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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 02.08.2019

+ FAO(OS) (COMM) 12/2019, C.M. Appl. No. 2885/2019 (Stay),
2886/2019 (Exemption), 2887/2019 (Addl. Evidence)

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

..... Appellant

Through: Ms. Neelima Tripathi, Mr. Apoorv P.
Tripathi, Ms. Gunjan Singh, Ms.
Vrinda Arora, Mr.Dharvesh Dwivedi,
Advocates

versus

GEOFIN INVESTMENTS PVT LTD

..... Respondent

Through: Mr. Rajiv K. Garg, Mr. Ashok Rana,
Mr. Ashish Garg, Mr.Govind Singh
Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

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JUDGMENT

G.S. SISTANI, J.(ORAL)

C.M. Appl. No. 2886/2019 (Exemption)

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

FAO(OS) (COMM) 12/2019

1. This is an appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act'). The appellant is aggrieved by order dated 13.11.2018 passed by the learned Single Judge of this court, by which objections filed under Section 34 of the Act stand dismissed. The appellant is also aggrieved by the initial order dated 31.05.2018, passed by the learned Single Judge while issuing the notice in the matter. The operative portion of the order dated 31.05.2018 reads as under: -

“Issue notice on the question 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.”

2. Some necessary facts, which are required to be noticed for disposal of this appeal are that the parties entered into two Leave and License Agreements, both dated 20.3.2012, with respect to four shops at CR-2 Shopping Mall, Backbay Reclamation Scheme, Block III, Mumbai - 400021 (hereinafter referred to as the 'Agreements'). Agreements in respect of four shops were initially for a period of three years from 01.01.2008 to 30.09.2011. On expiry, two fresh agreements were executed and registered on 20.03.2012 for a further period of two years i.e. 01.10.2011 to 30.09.2013. At the time when the Lease Agreement was coming to an end, the appellant was desirous to continue further, subject to reduction in license fee. Some

of the correspondences are placed on record to show the negotiations. The last amount paid towards the leases was Rs.9,77,500/- for the four shops. Respondent was willing to reduce the amount to Rs.8,00,000/-, while the appellant was of the view that the market rates had fallen and was agreeable to pay only Rs.5,00,000/- for all the four shops. Since no consensus was arrived at, disputes arose between the parties. Thereafter, the matter was referred to the Sole Arbitrator for adjudication of the disputes.

3. Amongst other claims, the Arbitrator has also awarded damages in favour of the respondent for use and occupation by the appellant, for the period after the leases had come to an end at the rate of Rs.8,00,000/- per month. The said period was from 1.10.2013 to 15.11.2015. The respondent was claiming much higher damages, which was disallowed by the Arbitrator. The Arbitrator also saddled the liability of property tax, maintenance charges, interest and costs on the appellant.

4. The appellant filed objections against the award by way of O.M.P. (COMM) 249/2018.

5. The learned Single Judge allowed the objections of the appellant herein with respect to the award of property tax and maintenance charges. The Award was upheld as far as it related to payment of damages/use and occupation charges for the period from 1.10.2013 to 15.10.2015 at the rate of Rs.8,00,000/- per month. The learned Single Judge did not interfere with the remaining part of the award with respect to the interest and the cost of arbitration

proceedings. As regards the interest, the learned Single Judge clarified that the amount of Rs. 20,81,162/-, mentioned in the award will not be binding on the parties and the interest shall be calculated by the parties at the rate of 6.5% per annum, on the principal amount and the outstanding rent found due and payable by the Arbitrator. The interest awarded was for pendente lite period and was to be calculated after deducting the security amount deposited by the appellant with the Respondent and also after giving due credit of any statutory deposit made by the appellant like the TDS etc.

6. What is challenged before this Court is the judgment of the learned Single Judge as well as the award with respect to quantification of damages/rent at Rs. 8,00,000/- per month, from 1.10.2013 to 15.11.2015 i.e. the date from termination of lease to the date of vacation of the premises. Challenge is also laid to the award of costs of Rs. 4,50,000/- awarded against the appellant.

7. Learned counsel for the appellant submits that the first grievance is that the Arbitrator did not allow her to lead evidence. She has drawn the attention of the Court to the order dated 02.04.2018, passed by the Arbitrator and submitted that for this purpose, she had made an application under Section 34(4) of the Act and the same should have been allowed. The matter should have been kept pending to enable the Arbitrator to allow her to lead evidence in the matter and thereafter the matter should have been heard. In support of her submissions, learned counsel has relied upon the decision of the Supreme Court in the case of **Kinnari Mullick & Anr. vs. Ghanshyam**

Das Damani (2018) 11 SCC 328, more particularly, paragraphs 13 and 17 thereof.

8. The second submission of learned counsel for the appellant is that there is no evidence and in the absence of any evidence, the Arbitrator could not have fixed Rs.8,00,000/- as damages for use and occupation charges for the period after the leases came to an end. Moreover, it is contended that the appellant was prevented from handing over the keys to the respondent as the respondent had threatened not to refund the security deposit.

9. Mr. Garg, learned counsel for the respondent relies on Clause 11.4 of the Leave and License Agreement in support of his contention that for the period the appellant had overstayed, the parties had agreed that the appellant would pay three times the applicable license fee. The appellant continued to remain in unauthorized occupation. He submits that not only has the Arbitrator erred in rejecting the claim of the respondent for higher damages, but has erred even in not awarding the damages as per the last pay license fee for four shops, which was Rs.9,77,500/-. His submission is that arbitrarily the Arbitrator has reduced the damages to a sum of Rs.8,00,000/- per month, only.

10. As far as the grievance of not allowing the appellant to lead evidence is concerned, Mr. Garg, learned counsel for the respondent, submits that neither any list of witnesses was filed nor evidence by way of affidavit was filed before the learned Single Judge. In fact, the appellant had not even taken any such stand before the learned Single Judge and thus, the appellant is estopped from raising this plea

at this belated stage. As far as maintainability of the application under Order XLI Rule 27 CPC for placing additional evidence on record is concerned, Mr. Garg, submits that such an application is not maintainable in proceedings under Section 37 of the Act. This application should have been made at the first instance i.e. before the learned Single Judge, during the hearing of the objections under Section 34 of the Act. Such an application as per provisions of the Act can be made only under Section 34(4) and that is before the award is set aside. The present application under Order XLI Rule 27 CPC thus deserves to be dismissed.

11. Ms. Neelima Tripathi, learned counsel for the appellant submits that DW1 in his affidavit had made a categorical assertion that the market rates had fallen and there was no cross examination to the same. In response, Mr. Garg learned counsel for the respondent submits that there was no requirement of any cross examination since DW1 had stated in the cross examination that he had not visited Mumbai between 2009 to 2015. No value can be attached to the vague deposition made in the affidavit. Additionally, Mr. Garg points out that no evidence has been led by the appellant, who was respondent before the Arbitrator and the onus shifted on the appellant who had asserted that rates had fallen. Even otherwise, he contends that the Arbitrator could not have awarded an amount less than the agreed amount between the parties, as it is the appellant who was at fault; who did not vacate the premises after period the lease came to an end. Mr. Garg further submits that the scope of interference in proceedings under Section 37 of the Act is far more limited than while deciding the

objections under Section 34 of the Act. Reliance is placed on the decision of this court in FAO (OS) (Comm) No.86/2016 titled as **M/s. L.G. Electronics India Pvt. Ltd. vs. Dinesh Kalra**, and in FAO (OS) (Comm) No. 201/2017 titled as **ADTV Communication Pvt. Ltd. vs. Vibha Goel & Ors.**

12. We have heard learned counsel for the parties.

13. The first question which arises for our consideration is whether the application under Section 34(4) of the Act is maintainable. Section 34(4) reads as follows:

“Section 34. Application for setting aside arbitral award.

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(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.”

14. Section 34 falls in Chapter 7 of the Act. The heading of its Chapter reads as under:-

“RECOURSE AGAINST ARBITRAL AWARD”

15. A bare reading of Section 34(4) makes it clear that the right to file certain application is available at the stage of Section 34 of the Act. On receipt of the application under Section 34(1), the Court has

the discretion to adjourn the proceedings for a certain period of time to give an opportunity to the Arbitral Tribunal to take such action which in the opinion of the Tribunal will eliminate the grounds for setting aside the award.

16. Admittedly, no such application was filed before the award was partially set aside, before the learned Single Judge. Thus, in our view such an application would not be maintainable at this stage in the present proceedings. Learned counsel has drawn the attention of the court to paragraph 17 of the judgment rendered by the Apex Court in the case of ***Kinnari Mullick (supra)***, which we reproduce below: -

“In the present case, the learned Single Judge had set aside the award vide judgment dated 07.03.2014. Indeed, the respondent carried the matter in appeal before the Division Bench. Even if we were to assume for the sake of argument, without expressing any opinion either way on the correctness of this assumption, that the appeal was in continuum of the application under Section 34 for setting aside of the Award and therefore, the Division Bench could be requested by the party to the arbitral proceedings to exercise its discretion under Section 34(4) of the Act, the fact remains that no formal written application was filed by the respondent before the Division Bench for that purpose. In other words, the respondent did not make such a request before the learned Single Judge in the first instance and also failed to do so before the Division Bench rejected the appeal of the respondent.”

17. In our view the Apex Court has not laid down any law which permits the party to file an application under Section 34(4) of the Act before the Division Bench in an appeal under Section 37. All that the

Apex Court has held is that even assuming that the appeal was in continuation of the application under Section 34, no such application had been filed. We are of the view that after the Award has been set aside partially such an application is not maintainable.

18. Learned counsel for the appellant relied on another judgment of Madras High Court in *Chellaiah (died) & Ors. vs. The Competent Authority cum Special District Revenue Officer & Ors.*, in C.M.A. (MD) Nos. 1760, 1889, 1942 of 2013, decided on 23.03.2018. In our view, the facts of that case would not apply to the facts of the present case. Therefore, the appellant cannot have any benefit thereof.

19. We may also notice that the appellant had not urged any ground before the learned Single Judge that the Arbitrator had prevented the appellant to lead evidence. No review has been filed against the order of the learned Single Judge contending that such a ground had been urged.

20. We have further examined the order passed by the Arbitrator by which the Arbitrator has rejected the claim of the appellant to lead evidence. Reading of the order of 02.04.2018 would show that the appellant herein was in fact allowed to lead evidence but neither any list of witnesses was filed nor any affidavit of any other witness was filed. In fact, no witness was even present, as recorded in the order. Relevant portion of the order of the Arbitrator is as under:-

“Submission made by Shri Aggarwal is unfounded neither the list of witnesses are there over the record nor any witness is present in attendance nor affidavit of any other

witness has been filed in the matter. As admitted by Shri Mohunta in his testimony, no new agreement was entered into between the parties after expiry of terms of the Lease Deed Ex. P1 and P2. Under that circumstances factum of negotiations going on between the parties and its proof by the respondent is irrelevant.”

In view thereof, we find that there is no infirmity in the order of the Arbitrator in not granting further opportunity to lead evidence.

21. The next question, which arises for our consideration is as to whether the view taken by the Arbitrator, which has been upheld by the learned Single Judge is erroneous or is against the law, which would require interference in proceedings arising out of Section 37 of the Act. The answer is in the negative. The Arbitrator has taken a correct view in the matter. He has, in fact, rejected the claim of the respondent although as per the terms of the registered Leave and License Agreement, parties had agreed to pay three times the existing last paid license fee. However, the Arbitrator has rightly relied upon the liability and in the absence of any evidence led by the respondent, rejected the plea of the respondent. In fact, the Arbitrator has not even granted the landlord the last paid license fee, which was Rs.9,77,500/-, but only awarded the damages at the rate of Rs.8,00,000/- based on the stand of the respondents in the correspondences exchanged between the parties. Since the findings of the Arbitrator are neither contrary to the terms of the contract nor ex-facie perverse, they cannot be interfered with. It is settled law that the Arbitrator is the final Authority on facts as well as law and even errors, factual or legal,

which are short of perversity do not merit interference under Section 37 of the Act.

22. In view of the aforesaid discussions, this court finds that no ground is made out to interfere in the order of the learned Single Judge. The same is accordingly upheld and the appeal filed by the appellant is dismissed.

C.M. Appl. No. 2885/2019 (Stay), 10204/2019 (Directions), 13405/2019 (Stay)

23. Since the appeal filed by the appellant has been dismissed, therefore, the present applications are also dismissed and disposed of as such.

C.M. Appl. No. 2887/2019 (Addl. Evidence)

24. By this application, the appellant seeks to lead additional evidence. Since this court has already dismissed the application under Section 34(4) of the Act, no ground is made out to allow the present application. Accordingly, the application is dismissed.

G.S.SISTANI, J

JYOTI SINGH, J

AUGUST 02, 2019

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