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

% ***Judgment Pronounced on: 16.10.2018***

+ **O.M.P. (COMM) 285/2017, IA No. 8762/2017 and 8734/2017**

NELOFAR CURRIMBHOY Petitioner

Through **Ms.Sumedha, Adv.**

versus

PERFALOOK INTERNATIONAL Respondent

Through **Mr.Arjun Mitra and Ms.Jaskaran
Kaur, Advs.**

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 seeking to impugn the Award dated 15.02.2017 passed by the learned Arbitrator.

2. The brief facts of the case are that the petitioner is said to be a well known entrepreneur in the business of making and selling cosmetics and is the proprietor of Shahnaz Green Herbal Door. She was a tenant of shop No. 7, Khan Market, New Delhi which had been taken on rent by a registered lease deed dated December 29, 2005. She was running a salon, namely, Shahnaz Hussain Herbal Door in the said suit property. After closing the said salon, the petitioner was desirous of starting a restaurant in the said suit property. All fixtures relating to the salon were dismantled and investments were made to upgrade the decor of the shop. The petitioner subsequently

entered into a First Management Contract dated 18.05.2010 with the respondent. The respondent was appointed to run a health cafe/restaurant by the name and style Cafe Watermelon with the possession of the said property resting with the petitioner. According to First Management Contract the petitioner was to provide capital expenditure with respect to complete interiors, furniture, fixtures and flooring besides providing for an electric generator set. Running cost and the electricity charges were to be borne by both the parties in a stated ratio. The petitioner was required to procure health license for operating cafe/restaurant. As per the said contract the petitioner was entitled to minimum guarantee commission of Rs.2,50,0000/- each month or 25% of the total receipts whichever would be higher.

3. It is the case of the petitioner that she invested a sum of Rs.13,75,679/- for setting up the restaurant. The restaurant was inaugurated on 20.09.2010. It is the further contention of the petitioner that on account of the reputation of the petitioner, the cafe generated lot of revenue. The Cafe was doing well as it was serving hookah which unfortunately was discontinued due to a ban by the Government of NCT of Delhi in 2012. It is further stated by the petitioner that the respondent breached the terms of the contract and made changes in the permanent structure. Such changes were not contemplated by the First Management Contract as the respondents were only required to maintain the said property as stipulated under clause 2.6 of the contract. It is also stated that in the interregnum the sales and revenues of the restaurant dropped, due to which the respondents approached the petitioner to expand the business to the first floor of the property. Hence, it is in this background that the Second Management Agreement dated

28.09.2011 (*hereinafter referred to as “the Second Management Contract”*) was executed between the parties. As per the Second Management Contract, the business was expanded to the first floor of the property. As per the second agreement the petitioner was entitled to minimum guarantee commission of Rs.3 lacs for the first floor and second floor or 25% of the gross income whichever is higher.

4. Disputes arose between the parties. It is pleaded that sometimes in September 2012 the petitioner received an email dated 17.09.2012 from her landlord stating that there were outstanding dues of electricity and water of Rs.2,49,809/-, which was the liability of the respondent as stipulated under clause 2.11 and 2.13 of the two management contracts dated 18.05.2010 and 28.09.2011, which the respondent had failed to pay. As a consequence the petitioner paid the bill for the period of August 2012-September 2012 for a sum of Rs.2,44,019/- under goodwill on behalf of the respondent. Similarly, the respondent set up a dessert counter under the flagship of ‘Whipped’ and the sign board of ‘Whipped’ was put over the demised premises. The owner of the said brand had compensated the respondent for putting up the board and that the respondent illegally entered into this transaction in violation of the terms of the Management Contracts. It is also pleaded that the respondent using the Pan Card of the petitioner procured liquor on credit to the tune of Rs.12 lakhs from various traders. Hence, the petitioner was constrained to lock up the premises on 24.11.2012. A legal notice was sent on 29.12.2012. The respondent filed a petition under Section 9 of the Arbitration Act before this court being OMP 17/2013. The same was disposed on 17.01.2013 and by consent Mr. Abhijat, learned advocate was appointed as the Sole Arbitrator.

5. The respondent filed its claim petition before the learned Arbitrator claiming as follows:-

- I. Loss occasioned on account of non-availability of the liquor license for 16 months- Rs. 4 7,78,729/-;
- II. Refund of commission illegally charged by the Respondent - Rs.37,00,000/-;
- III. Loss occasioned due to lack of generator back up- Rs.25,00,000/-;
- IV. Compensation for the expenses incurred towards renovation of the second floor- Rs. 2,91,203/-;
- V. Compensation for the expenses incurred towards renovation of the first floor- Rs. 17,63,340/-;
- VI. Costs incurred on architects engaged for the renovations - Rs.1,02,000/-;
- VII. Re-imbursement of 50% liquor license fee- Rs.2,61,250/-;
- VIII. Compensation for investment towards new fixed assets for first floor -Rs.8,81,339/-;
- IX. Compensation for investment towards new fixed assets for second floor - Rs.10,14,860/-;
- X. Loss of profit and business for the remaining period up-to 31.12.2014- Rs. 37,50,000/-;
- XI. Loss on account of spoilt perishable goods- Rs.50,000/-;
- XII. Re-imbursement of Security Deposit- Rs.5,50,000/-;
- XIII. Litigation expenses; and
- XIV. Interest.”

6. The petitioner also filed her counter claim as follows:-

- I. Recovery of amount to the tune of Rs. 12 lacs for procuring liquor on credit from about 19 companies.

II. Claim towards change of interiors of the Second Floor of the said Property in violation of the terms of the contract and/or without taking prior consent.

III. Recovery of amount to the tune of Rs.7,26,300/- towards minimum Guarantee Commission till date.

IV. Interest on the unpaid Minimum Guarantee Amounts.

V. Claim for mesne profits for the period between 19.11.2012. and March 2013.

VI. Third Party Assignment.

VII. Claim towards outstanding Electricity, Water/Broadband Bills

VIII. Claim towards damage caused to the said property while, removing goods belonging to the Claimant.

IX. Unliquidated damages towards loss of profit/opportunity, loss of reputation and goodwill.

X. Cost of Litigation.

XI. Pendente lite and future interest.”

7. The following issues were framed by the learned arbitrator on 30.07.2013:-

“1. Whether the respondent/counter claimant has committed breach of the management contracts by prematurely terminating the same? OPC

2. Whether the termination of the management contracts by the respondent/counter claimant was illegal and/or unjustified? OPC

3. Whether the claimant is entitled to the claims made in the statement of claim and if so to what extent? OPC

4. Whether the respondent/counter claimant committed breach of the management contracts by locking the premises in question and by preventing the access of the claimant to the same? If so, whether the breach was a material one? OPC
5. Whether the statement of claim has been signed and filed under due Authority of the claimant? OPR
6. Whether the claims of the claimant are hit by the provisions of Section 69 of the Indian Partnership Act, 1932? OPR
7. Whether the Claimant has committed a breach of first management contract dated 18.05.2010 by changing the interiors of the second floor of the property in question without the prior consent of the Respondent? If, this issue is answered in the affirmative, whether such breach was a material one? OPR
8. Whether the Respondent/Counter Claimant is entitled to claim damages towards alleged change of interiors of the second floor of the property in question in violation of the first management contract dated 18.05.2010 and if so, the quantum of such damages? OPR
9. Whether the claimant has committed breach of the management contracts by allegedly making third party assignment of the subject property and if so whether the said breach is a material one? OPR
10. Whether the claimant has committed breach of the management contracts by allegedly not making payment of utility bills and if so whether the said breach is a material one? OPR
11. Whether the claimant has committed breach of the management contracts by allegedly not paying to the counter

claimant minimum guaranteed commission to the tune of Rs.7,26,300/-? OPR

12. Whether the counter claimant is entitled to the claims made in statement of claim and if so to what extent? OPR

Additional issues were framed on 06.09.2013 as follows:

13. Whether the documents filed by the claimant with the statement of claim at page Nos. 300, 304, 335, 336, 340, 341, 342, 412, 458, 597, 692, 801, 890, 892, 893, 872, 870, 850, 938, 847, 846, 845, 842, 838, 835, 833, 832, 830, 831, 827, 819, 818, 802, 794, 773, 772, 771, 861, 906, 860, 915, 916, 858, 857, 901, 1003, 1004, 1005, 1011-1017, 1019, 1021 and 1022 are forged and fabricated? OPR”

8. The respondent led the evidence of Mr. Tarun Sikka-CW-1 (respondent's Partner), Mr. Anokhe Lal-CW-3(Incharge Plumbing work), Mr. Rajesh Kumar-CW-4(Proprietor of a Firm in his name engaged in business of water proofing), Mr. Satyanarayan Yadav- CW-5(A civil work contractor), Mr. V.K. Bhalla-CW-6, Mr. Sant Ram Yadav-CW-7(engaged for doing the painting work). The petitioner led her own evidence as RW-1. She also led the evidence of Mr. Ajay Bharti as RW-2(Accountant with the respondent), Mohd. Faiz, RW-3(Cashier of the respondent), Mohd. Yakub- RW-4(Mason who use to supervise labourer).

9. By the Award, the learned Arbitrator has allowed the following claims of the respondent:-

“241. This Award is summarised thus:

The following claims are awarded in favour of the Claimant (respondent herein) and against the Respondent:

- I. Loss occasioned on account of non-availability of the liquor license for 16 months- Rs.5,60,000/-.
- IV. Compensation for the expenses incurred towards renovation of the second floor; and
- V. Compensation for the expenses incurred towards renovation of the first floor- Rs.12,23,695/-.
- X. Loss of profit and business for the remaining period of Agreements Rs.9,00,000/-.
- XII. Re-imbursement of Security Deposit- Rs.5,50,000/-.
- XIII. Litigation expenses- Rs.1,80,000/-.
- XIV. Interest -12% per annum.”

10. The following counter claims of the petitioner were awarded:-

“244. The following Counter-Claims have been awarded in favour of the Respondent;

VII. Claim towards outstanding Electricity, Water/Broadband Bills- Rs.2,49,809/-.

XI. Pre-suit and pendent lite simple interest on the awarded amount at the rate of 12% per annum- Rs.1,32,228/-.”

11. After adjusting the amount awarded in favour of the petitioner, the respondent was awarded a sum of Rs.30,31,658/- along with simple interest @12% p.a. from the date of the award till the date of realisation.

12. A perusal of the award will show that on issues No. 1, 2 & 4, namely, as to whether the petitioner had committed breach of the management contracts by prematurely terminating the same and as to whether the termination of the contracts was illegal, the learned Arbitrator based on the

evidence on record noted that the justifications given by the petitioner to terminate the contract were as follows:-

- (i) The respondent shut the second floor and made structural changes in the building.
- (ii) There was decline in the sales in the restaurant from August 2011 to November 2011.
- (iii) The respondent defaulted in tendering the minimum guaranteed returns as per the agreement.
- (iv) The respondent failed to pay electricity and water bills.
- (v) The premises were sub-let to Whipped.
- (vi) Unauthorised use of the PAN by the respondent for procuring liquor on credit for the tune of Rs.12 lakhs.

13. The learned Arbitrator noted that both the agreements had a lock in period of 14 months during which neither of the parties had the right to terminate the contract. The First Management Contract was for four years. After the lock in period the respondent could terminate the contract by giving a six months notice. The petitioner could not have terminated the contract prematurely in terms of the agreement.

14. The learned Arbitrator concluded that the construction activity was with the consent of the parties. It is also concluded that there is no material or evidence to show that there has been decline in the sales during the period from August 2011 to November 2011. Except for the period from 01.10.2012 to 18.11.2012, the restaurant was making sales far in excess of the minimum guarantee amount and there was no reason for the petitioner not to retain at least the minimum guarantee amount. The learned Arbitrator

concludes that the severance of relationship by the petitioner by preventing access of the respondent to the premises was not sanctioned or permissible under the contracts and hence, is illegal.

One of the main issues argued before the learned Arbitrator pertained to issue No. 9, namely, as to whether the respondent committed breach of the management contracts by making third party assignment. The issue was as to whether the respondent had illegally assigned and permitted a third party unconnected to Cafe Watermelon, namely, 'Whipped' to run its business from the property of the respondent. The learned Arbitrator noted that the sign board of 'Whipped' was put up on 17.11.2012 and was removed also on that date. The learned Arbitrator concluded that mere putting up of a sign board of the third party on the premises does not *ipso facto* lead to a finding that the premises was sub-let by the respondent. It also does not lead to a finding that the respondent assigned its rights under the agreement to a third party. The Award concludes that the petitioner has failed to discharge her onus of proving that the respondent sub-let the premises and assigned its rights under the agreement to any third party.

15. I have heard learned counsel for the parties.

16. Learned counsel for the petitioner has filed his written submission and has also submitted as follows:-

(i) He submits that under Clause 8.6 of the Managing Agreement, sub-letting was not permissible. The respondent illegally sub-let the premises to Whipped and the learned Arbitrator has come to a completely erroneous and illegal conclusion. This sub-letting rights warranted termination of the contract.

(iii) It has further been pleaded that the respondent has not been able to

prove any renovation work carried out for which the learned Arbitrator has awarded Rs.12,23,695/-. It is urged that some of the bills relied upon by the learned Arbitrator do not pertain to the renovation of the premises but belongs to cutlery, crockery, pest control, etc.

17. In my opinion, there is no merit in the pleas raised above. As far as the allegation of sub-letting is concerned, the learned Arbitrator did come to a conclusion that the sign board of the Whipped was installed at the site by the respondent. The sign board was found put on 17.11.2012 and was removed on that date. The Award concludes that under Clause 8.6 of both the agreements, there cannot be any dispute that the agreements prohibit sub-letting of the premises by the respondent or assignment of the rights by the respondent under the agreements. The Award further concludes that mere putting up of a sign board of a third party on the premises cannot ipso facto lead to a conclusion that the premises was sub-let or that the rights were assigned in the agreement.

18. The issue of sub-letting is a question of fact. Reference in this context may be had to the judgment of the Supreme Court in the case of *M/s Shalimar Tar Products Ltd. v. H.C.Sharma & Ors., (1988) 1 SCC 70*, where the Supreme Court held as follows:

“16 Reliance was also placed on the Treatise of Foa on *Landlord and Tenant*, 6th Edn, at p. 323, where the law on the subject has been summarised in the following words:

“The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not so long as he retains the legal possession himself, a breach of the covenant.”

After considering all these decisions, the High Court of Madras extracted the following principles and came to the conclusion

that a mere taking in of partners did not amount to transferring of possession and did not constitute assignment or subletting. Says the Madras High Court:

“It is clear from the aforesaid decisions that there cannot be a subletting unless the lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. Section 105 of the Transfer of Property Act defines a lease of immovable property as to transfer of right to enjoy such property. Therefore to create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be conferred on another. In the present case the exclusive possession of the premises was not given to the second respondent. The first respondent continued to be the lessee, though in regard to the business carried on in the premises he had taken in other partners. The partners are not given any exclusive possession of the premises on a part thereof. The first respondent continues to be in possession subject to the liability to pay rent to his landlord. The partnership deed also, as I have already stated, does not confer any such right in the premises on the other partners. I, therefore, hold in the circumstances of the case the first respondent did not sublet the premises to the second respondent, and therefore he is not liable to be evicted under the provisions of Act 25 of 1949.”

The view taken by me is reinforced by the opinion expressed by the Madras High Court in the aforesaid decision. A similar view has also been taken by the Saurashtra High Court in *Karsandas Ramji v. Karsanji Kalyanji* [AIR 1953 Sau 113] at pp. 114 and 115. In my opinion, it is therefore clear that there has been no assignment or subletting in favour of the partners of the firm by the tenant so as to attract the bar of Section 13(1)(e) of the Rent Act. The view taken by the lower courts is correct and no exception can be taken thereto.

19. There is no dispute in the legal proposition that there must be parting of the legal possession. Parting to the legal possession means possession with the right to include and also

right to exclude others. That, in our opinion, is the matter of fact
.....”

20. In the present case, a finding of fact is recorded by the learned arbitrator that there was no parting of legal possession. Even otherwise mere installation of a sign board would not amount to sub-letting of premises by the respondent as has been alleged. There is no error in the conclusion of the award that there is no sub-letting.

21. As far as the second submission of the learned counsel for the petitioner is concerned, this pertains to award of a sum of Rs.12,23,695/- towards renovation which according to the petitioner has been wrongly awarded. The respondent had sought reimbursement of the expenses incurred towards renovation of Second Floor for Rs.2,91,203/-. A compensation of expenses incurred towards renovation of the First Floor were sought for Rs.17,63,340/-. A perusal of the Award shows that as per the agreement it was the petitioner who was to incur capital expenditure with respect to interior, furniture, fixtures, flooring, wall to wall furnishing and air conditioning of the second floor. Despite this commitment, it was pleaded by the respondent that the petitioner had expressed her inability to meet the full expenditure and assured the respondent of reimbursement. Hence, the respondent renovated the second floor and the first floor of the property from its own funds. Another reason stated by the respondent to renovate the second and the first floor from its own funds was the assurance in anticipation that the business would run for the duration of 4 years, during which adequate profits would be generated. The term of the contract was four years. Due to illegal termination of the agreement, the respondent

claims the expenditure got wasted. This aspect has been denied by the petitioner. It is stated that it was the respondent who failed to maintain the furniture and made structural changes and installed poor quality and cheap interiors.

22. The Award concludes that the petitioner admits the factum of installation of fixtures and fittings by the respondent. The Award also holds that the petitioner failed to substantiate the claim that the second floor was handed over to the petitioner complete in all respects. The Award also notes that the respondent in its cross-examination has set out a chart giving vendor wise bills' details and details of the payment made. On verification, the chart was proved substantially correct.

23. Given the objection of the petitioner about fabrication and forgery of the bills, an additional issue was framed. Issue No.13, the additional issue was framed regarding the documents filed by the respondent as to whether the same were forged or fabricated. The learned Arbitrator has culled out the bills where corresponding payments have been tallied with the documents on record. The learned Arbitrator concluded that the nature of evidence led by the petitioner was not sufficient to hold that the documents referred to in the said issue were forged or fabricated. The learned Arbitrator holds that the petitioner failed to discharge the onus on her to prove the said issue. The bills were taken to be duly proved.

24. In any case, these are findings of fact recorded by the learned Arbitrator. The legal position in this regard is settled in the case of the Supreme Court in *Associate Builder. vs. DDA, (2015) 3 SCC 49*, as follows:-

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

- (i) a finding is based on no evidence, or
- (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons* [1992 Supp (2) SCC 312] , it was held: (SCC p. 317, para 7)

“7. ... It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.”

In *Kuldeep Singh v. Commr. of Police* [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , it was held: (SCC p. 14, para 10)

“10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.”

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)

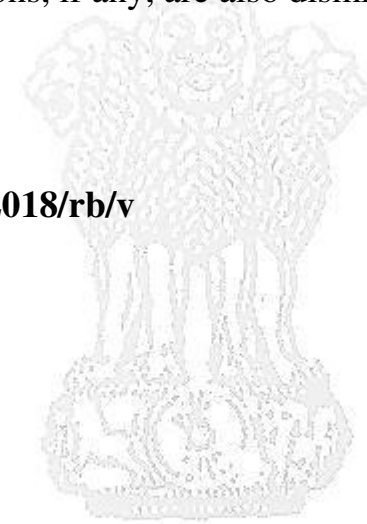
“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and 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.”

25. Essentially, the petitioner is making a challenge to the findings of fact recorded by the learned Arbitrator. It is not possible for this court to sit as a court of appeal over the findings of fact recorded by the learned Arbitrator. There is no merit in the present petition. The petition is dismissed. All pending applications, if any, are also dismissed.

JAYANT NATH, J.

OCTOBER 16, 2018/rb/v



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