

\$~55 and 56

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

Date of decision: 11th April, 2019

+ **O.M.P. 599/2007**

SHIVANI TEXTILE LTD.

..... Petitioner

Through

Mr. Manish Kaushik, Mr. Samir
Sagar and Mr. Ankit, Advocates (M.
No.9818218885)

versus

SMS DEMAG PVT. LTD.

..... Respondent

Through

None

And

+ **O.M.P. 600/2007**

PASHUPATI FINCAP LTD.

.... Petitioner

Through

Mr. Manish Kaushik, Mr. Samir
Sagar and Mr. Ankit, Advocates (M.
No.9818218885)

versus

SMS DEMAG PVT. LTD.

..... Respondent

Through

None

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. The present petitions have been filed challenging the impugned awards dated 12th April, 2007. By the impugned award, the three-member Arbitral Tribunal, awarded various claims in favour of the Respondent. The background of the petition is that one M/s Ganga Automobiles had entered into a lease agreement dated 14th October, 1994 with M/s Indomag Steel Technology Pvt. Ltd., now known as SMS Demag Pvt. Ltd. (claimant in the

arbitration/respondent herein) (*hereinafter 'tenant'*) in respect of flats in Ganga Plaza 81/1, Adchini, Sri Aurobindo Marg, New Delhi. The said lease related to lower ground floor and ground floor. On 1st November, 1997, M/s Pasupati Fincap Ltd. and M/s Shivani Textiles Limited (formerly M/s. Pasupati New Tec Ltd.) (respondents in the arbitration/petitioners herein) (*hereinafter 'Petitioners'*), informed the tenants that they had purchased rights in the lower ground floor and ground floor of the property. The tenant i.e. the claimant attorned to the new owners and started paying rent. However, notice of termination was issued by the tenant on 20th December, 2001 by which the tenant informed the petitioner that they would continue to occupy the third floor and fourth floor. Disputes arose in respect of the said termination as the security deposit which was originally paid by the tenant to M/s Ganga Automobiles – the earlier landlord, was not refunded.

2. The three-member Tribunal which was constituted held in favour of the tenant in the following terms: -

“To conclude, we hereby make the following award:

a) the respondent is directed to pay to the claimant a sum of Rs.20,81,770/- against all the claims except the claim of interest and cost.

b) The respondent is directed to pay to the claimant a sum of Rs. 08,74,344/- on account of interest on the above mentioned amount of Rs.20,81,770/-

c) The respondent is directed to pay to the claimant a sum of Rs.2,25,000/- as cost of these proceedings.

d) The counter-claim raised on behalf of the respondent is hereby rejected.”

3. The grievances in the present petitions are two, namely: -

- i) That the arbitration clause does not apply qua the new owners of the property

ii) That the learned Tribunal has failed to consider some extremely relevant and important facts.

4. Notice was issued in the petitions on 30th October, 2007. The petitions were dismissed for non-prosecution on 08th November, 2016 but were thereafter restored on 26th May, 2017. For the last two hearings, none has appeared on behalf of the respondent/tenant. The learned counsel for the Petitioners has made submissions on 10th April, 2019 and 11th April, 2019. None has appeared for the respondent/tenant on both dates. The court is accordingly proceeding to decide the matter.

5. The submission of Mr. Kaushik appearing for the Petitioners is that the tenant never vacated the two floors but continued to enjoy possession and occupation of the said floors. He supports his argument by relying upon letter dated 20th December, 2001. He submits that the tenant by this letter had only agreed to vacate w.e.f. 31st December, 2001. In fact, it did not vacate. After the issuance of this letter, another letter dated 12th February, 2002 was issued, by which it was claimed by the tenant that it had vacated the ground floor. The tenant had sought refund of the security deposit vide these two letters in respect of the lower ground floor (upper basement) and the ground floor.

6. On 3rd April, 2002, the Petitioners refunded Rs. 3.75 lakhs towards part payment of the security deposit. Thereafter, however, the tenant demanded the remaining security deposit. However, on 16th December, 2002, the tenant again entered into two agreements, taking on rent, two portions of the property i.e. 523 sq. ft. on the ground floor of Ganga Plaza by one agreement and 180 sq. ft. on the ground floor of Ganga Plaza by a second agreement of the same date. In respect of these two agreements, the

tenant paid security deposit as contained in Clause 2 of the said two agreements.

7. Mr. Kaushik's submission is that since further security deposit was paid, it points to the fact that no other security deposit was due to be refunded to it. It is further submitted that the arbitration proceedings were invoked on 26th April, 2004 and the arbitrators were also nominated on 21st May, 2004. However, on 23rd June, 2004, a further letter was written by the tenant confirming that it would be vacating the suit property on or before 30th June, 2004. At that stage, some of the furniture and fixtures which were lying in the property were also purchased by the Petitioners for a payment of Rs. 1 lakh. Thus, it is his submission that in fact the tenant had not vacated the property in 2001 when the first notice was issued. He further submits that the Petitioners relied on these two letters in their reply to the claim petition and the same also find reference in the rejoinder that was filed. Despite the same, the Id. Tribunal failed to consider the 2004 letters. According to Mr. Kaushik, the non-consideration of the 2004 letters led the Arbitral Tribunal to the conclusion that the tenant had vacated the suit property in 2001, which was factually incorrect. He also relied upon photographs placed on record to show that until 2004 the property was in fact being used for storing of various files/documents of the tenant and in fact all the tables, chairs, fixtures etc. continued to remain there till 2004. Thus, the award of refund of security deposit is not tenable and the award is liable to be set aside.

8. This court has considered the award and the various correspondence placed on record. The Arbitral Tribunal has proceeded on the ground that the tenant vacated the property as of December, 2001. The finding of the

Tribunal in respect of the further lease entered into by the tenant is contained in paragraph 21 which reads as under: -

“21. The fact that the claimant had handed over the possession of flats to the claimant is further proved from the facts that a small portion measuring built up area of 523 sq. feet on the ground floor was retained by the claimant company and for that area a fresh lease deed dated 16.12.2002, Exh.CW-1/54 & 55, was executed between the parties and the said lease deed was for a period of 5 years w.e f 01.01.2002. This also shows that the claimant had handed over the possession of the flats to the respondent on 31.12.2001. Accordingly, we hold that the claimant had handed over the possession of the demised premises to the respondent on 31.12.2001. As stated in para 15 here-in-above, the balance amount of security comes to Rs.27,93,808/-.”

9. Thereafter, the Arbitral Tribunal notes at paragraph 23 of the award that the furniture and fixtures were sold to the Petitioners on 12th July, 2004. However, in the entire award, there is no reference to the letter dated 23rd June, 2004. For the purpose of ready reference, the letters dated 20th December, 2001 and 23rd June, 2004 are set out as under: -

LETTER DATED 20.12.2001

“Please refer to the Lease Agreement dated October 14, 1994 and subsequent renewals dated 30.12.1997 and 16.01.2001 of Ganga Plaza building situated at 81/1, Adchini, Sri Aurobindo Marg, New Delhi - 110017. In this building you own 4619 sq. ft, area in Ground Floor.

Ever since we occupied this building we have been facing problems with regard to the electric connection to the building, certificate from Delhi fire Services, pollution, car parking etc. The matter was discussed number of times with Adchini Flat Owners Association but no result. Meanwhile, our

requirement for the number of floors have reduced. After discussion with the Adchini Flat Owner Association and its President, Secretary etc. on Sept. 26, 2001, we have decided to take only two floors on rent i.e. 3rd & 4th Floor w.e.f 01st January 2002. Accordingly, this may be please treated as notice of termination of the lease agreement for your floor/ space dated 14.10.1994. We will vacate the floor with effect from December 31, 2001. This was discussed and agreed upon in our meeting dated Sept. 26, 2001 with your Association.

Our Company (Lessee) has paid you 6 months security deposit of Rs. 2394489.60 in accordance with Clause 1 (d) of the said Lease Agreement. You are requested to refund back the amount by 31.01.2002.

In accordance with clause 2 of the aforesaid lease agreement, we (Lessee) have made improvements and additions in the interiors of the building. In case you are willing to take over the possession of your area of the floor along with the improvements/ additions in the interiors, kindly indicate to us within 10 days of the receipt of this letter falling with we will make arrangements to remove/sell the improvements / additions we have made in the building.

Thanking you.”

LETTER DATED 23.06.2004

“Dear Sir,

In continuation to our letter dated April 23, 2004 this is to inform you that we shall be vacating your premises on or before June 30, 2004. You are, therefore, requested to come personally or to depute your representative on June 30, 2004 at 11.00 A.M. to take over the possession of the space leased to us. In case you or your representative does not come by 5 p.m., we shall leave the key of

ground floor, which includes your space, with the Security Guard. We are for the present leaving the fixtures so that in case you wish to take them over, you may do so but in case you do not come on June 30, 2004, we shall have these removed. The false ceiling has also been done by us and is our property but dismantling the same might damage the ceiling and such we are not removing the same except the lights fixtures, Smoke detectors, A.C. grills but shall not charge you anything for this. If however, you still insist that this should be removed, please let us know and we shall, without prejudice remove the same.

We will keep a Security guard for a period of one month whereafter, you may please come to our new office at R1 Nehru Enclave, New Delhi 110019 to collect the keys.

In case you wish to have any further information or clarification, please feel free to meet me or call me on my phone No.51961673.

We take this opportunity to thank you for your cooperation.

Thanking you.

Yours faithfully,

SMS DEMAG PVT. LTD. ”

10. A perusal of the above two letters read along with the fact that the fixtures etc. were purchased by the Petitioners only in July, 2004 goes to show that at least until 30th June, 2004, it clearly appeared that the tenant had not handed over vacant and peaceful possession of the property. It is nigh possible that after 2001 the premises was being kept empty by the tenant and not being put to too much use. Until and unless vacant and peaceful possession is handed over to the owner, it cannot be stated that the property has actually been vacated. Further, in the reply to the claim

petition the Petitioners categorically asserted as under: -

“15. In reply to para 11 to 14: It is an admitted fact by the claimant that its entire furniture, fixtures, equipment etc. were lying at the premises even after the notice of termination on 20.12.2001 till 12.7.2004. Therefore, the claimant is liable to make payment of the entire lease rent of the intervening period from the date of the notice of termination till the equipment were physically removed by the claimant. Accordingly, the claimant wrote to the respondent on 13.10.2003 which may be treated as part and parcel of the present reply. A copy of the letter dated 13.10.2003 of the respondent is annexed as Annexure-A. A copy of the letter dated 23.6.2004 and 12.7.2004 are annexed hereto and marked as ANNEXURE-B(COLLY)

11. In response thereto the tenant, in its rejoinder, pleaded as under:-

“15. (Our para 11). It is common case that the furniture and fixtures were not removed when the Claimant vacated the premises on 31 December 2001, and eventually were purchased by the Respondent. However, that does not lead to the conclusion that the Claimant was in occupation, as alleged. The furnitures and fixtures left behind by the Claimant were gainfully used by the Respondent and/or the other tenants who occupied the premises, which stands admitted by the Respondent. The Claimant also denies the contents of the letter dated 13 October 2003. The Claimant craves leave to refer to the true import of the letters dated 23 June 2004 and 12 July 2004 filed by the Respondent.

12. A perusal of the above two paragraphs shows that the tenant does not deny the issuance of letter dated 23rd June, 2004 and reply dated 12th July, 2004. The letter dated 23rd June, 2004 is clear and categorical i.e. that the tenant would be vacating the property on or before 30th June, 2004. This

letter, which is mentioned in the pleadings, having not been considered, the award suffers from a patent illegality. In fact, the learned Tribunal notices the fact that furniture and fixtures were purchased by the Petitioners in July, 2004. The tenant having not denied the letter dated 23rd June, 2004, it cannot be stated very clearly that the tenant had in fact vacated the property in 2001. There being ambiguity and lack of clarity as to the exact date of the vacation of the suit property, further combined that the fact that the tenant took two further portions of the property on lease through two further lease deeds and also accepted part refund of the security deposit in April 2002, it appears that the Arbitral Tribunal failed to consider a very crucial document.

13. The evidence of the Petitioners also records the factum of issuance of letter dated 23rd June, 2004 in the following terms: -

*“9. I say that I am relying upon the enclosed photographs which show that the claimant remained in possession of the lower ground floor till 12.7.2004. These photographs were taken on 19.5.2004 which show the possession of the claimant. The photos are annexed hereto as **Annexure-A**. In fact the letter dated 23.6.2004 issued by the claimant itself clearly shows that the claimant would be vacating the premises on or before 30.6.2004. On 12.7.2004 the claimant has even accepted the payment of Rs.50,000/- towards the consideration for the transfer of all the furniture and fixtures lying at the lower ground floor. Therefore, under Clause 1 (d) of the lease, the Claimant vacated the premises on 12.7.2004 and is liable to pay the charges till then. I say that the officers of the Claimant used to regularly visit the lower Ground Floor for accessing their files and other facilities, even after the alleged termination*

letter. Since the Claimant was retaining the lease of a part of the premises at the Ground Floor, it was in no hurry to vacate the premises at the lower ground floor and was effectively utilizing the said lower ground floor till 12.7.2001.

14. Further despite repeated adjournments, no one has appeared on behalf of the tenant in this matter for the last three hearings. The Arbitral Tribunal having failed to consider the letter dated 23rd June, 2004, the award is not sustainable and the same is accordingly set aside, leaving the parties to bear their own costs. Both the petitions are allowed in the above terms.

15. Both the petitions are disposed of.

**PRATHIBA M. SINGH
JUDGE**

APRIL 11, 2019

b