interest is on two grounds; firstly, the Award does not disclose any basis for computation of Rs.20,81,162/- arrived at by the Arbitrator; and secondly, that the interest has been awarded without adjusting the security amount deposited by the petitioner with the respondent at the time of making of the Leave and Licence Agreements and the statutory deductions like Tax Deducted at Source etc. deposited by the petitioner. She further submits that the respondent had issued certain credit notes that have not been taken into account by the Arbitrator while calculating the interest. Counsel for the petitioner relying upon various correspondences

exchanged between the parties submits that even the respondent had agreed to the adjustment of the security deposit against the claim made by the respondent on the petitioner.

17. As far as the quantification of the interest as Rs.20,81,162/- is concerned, the Award does not state any basis to arrive at the said figure. The same, therefore, cannot be sustained. At the same time, the Arbitrator has granted interest @ 6.5% p.a. for the *pendent lite* period and is even agreed upon by the counsel appearing for the parties. The same can always be calculated by the parties. They shall, therefore, not be bound by the figure stated by the Arbitrator in paragraph 60 of the Award.

18. As far as the adjustment of the Security amount, statutory deposits and Credit Notes are concerned, counsel for the respondent submits that even the Arbitrator has granted interest after adjusting the said amounts as on the date of filing of the Statement of Claim. If that is so, interest would again be a matter of calculation by the parties.

19. Therefore, not binding the parties to the amount of Rs.20,81,162/- which is mentioned by the Arbitrator as interest in paragraph 60 of the Impugned Award, the rate of interest granted by the Arbitrator for the *pendent lite* period is upheld.

20. In view of the above observation, the Impugned Award in so far as it grants the property tax and maintenance charges in favour of the respondent is set aside. In respect of the interest, it is clarified that the amount of Rs.20,81,162/- mentioned in paragraph 60 of the Award will not be binding on the parties and the interest shall be calculated by the parties @ 6.5% p.a. on the principal amount and the outstanding rent

amount found due and payable by the Sole Arbitrator. Such interest shall be for the *pendent lite* period and shall be calculated after adjusting the security amount deposited by the petitioner with the respondent, and giving due credit of any statutory deposit made by the petitioner for the respondent, like Tax Deducted at Source (TDS), and any credit notes issued by the respondent in favour of the petitioner.

21. The petition is disposed of with the above directions, with no order as to costs.

NAVIN CHAWLA, J

NOVEMBER 13, 2018/Arya