

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
10~07~2019	16~07~2019

CORAM

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

Original Petition No.487 of 2015
and Application No.8407 of 2018

3i Infotech Limited
Tower No.5, 3rd to 6th Floors,
Vashi, Navi Mumbai-400703.

... Petitioner/Respondent

Vs

1. Mr.P.Balasubramanian
2. Mr.Prabhakar Jain
3. Mrs.Anitha Jain
4. Mr.Rajiv Sawney
5. Mrs.KaminiSawhney
[R2 to R5 represented by R1
as their Power Agent]

... Respondents 1to5/Claimants

6. Dr. Justice AR. Lakshmanan
Former Judge, Supreme Court of India
1G/1E, Dev Regency, No.11, First Main Road,
Gandhi Nagar, Adyar,
Chennai 600020.

7. Mr. Justice J. Kanakaraj,
Former Judge, High Court of Madras,
No.7/3. Justice Ramanujam Road,
Chennai 600041.

8. Mr. Justice K. Mohanram
Former Judge, High Court of Madras
No.3, 2nd Cross Street, Sivakamipuram,
Thiruvananthapuram,
Chennai 600041

... Respondents 6to8/Arbitrators

Prayer: The Original Petition has been filed under section 34 of the Arbitration and Conciliation Act to set aside the award dated 10.06.2015 passed by the Arbitral Tribunal insofar as it is against the petitioner, reject the claims of the Respondents and allow the counter claim of the petitioner and alternatively remit the matter to the Arbitral Tribunal to decide the issue in accordance with the findings of this Court with costs.

For Petitioner : M/s. Anirudh Krishnan

For Respondents : M/s. K.S. Sundar
R1 to R5

ORDER

This Original Petition has been filed by the Claimant to set aside the award dated 10.06.2015 passed by the Arbitral Tribunal insofar as it is against the petitioner, reject the claims of the Respondents and allow the counter claim of the petitioner and alternatively remit the matter to the Arbitral Tribunal to decide the issue in accordance with the findings of this Court. For the sake of convenience the parties are referred as per their own rankings before the Arbitral Proceedings.

2 The brief facts of the claimant's case is as follows:

2(a) The claimants are the co-owners of the four office units situated at 7th Floor of the building known as Prince Techno park, Old Mahabalipuram Road, Thoraipakkam, Chennai. They entered into a Lease Agreement tilted as Lease Deed dated 01.08.2007 with M/s. SDG Software Technologies Ltd., on the monthly rent of Rs.11,80,000/- and the monthly rent shall be calculated at the rate of Rs.40/- per sq.ft. to be paid by the Lessee to the Lessors on or before the 7th day of each month in the following manner

Office Unit No.	Name of the owner	Area (in sq.ft.)	Monthly Rent	Security Deposit
701	Mr.B.Balasubramanian	7299	2,91,960/-	35,03,520/-
702	Mr.Prabhakar Jain (50%)	7325	1,46,500/-	17,58,000/-
	Mrs. Anita Jain (50%)		1,46,500/-	17,58,000/-
703	Mr.Rajiv Sawhney (50%)	7503	1,50,060/-	18,00,720/-
	Mr.Kamini Sawhney(50%)		1,50,060/-	18,00,720/-
704	Mr.Rajv Sawhney (50%)	7373	1,47,460/-	17,69,520/-
	Mrs.Kamini Sawhney(50%)		1,47,460/-	17,69,520/-
	Total	29500	11,80,000/-	1,41,60,000/-

2.(b) Lease was agreed to commence from 1.10.2007 and the initial lease period will be 3 years i.e., upto 30.09.2010. The said 3 years initial lease period was agreed to be lock in period. After the

initial three years lease period after 30.09.2010, the lessee has the option to issue three months advance notice and terminate the lease and hand over the leased premises to the claimants. Originally the Lessee/Respondent company was amalgamated with M/s.SDG Software Technologies Ltd., and the Respondents also made payments to the claimants regularly. The Respondent also undertook to arrange for the remittance of the rents in the loan accounts. Accordingly the Respondent forwarded letters to the banks undertaking to credit the rents into the bank accounts and hand over the vacant and peaceful charge of the leased property to the banks in the event it vacated the premises leased property. The Respondents have always been irregular in making the payment of rent. The Respondent has also paid delayed interest for delay in payment of rents to the 2nd and 3rd Claimants. The Claimants demanded rents by their various letters and the Respondent took a false stand that the lease was terminated and possession was handed over on 30.09.2010 itself. Several demands from the Claimants were failed to evoke any response. Therefore, claim was preferred before the Arbitrator for payment of Rs.6,06,96,548/- and also delivery of possession and various other reliefs.

3. It is the case of the Respondent that there was no formal handing over of the possession by the Claimants to the Respondent. It is his further case that the commencement of the lease was marked by the payment of rents and similarly the termination was by way of written communication followed by the stoppage of payment of rents. It is contended that by letter dated 5.8.2013 they intimated that they would not require to continue the lease agreement with effect from 30.09.2010 and sought for refund of security deposit, besides by letter dated 9.3.2011 they informed that they have already vacated. It is the case of the Respondent that vacant possession has already handed over, therefore, they are not liable to pay damages.

4. The learned Arbitrators have framed the following issues:

1. Has not the Tribunal jurisdiction to arbitrate on the claim statement for the reasons stated in the counter statement?

2. Is the claim made by the Claimants in paragraph 13(i) to 13(v) true and acceptable?

3. Did the Respondents hand over possession of the demised premises on 30.09.2010?

4. Is the counter claim made in paragraph 25(a) to 25(c) of the counter statement true and acceptable?

5. What is the rate of interest allowable on the respective claims, if found true?

6. To what relief are the parties entitled to?

5. The learned Arbitrators passed the award that the Tribunal has jurisdiction to arbitrate the claim; the claimants are entitled to the arrears of rent for the period from 1.6.2010 to 09.03.2011 and damages at the rate of Rs.30.00 per sq.ft. for the period from 10.03.2011 to 09.10.2014. The Claimant are also entitled to interest at the rate of 12% p.a. on the aforesaid amount from 21.11.2012 till the full payment and the available interest free security deposit shall be deducted and the balance amount shall be paid by the respondent to the claimants. Further the Arbitrators have found that the Respondent did not hand over the possession of the demised premises to the claimants on 30.09.2010 and the respondent is not entitled to the reliefs claim in Paragraphs 25(a) to 25(c) of the Counter Claim and the same are rejected. Aggrieved over the same the present petition has been filed by the Respondent in the Arbitral Award.

6. The main contention of the Mr. Anirudh Krishnan, learned counsel appearing for the Petitioner/Respondent is that the letter dated

09.03.2011 clearly indicate that the lessee has expressed their desire to vacate the premises, but the lessor/landlord has not taken any steps to take possession of the property. The learned Arbitrators without taking into the note of the fact that the landlord has failed to mitigate the damages has awarded damages. It is his further contention that when the lessee has given notice that they desired to vacate the premises but the landlord failed to take possession, there is deemed constructive possession. Therefore, the landlord cannot claim any rent or damages. Hence, it is the submission of the learned counsel that the learned Arbitrators have not decided the above issue on merits and mechanically ordered damages.

7. The learned counsel further submitted that the Respondent himself admitted vide their letter dated 09.03.2011 that the premises was not utilised by them. Therefore, till 09.10.2014 the petitioner was not in possession of the premises and the premises was empty and dusty. Hence his contention is that the learned Arbitrators awarding damages is not according to law. It is his further contention that if the date of 9.3.2011 has taken for mitigation of loss the petitioner is entitled to a sum of Rs.22,78,040/- and his contention that the Court can modify the award. Hence it is his contention that when the binding

precedent has been overlooked by the Arbitrators, such award is certainly in violation of public policy. Hence, prayed for entire Award has to be set aside.

8. In support of his contention the learned counsel for the petitioner has relied the following judgments:

1. Muralidhar Chiranjilal v. Harishchandra Dwarkadas and Another [AIR 1962 SC 366]

"9. The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable step" to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London (1)). These two principles also follow from the law as laid down in Sec.73 read with the Explanation thereof."

2. ICRA Limited v. Associated Journals [ILR 2008 I Delhi 684]

"20. Learned Counsel for the plaintiff has

relied upon the judgment of Onida Finance limited v. Mrs. Malini Khanna 2002 III AD (Delhi) 231 wherein it was held that although the plaintiff had taken appropriate steps by offering the possession of the premises to the defendant, it is the defendant who did not take possession. The plaintiff therefore discharged its obligation under law. Hence, if the defendant avoided to take possession, the defendant cannot be permitted to take advantage of its own wrong. This position has been reiterated in the case of [Raja Laxman Singh v. State of Rajasthan](#) AIR 1998 Raj 44. "

3. ONGC Ltd. Vs. Saw Pipes Ltd. reported in (2003) 5 Supreme Court Cases 705.

"31. Therefore, in our view, the phrase 'public policy of India' used in [Section 34](#) in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning

given to the term 'public policy' in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.'

4. of India v. Modern Laminators Ltd., [2008 SCC Online Del 956]

18. Section 34 of 1996 Act uses the expression "set aside" only in contradistinction to the myriad options given to the court under the 1940 Act. The reason is not for to fathom. The 1996 Act OMP 103/2005 Page no. 8 of 12 limited the courts' jurisdiction to interfere with the award. The grounds provided for interference were such which if found could only lead to setting aside of the award. The legislature therefore did not feel the

*need to expressly provide for the power in the court to 'modify' the award, in as much as, if the grounds provided for were to be found, there would be no occasion for modification and only result would be setting aside of the award. The Apex Court in *Mcdermott International Inc v Burn Standard Co Ltd* 2006(5) SLT 345 thus held that power of court under [Section 34](#) was only to set aside the award.*

5. Gayatri Balaswamy v. ISG Novasoft Technologies Ltd.,[2014 (6) CTC 602]

53. It is well settled that in a petition under [Section 34](#), a Court does not exercise the powers of an Appellate Court. The jurisdiction vested under [Section 34](#) is not an appellate jurisdiction. Even as per the decision in *Mc Dermott*, the Court exercises under [Section 34](#), only a supervisory role. It is almost like a revisional jurisdiction or may be little less in its scope than a revisional jurisdiction under Section 115 of the Code of Civil Procedure. But, a revisional jurisdiction would normally include within its purview, a power to correct patent illegalities. The fact that the jurisdiction of the court under [section 34](#) is revisional, is quite obvious. [Section 34\(1\)](#) comprises of two parts. The first is in clause (a), where the burden is on the party assailing the award to prove certain things. The second is in clause (b) of sub-section (1), where the court tests the award with

reference to certain parameters. There is no necessity for splitting sub-section (1) of [section 34](#) into 2 clauses, one imposing an obligation upon the party to establish certain facts and another imposing a duty upon the court to satisfy itself about a different set of factors, unless the jurisdiction sought to be conferred is revisional in nature. Therefore, I am of the view that this Court has power under [Section 34](#) to modify or vary the award passed by the arbitral Tribunal."

9. Whereas the learned counsel appearing for the Respondents/claimants submitted that the Arbitrators have factually found that the contention of the respondent that he has vacated the premises is false one. The learned Arbitrators, in fact, took note of the prevaricating statements of the tenants and come to the right conclusion. In fact the damages has been reduced considerably taking note of the fact that the landlord also not taken steps immediately to mitigate the loss. When the learned Arbitrators have considered the entire aspect and come to the conclusion, this court cannot re-appreciate the evidence. Hence, submitted that there is no merits in this petition and prayed for dismissal.

10. In support of his contention the learned counsel for the

Respondents has cited the following judgments:

1. Haribilas v. Roshan Lal [AIR 1983 Punjab and Haryana 256]

"Where the tenant fails to deliver up possession of the premises to the landlord on the expiry of his lease, he is not liable to pay damages at the rate of double the rent if the landlord leads no evidence to prove the actual damages suffered by him for the period during which the tenant holds over."

2. The Union of India and another v. Andhara Bank Ltd., Madras [AIR 1976 Madras 387]

"If a tenant at sufferance continues to occupy the premises after the determination of the lease, then he cannot unjustly enrich himself by claiming that he will pay only the quantum rent and not reasonable rate of damages for use and occupation of the premises."

3. Sri Thiagarajaswami Devasthanam Tirukkavalai v. Kamalappa Thevas and others [AIR 1962 Madras 439 (V 49 C 131)]

"It is impossible to say that merely because the receiver is an officer of the court, his taking over possession is not a dispossession for the person previously in possession. If his taking over

possession of any property were not to amount to the removal of any person from the possession or custody of such property, then there was no occasion for sub-rule (2) at all. It need not have been there. The very fact that it has been enacted shows that the legislature intends that if a receiver takes possession of some property, then the person from whose custody or possession it is taken has been removed from such possession or custody. As such a receiver is appointed, and property is taken possession of by him the property passes out of the possession and custody of the other person. Even where the person in possession is himself appointed the receiver, the character of his possession changes and his liability is of a different nature, as he becomes an officer of the Court and holds possession of the property on its behalf."

4. Hindustan Steel (Pvt.) Ltd., v. Smt. Usha Rani Gupta [AIR 1969 Delhi 59 (V.56 C 12)]

"Where the tenant fails to deliver up possession of the premises to the landlord on the expiry of his lease, he is not liable to pay damages at the rate of double the rent if the landlord leads no evidence to prove the actual damages suffered by him for the period during which the tenant holds over."

11. The learned Arbitrators in fact, found that the contention of

the tenant that they vacated the premises on 30.09.2010 immediately after the expiry of the lease period is factually false and the learned Arbitrators factually recorded that the claimant has taken possession of the premises only on 09.10.2014. It is the main contention of the petitioner that though the Petitioner cannot assail the factual aspect recorded by the Arbitrator, the fact remain that the Arbitrators have fixed the cut off date as 9.3.2011 to show that the tenant has expressed their desire that he has no longer in possession of the property. Such being the position the Arbitrators ought to have taken note of the fact that the landlord has not taken any steps to mitigate the damages. Learned Arbitrators having found that the landlord has not taken any steps to mitigate the damages, the litigation damages ought not to have been awarded. Whereas the learned Arbitrators in fact considered the above submission and reduced the rate of damages for the contract period from Rs.40/- per sq.ft. to Rs.30/-per sq.ft

12. Be that as it may. Much reliance has placed in a judgment of the single Judge of this Court in **O.P.No.416 of 2014 dated 30.4.2019 [3i Infotech Limited v. Mrs. Romila Bajaj and others]** to show that when the lessee offers to handover the vacant possession and landlord does not take possession, constructive possession is

deemed to have been handed over on the date of possession was offered to be handed over by the tenant and the landlord cannot claim rent thereafter as if the tenancy is continued.

13. In deciding the issue, the learned single judge on placing reliance on the judgments in ***ICRA Limited v. Associated Journals [ILR 2008 1 Delhi 684]***; ***AC Raman v. Mathuvally [AIR 1953 Mad 1996]***; ***HS Bedi v. National Highways Authority of India [2015 220 DLT 179]*** held that when the lessee offers to hand over vacant possession and landlord does not take the possession, constructive possession is deemed to have been handed over to the Lessor. Therefore, the lessor cannot claim rent as if the lessee is subsisting. Absolutely there is no dispute with regard to the preposition laid down in the above judgments. In the above cases in fact, the lessee in categorical terms has expressed his desire to handover the possession or vacate the possession. Whereas the lessor did not take possession. Only in that scenario the Court had applied the constructive possession theory. Whereas in a given case, the lessee has taken a stand as if the premises has been vacated immediately after the expiry of the agreement.

14. The learned Arbitrators have found that such stand is not substantiated, in fact, is false stand. Similarly, on 9.3.2011 letter, the lessee has reiterated his stand that he has vacated the premises immediately after expiry of the lease period. In the letter dated 9.3.2011 on which much emphasis was made by the learned counsel when perused the stand that the tenant has vacated the premises on 30.09.2010 has been reiterated. Whereas the learned Arbitral Tribunal found that such stand is false one and has not been established. In reply to the above letter on 4.4.2011 the landlord issued reply denying the contention. While denying, in para 6 the landlord has stated that the lessee has failed to maintain the premises in tenantable conditions instead put the premises to waste by non-utilisation. Therefore, merely because the lessor has stated that the building was put into waste by non-utilisation, it cannot be inferred that the possession is handed over and the lessor has taken the possession. It is to be noted that when the tenant continues in possession even after the expiry of the lease agreement and the landlord receives the rent, the tenant remaining in the possession as a tenant holding over.

15. Therefore, even assuming that the lessor in possession by sufferance he cannot be thrown out from the premises except by due

process of law. This is settled position of law. Such being the position, when the lessee's stand that they have already vacated the premises is found to be false factually. Merely on the basis of letter dated 09.03.2011 or subsequent reply by the landlord/lessor deeming fiction of constructive possession cannot be inferred. Therefore, the judgments relied upon by the learned counsel in this regard cannot be applied in this case.

16. The learned Arbitrators in fact found that possession has been taken by the lessor only during the Arbitration proceedings. Learned Arbitrators also found that the landlord also had not taken immediate steps to evict them. It is further to be noted that the lessee himself undertaken to hand over the possession by issuing notices to the respective bankers as per the instruction given by the lessor. Such instruction also acknowledged by the lessee. The learned Arbitrators factually found that vacant possession were not handed over either on 30.09.2010 or 9.3.2011 or any other date. The learned Arbitrators having taken note of some delay on the part of the landlord to take possession immediately, on the basis of the admission of the witnesses in the cross examination, in fact, reduced the damages from the contractual rate of 40% to 30%. No doubt learned single Judge held

that the court can also modify the award u/s 34 of the Act (insert judgement) but on perusal of the discussions above, I do not find any materials even to countenance the contention of the learned counsel for the petitioner. Therefore, the Arbitrators have considered the entire aspects and awarded reasonably on the basis of the evidences and exhibits. The Award cannot be interfered. I do not find any ground under Section 34 of the Act to interfere the Award. The petition is liable to be dismissed. Accordingly, the Original Petition is dismissed.

17. In the result, the Original Petition is dismissed. No costs. Consequently connected Application is closed.

16.07.2019

Index : Yes/ No

Internet : Yes

Speaking/Non-speaking Order

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N.SATHISH KUMAR, J.

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**Order in
Original Petition No.487 of 2015
and A.No.8407 of 2018**

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16.07.2019