

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.02.2020

CORAM:

THE HON'BLE MR.JUSTICE N.KIRUBAKARAN
and
THE HON'BLE MR.JUSTICE P.VELMURUGAN

O.S.A.No.278 of 2013
and M.P.No.1 of 2013

Lakshmi Rauschenbach
Rep. by Power of Attorney
Anand Sasidharan
T 57 A, 32nd Cross Road
Besant Nagar
Chennai-600 090 ..Appellant/Petitioner

-Vs-

1.Valuesource Technologies (P) Ltd
Rep. by its Director Mr.Christian Lippens
No.64 Am C.P.Ramaswamy Road
Alwarpet
Chennai-600 018
2.Hon'ble Mr.Justice J.Kanakaraj
Arbitrator
No.7, Ramanujam Road
Chennai-600 041 ..Respondents/Respondents

Prayer: Original Side Appeal filed Under Clause 15 of the Letter's Patent r/w.Order 36 Rule 1 of the O.S.Rules and Section 37 of the Arbitration and Conciliation Act, 1996, against the judgment and decree dated 19.04.2013 passed in O.P.No.11 of 2010.

O.P.No.11 of 2010:

(a)to set aside the award dt.27.8.2009 under section 34 of the Arbitrator and conciliation Act.1996.

(b)direct the 1st Respondent to pay the cost.

For Appellant : Mr.Kabir, Senior Counsel
for Mr.A.Dhiravia Nathan

For Respondents : for R1- Mr.Raj Kishore.

JUDGMENT

P.VELMURUGAN, J.

This Original Side intra-court Appeal is filed by the Petitioner in O.P.11 of 2010, as against the judgment and decree dated 19.04.2013 passed in O.P.No.11 of 2010, whereby, the Petitioner's challenge to the Award of the Arbitrator dated 27.08.2009 under Section 34 of the Arbitration and Conciliation Act, 1996, was dismissed, by the learned Single Judge.

2.1. The facts of the case is that the appellant/Lakshmi Rauschenbach and the 1st respondent M/s.Valuesource Technologies (P) Ltd., entered into an agreement of lease in respect of the property bearing Door No.1, Swathi Ceebros Residential Complex, Raja Rangasamy Avenue, Yedediary Enclave, Valmiki Nagar, Chennai-600041.

2.2 Appellant is the owner of the property which is a residential house having a built up area of 2665 sq.ft., together with fixtures and fittings stated in the annexure to the agreement. The period of lease was for a period of 11 months with an option to renew it for a like period. The amount payable towards rent and amenities was fixed at Rs.52,500/-. The 1st respondent also paid security deposit of Rs.5,25,000/- which is an interest free deposit. As per the agreement, the 1st respondent had taken possession of the above said properties and running a business.

2.3 The lease period began on 01.10.2004 and ended on 31.08.2005. After entering into lease agreement dated 01.10.2004, the 1st respondent occupied and enjoying the property as per the agreement. Subsequently, the 1st respondent issued a letter dated 11.08.2005, stating that it will be vacating the premises on 31.08.2005 and the vacant possession will be handed over on the said date. Therefore, on 01.09.2005, when the Power Agent of the appellant wanted to take possession, he found that there were some damages in the buildings, fixtures and fittings. Therefore, he called upon the first respondent to rectify the damages and handover the vacant possession after carrying out repair work. The said work was completed in the month of January, 2006.

2.4 The appellant issued a letter dated 27.01.2006 complaining about some damages caused to the building. As per the agreement, it is a mandate of the 1st respondent to deliver vacant possession of the premises with fittings and fixtures in good condition. But, the 1st respondent did not handover the vacant possession on 31.08.2005 as stated in their letter dated 11.08.2005 since there were some damages in the buildings and fixtures. Subsequently, after carrying out the repairs, possession was handed over on 27.01.2006. At the time of handing over, the appellant found that still there were some damages which were not rectified and the building was not

handed over in good condition as stated in the agreement. Therefore, the appellant deducted a sum of Rs.2,75,000/- for overstayed and calculated at the rate of Rs.52,500/- per month and Rs.1,00,000/- for remaining repair work and returned the balance amount of Rs.1,50,000/- to the 1st respondent from the interest free deposit amount of Rs.5,25,000/-.

2.5 Aggrieved by the deductions made by the appellant, the 1st respondent filed O.P.No.120 of 2008 for appointment of an Arbitrator. The 2nd respondent was appointed as the Sole Arbitrator, who vide Award dated 27.08.2009 directed the appellant to refund Rs.2,75,000/- to the 1st respondent while upholding retention of Rs.1,00,000/-.

2.6 Aggrieved by the said Award passed by the 2nd respondent-Arbitrator, the appellant herein, preferred a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called as "Act") in O.P.11 of 2010, as against the Award dated 27.08.2009.

2.7 The learned Single Judge, after hearing the arguments on either side and on perusal of the Award passed by the 2nd respondent -Arbitrator dismissed the Petition filed under Section 34 of the Act and confirmed the Award of the Arbitrator.

2.8 Challenging the said order passed in O.P.No.11 of 2010 dated 19.04.2013, this intra court Original Side Appeal is filed.

3. The learned Senior counsel appearing for the appellant would submit that the Award passed by the 2nd respondent/Arbitrator is against the Public Policy and also the Principles of Substantive law. Both the parties entered into an agreement and agreed that after termination of the lease, the building had to be handed over in good condition and the 1st respondent, admittedly, in this case, during the end of the lease period, sent a letter expressing his intention to vacate the building when the lease period came to an end on 31.08.2005. The Power Agent of the appellant inspected the leased premises and found that building was not in good condition and it was in damaged condition including the fixtures and fittings. Therefore, the Power Agent of the appellant asked the 1st respondent to carry out the repair work and handover the premises. The 1st respondent also agreed and he was retaining the possession to carry out the repair work. Possession of the premises was not handed over in good condition as per the agreement, on 31.08.2005; repair work was carried out till January 2006. Even after a reasonable period, the building was not handed over to the appellant. Therefore, the appellant sent a letter to the 1st respondent stating to handover the possession on 27.01.2006 and she agreed to take the possession. When the possession was taken on 27.01.2006, it was found that there were still some repair work not

carried out to the satisfaction of the appellant. Therefore, the appellant deducted Rs.2,75,000/- by way of rent for overstayal beyond the termination of lease period which came to an end on 31.08.2005. Since the possession was handed over by the 1st respondent only on 27.01.2006 and further not being satisfied with the repair work carried out as far as buildings, fixtures and fittings are concerned, the appellant further deducted Rs.1,00,000/- for the damages. So, according to the learned Senior counsel for the appellant, deductions have been made as per the agreement and as per Section 108 of The Transfer of Property Act, 1882. The 1st respondent had no grievance for invoking the Arbitration clause and accordingly, as per the agreement and the direction of the Court, the 2nd respondent Arbitrator was appointed. However, the 2nd respondent Arbitrator failed to consider Clause 5 of the agreement and Section 108(m) and (q) of the Transfer of Property Act and passed the Award.

4. The further contention of the learned Senior counsel appearing for the appellant is that the finding of the Arbitrator that the appellant is not entitled to deduct the rent since the 1st respondent was ready to handover the possession as on the date of the termination of the lease period, is not sustainable since the 1st respondent accepted and approved the deduction of Rs.1,00,000/- for the damages in the fixtures of the building. Though the appellant filed O.P., under Section 34 of the Act before this Court, the learned Single Judge, failed to consider the scope of Arbitration and further not appreciated the evidence and facts available on record that the building was actually handed over only on 27.01.2006 and till handing over the possession of the building in good condition, the appellant is entitled to get rent. The learned Senior counsel further submits that both the Arbitrator and the learned Single Judge have not appreciated the facts that the appellant deducted the rent for overstayal for the reason that even after giving sufficient opportunity till 27.01.2006, the 1st respondent could not make good of the building. Therefore, the deduction of Rs.1,00,000/- was towards damages caused to the building. Both the Arbitrator and the learned Single Judge failed to appreciate these facts and the direction of the Arbitrator to the appellant to refund Rs.2,25,000/- which was deducted as rent for overstayal, is not sustainable. Therefore, the appellant is before this court, praying to set aside the Award.

5. The learned Senior counsel for the appellant would further submit that the learned Single Judge failed to note that the award of the 2nd respondent/Arbitrator is contrary to law and it is opposed to substantive law of India and Public Policy as held by the Honourable Supreme Court of India in 2005 (6) SCC and 2006(1) SCC 181. When the statute mandates the lessee to maintain the premises in good condition and deliver possession of the same, normal wear and tear excepted

and the agreement also enjoins the lessee to maintain the premises in good condition and deliver the same upon termination, in the absence thereof, the landlord would be entitled to deduct rent for the period occupied by the tenant to carry out the repairs. Therefore, the non grant of the relief by the Arbitrator being opposed to the substantive law of India, the learned Single Judge ought to have set aside the Award. The learned Senior counsel would further submit that as per the admission of the 1st respondent, the 2nd respondent-Arbitrator found that the building was under repair and repair works were being carried out till December 2005. Therefore, the learned Arbitrator held that insofar as non delivery of possession is concerned, as both under the Agreement and Statute, delivery contemplates actual vacant possession in a tenantable condition and consequently, there cannot be a symbolic delivery which is not permissible in law and that too in a untenable condition. The 1st respondent sought to approve the sort of symbolic delivery which is not permissible. But the Arbitrator, by directing the refund of the amount of Rs.2,75,000/-, upheld the retention of Rs.1,00,000/- only, but works were in progress and during that period, delivery of possession was not completed under law. Therefore, the judgment of the learned Single Judge has to be set aside and appeal has to be allowed.

6. Per contra, the learned counsel appearing for the 1st respondent would submit that as per the agreement, prior to the termination of the contractual period, the 1st respondent duly intimated to the appellant that he was going to deliver the possession before the end of the lease period. Though the Power Agent of the appellant inspected the property and he had taken the keys of the property, after inspection, he only asked the 1st respondent to carry out the damages and handed over only one key to the 1st respondent for the purpose of carrying out repairing work. So possession was handed over on 31.08.2005 itself. Therefore, the 1st respondent had taken one of the keys only for the purpose of carrying out repair work and not occupied the premises as a tenant and it was not in possession for the benefit of the 1st respondent. It is for the benefit of the appellant and to carry out the repair works in respect of damages caused, the 1st respondent was in possession for some time. The appellant herself sent a letter to the 1st respondent, stating she was ready to take delivery on 27.01.2006 and accordingly, the 1st respondent also handed over the possession. After taking over possession, the appellant had to return the interest free deposit made by the 1st respondent at the time of entering into the agreement, whereas, she had not returned the entire amount of deposit and retained Rs.3,75,000/- in which Rs.2,75,000/- by way of rent for overstaying of the premises and further since there were some more damages in the building, to carry out the same, a sum of Rs.1,00,000/- was retained for damages. Therefore, the 1st respondent approached this court as per the terms of the agreement. This court appointed the 2nd respondent as

Arbitrator. Though the Arbitrator had not accepted the contention of the appellant, on the other hand, he had accepted the contention of the 1st respondent and pointed out that possession was handed over to the Power Agent of the appellant on 31.08.2005 itself and therefore, the appellant is not entitled to rent for further period, since the 1st respondent was in possession only to carry out the necessary repairs. However, the Arbitrator approved the deduction of Rs.1,00,000/- towards damages to the fixtures and fittings of the building. The 1st respondent accepted the award of the Arbitrator, whereas, the appellant aggrieved by the award passed by the Arbitrator, filed Original Petition No.11 of 2010 before this court. The learned Single Judge, rightly dismissed the petition, holding that there is no ground made out by the petitioner under Section 34 of the Arbitration and Conciliation Act since the Award can be set aside only on the ground mentioned under Section 34(2) (b) of the Act and none of the grounds made out in the present case to attract section 34 (2) (b) of the Act. The appellant invented the grounds to suit her convenience to make out a provision under Section 34 of the Arbitration and Conciliation Act, but there is no merit in the appeal. The learned Single Judge rightly dismissed the original petition and this appeal is liable to be dismissed.

7. Heard the learned counsel on either side and perused the materials available on record.

8. It is an admitted fact that the appellant is the owner of the above mentioned property and 1st respondent is the tenant. Both the appellant and 1st respondent entered into a lease agreement on 01.10.2004 for a period of 11 months and also liberty was given to extend the lease for a further period of 11 months if both the parties agreed as per the agreement. The 1st respondent had taken possession of the property, was enjoying the property and he had written a letter dated 11.08.2005 and expressed his intention to vacate the premises on 31.08.2005 i.e., end of the termination of the lease period. Though the Power of Attorney of the appellant also inspected and accepted the termination of lease, since they found that the buildings along with fixtures and fittings were in damaged condition, as per the agreement, asked the 1st respondent to deliver the building and fixtures in good condition and redelivered the property for carrying out the repairing work. The 1st respondent also agreed for the same and the appellant had taken back the possession after carrying out the repairing work, on 27.01.2006 and enclosed a cheque for a sum of Rs.1,50,000/- after deducting Rs.2,75,000/- + Rs.1,00,000/- towards rent for overstayal and to carryout repairing works respectively.

9. The fact remains that the ownership of the property is not in dispute. The relationship of the parties is not in dispute. The lease period was only for 11 months and after completing the lease period, the 1st respondent/lessee had also

expressed his intention to handover the possession and as such Power of Attorney of the appellant made an inspection and also had taken the keys and one of the keys was handed over back to the 1st respondent to carry out the repairs. After carrying out the repair work, the appellant had taken possession of the premises on 27.01.2006. Admittedly, the monthly rent is Rs.52,500/- and a sum of Rs.5,25,000/- was received by the appellant as interest free deposit which is equivalent to 10 months rent. After taking possession on 27.01.2006, the appellant retained Rs.3,75,000/- and only returned Rs.1,50,000/-.

10. Clause 17(d) of the agreement provides for Arbitration. It reads as under:-

"17. PROVIDED IT IS HEREBY MUTUALLY AGREED AS FOLLOWS:

- (a).....
- (b).....
- (c)

(d) Any dispute under this agreement shall be referred to arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996."

11. According to the appellant, she retained a sum of Rs.2,75,000/- for overstaying from 01.09.2005 to 27.01.2006 and also Rs.1,00,000/- for the damages to the building and fixtures. According to the 1st respondent, he delivered the possession on 31.08.2005 itself. The Power Agent of the appellant also had taken delivery of the possession and they handed over only one key for the purpose of carrying out repairs in respect of the damages to the building and fixtures. Aggrieved by the deduction of Rs.3,75,000/-, the 1st respondent invoked the Arbitration clause as provided under the lease agreement and 2nd respondent was appointed as Arbitrator. The 2nd respondent-Arbitrator, on due completion of the arbitration proceedings, passed the Award.

12. Now the core question is whether the appellant has made out a case before the Single Judge to set aside the arbitration award under Section 34 of the Arbitration and Conciliation Act.

13. As already stated, the relationship between the parties, the lease period, payment of rent as well as advance amount and the termination of the lease period are not in dispute. Lease period was also not extended and ended with the 11th month of tenancy as per the agreement.

14. What transpires from the reading of the entire materials is that the first respondent had written a letter dated 11.08.2005 itself stating that he was going to vacate the premises on 31.08.2005. The Power of attorney of the appellant had also inspected the property and taken delivery

of the keys and subsequently handed over only one of the keys to the 1st respondent to carry out the repair work of the damage of the buildings, fixtures and fittings. Therefore, the learned Arbitrator held that the possession after 31.08.2005 by the 1st respondent is not for the benefit of the 1st respondent and there is no express clause in the agreement that in case, the property is not delivered on the date of termination of the lease period in good condition till completing repairing work, the lessor is entitled for rent. The learned Arbitrator found that the 1st respondent was in possession only to carry out the repair work and also carried out the said work, worth about Rs.75,000/-, but there is no proof. Therefore, the Arbitrator approved the deduction of Rs.1,00,000/- for the damage of buildings and fixtures. However, the Arbitrator rejected the contention of the appellant for deduction of Rs.2,75,000/- for overstaying.

15. A reading of the Award of the Arbitrator shows that the Arbitrator had given cogent reasons for passing the award. The Arbitrator being a fact finding authority, passed the award in due compliance to the procedures. The learned Single Judge also upheld the same by dismissing the Original Petition. There is no merit in the appeal. The Honourable Supreme Court has time and again held that interference of the court in Arbitration award especially under Section 34, is very limited except the grounds given under section 34(b)(ii) and no other grounds to interfere with the Arbitration award. In this regard, it is useful to refer the decision of the Honourable Supreme court of India reported in (2018) 14 SCC 688 in the case of The State of Jharkhand vs. M/s. HSS Integrated SDN and another [Special Leave to Appeal [C]. No.13117 of 2019 dated 18 October 2019, wherein, the Apex Court has held that when two views are possible, a particular view taken by the Arbitral Tribunal which is also reasonable should not be interfered with in a proceeding under Section 34 of the Arbitration Act. The relevant paragraph of the decision is as under:-

"6. The main controversy is with respect to the termination of the contract vide letter/communication dated 09.2.2012 terminating the contract with effect from 12.03.2012 invoking Clause 2.9.1(1) and (d) of the GCC. That, on appreciation of evidence and considering the various clauses of the contract, the learned Arbitral Tribunal has observed and held by giving cogent reasons that the termination of the contract was illegal and contrary to the terms of the contract and without following due procedure as required under the relevant clauses of the contract. The said finding of fact recorded by the learned Arbitral Tribunal is on appreciation of evidence. The said finding of fact has been confirmed in the proceedings under Sections 34 and 37 of the Arbitration Act. Thus, there are concurrent findings of fact recorded by the learned Arbitral Tribunal,

First Appellate Court and the High Court that the termination of the contract was illegal and without following due procedure as required under the relevant provisions of the contract. 6.1 In the case of Progressive MVR (supra), after considering the catena of decisions of this Court on the scope and ambit of the proceedings under Section 34 of the Arbitration Act, this Court has observed and held that even when the view taken by the arbitrator is a plausible view, and/or when two views are possible, a particular view taken by the Arbitral Tribunal which is also reasonable should not be interfered with in a proceeding under Section 34 of the Arbitration Act.

6.2 In the case of Datar Switchgear Ltd. (supra), this Court has observed and held that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of the evidence on record are not to be scrutinized as if the Court was sitting in appeal. In para 51 of the judgment, it is observed and held as under:

51 Categorical findings are arrived at by the Arbitral Tribunal to the effect that insofar as Respondent 2 is concerned, it was always ready and willing to perform its contractual obligations, but was prevented by the appellant from such performance. Another specific finding which is returned by the Arbitral Tribunal is that the appellant had not given the list of locations and, therefore, its submission that Respondent 2 had adequate lists of locations available but still failed to install the contract objects was not acceptable. In fact, on this count, the Arbitral Tribunal has commented upon the working of the appellant itself and expressed its dismay about lack of control by the Head Office of the appellant over the field offices which led to the failure of the contract. These are findings of facts which are arrived at by the Arbitral Tribunal after appreciating the evidence and documents on record. From these findings it stands established that there is a fundamental breach on the part of the appellant in carrying out its obligations, with no fault of Respondent 2 which had invested whopping amount of Rs 163 crores in the project. A perusal of the award reveals that the Tribunal investigated the conduct of the entire transaction between the parties pertaining to the work order, including withholding of DTC locations, allegations and counter-allegations by the parties concerning

installed objects. The arbitrators did not focus on a particular breach qua particular number of objects/class of objects. Respondent 2 is right in its submission that the fundamental breach, by its very nature, pervades the entire contract and once committed, the contract as a whole stands abrogated. It is on the aforesaid basis that the Arbitral Tribunal has come to the conclusion that the termination of contract by Respondent 2 was in order and valid. The proposition of law that the Arbitral Tribunal is the master of evidence and the findings of fact which are arrived at by the arbitrators on the basis of evidence on record are not to be scrutinised as if the Court was sitting in appeal now stands settled by a catena of judgments pronounced by this Court without any exception thereto [See -Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204 and S. Munishamappa v. B. Venkatarayappa, (1981) 3 SCC 260] .

As held by this Court in catena of decisions, the award passed by the Arbitral Tribunal can be interfered with in the proceedings under Sections 34 and 37 of Arbitration Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against the public policy. (see Associate Builders v. DDA (2015) 3 SCC 49 etc.) 6.3 In the present case, the categorical findings arrived at by the Arbitral Tribunal are to the effect that the termination of the contract was illegal and without following due procedure of the provisions of the contract. The findings are on appreciation of evidence considering the relevant provisions and material on record as well as on interpretation of the relevant provisions of the contract, which are neither perverse nor contrary to the evidence in record. Therefore, as such, the First Appellate Court and the High Court have rightly not interfered with such findings of fact recorded by the learned Arbitral Tribunal.

6.4 Once it is held that the termination was illegal and thereafter when the learned Arbitral Tribunal has considered the claims on merits, which basically were with respect to the unpaid amount in respect of the work executed under the contract and loss of profit. Cogent reasons have been given by the learned Arbitral Tribunal while allowing/partly allowing the respective claims. It is required to be noted that the learned Arbitral Tribunal has partly allowed some of the claims and even disallowed also some of the claims. There is a proper application of mind by the learned Arbitral Tribunal on the respective claims. Therefore,

particularly, when in the proceedings under Sections 34 and 37 of the Arbitration Act, the petitioners have failed."

In another decision, reported in (2018) 16 SCC 661 in the case of Madhya Pradesh Power Generation Co.Ltd.. vs Ansaldo Energia Spa And Another on 16 April, 2018, the Honourable Supreme Court held that an arbitral award can 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. In the decision, it is held as follows:-

"Section 34 of the Act - 'Public Policy'

18. It is necessary to refer to the settled law on the scope of Sections 34 of the Act. In this case we are concerned with the point as to whether an arbitral award can be set aside for being in conflict with the public policy of India. An arbitral award can 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. (Renusagar Power Co. Ltd. v. General Electric Co.1) Patent illegality was added to the above three grounds in ONGC v. Saw Pipes Ltd.2. Illegality must go to the root of the matter and incase the illegality is of trivial nature it cannot be held that the award is against the public policy. It was further observed in the said judgment (ONGC v. Saw Pipes (supra)) that an award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. In Delhi Development Authority v. M/s. R.S. Sharma & 1 (1994) Supp.1 SCC 644 2 (2003) 5 SCC 705 Co.3 it was held that an award can be interfered with by the Court under Section 34 of the Act when it is contrary to :

- a) substantive provisions of law; or
 - b) provisions of the 1996 Act; or
 - c) against the terms of the respective contract; or
 - d) patently illegal; or
 - e) prejudicial to the rights of the parties
- The fundamental policy of India was explained in ONGC Ltd. v. Western Geco International Co. Ltd.4 as including all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. It was held inter alia, that a duty is cast on every tribunal or authority exercising powers that affect the rights or obligations of the parties to show a 'judicial approach'. It was further held that judicial approach ensures that an authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and its decision is not actuated by any extraneous considerations. It was also held that

the requirement of application of mind on the part of the adjudicatory authority is so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law. This Court further 3 (2008) 13 SCC 80 4 (2014) 9 SCC 263 observed that the award of the Arbitral Tribunal is open to challenge when the arbitrators fail to draw an inference which ought to be drawn or if they had drawn an inference which on the face of it is untenable resulting in miscarriage of justice. The Court has the power to modify the offending part of the award in case it is severable from the rest according to the said judgment (Western Geco ltd. (supra)).

19. The limit of exercise of power by Courts under Section 34 of the Act has been comprehensively dealt with by Justice R.F. Nariman in the case of Associate Builders v. Delhi Development Authority⁵. Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the Arbitrator. The restrictions placed on the exercise of power of a Court under Section 34 of the Act have been analyzed and enumerated in Associated Builders (supra) which are as follows:

5 (2015) 3 SCC 49

- a) The Court under Section 34(2) of the Act, does not act as a Court of appeal while applying the ground of "public policy" to an arbitral award and consequently errors of fact cannot be corrected.
- b) A possible view by the arbitrator on facts has necessarily to pass muster as the Arbitrator is the sole judge of the quantity and quality of the evidence.
- c) Insufficiency of evidence cannot be a ground for interference by the Court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34 (2) of the Act.
- d) An award can be set aside only if it shocks the conscience of the Court.
- e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a Court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the Court. Error of construction is within the jurisdiction of the Arbitrator. Hence, no interference is warranted.
- f) If there are two possible interpretations of the terms of the contract, the arbitrator's interpretation has to be accepted and the Court under Section 34 cannot substitute its opinion over the Arbitrator's view. "

16. The Honourable Supreme Court, in the above mentioned decision observed that it was concerned with the point as to whether an Arbitral Award could be set aside for being in conflict with the public policy of India. In this context, it was observed that an arbitral Award could be set aside if it was contrary to the fundamental policy of Indian law or the interest of India or justice or morality. Reference was made to in the case of RENU SAGAR POWER CO. LTD. Vs. GENERAL ELECTRIC CO [1994 Supp. (1) SCC 644], wherein, it is held as follows:-

"....an Award could be interfered with by the Court under Section 34 of the Act of 1996 when it was contrary to substantive provisions of law, or provisions of the Act of 1996, or against the terms of the contract, or was patently illegal or prejudicial to the rights of the parties."

According to the Supreme Court, the power to modify the offending part of the Award, in case it was severable from the rest, would be available in such a scenario. The limit to the exercise of power by Courts under Section 34 of the Act of 1996 was stated to have been comprehensively dealt with in ASSOCIATE BUILDERS Vs. DELHI DEVELOPMENT AUTHORITY. As per this judgment, lack of judicial approach, violation of the principles of natural justice, perversity and patent illegality were identified as grounds for interference with the arbitral Award. The Supreme Court accordingly upheld the Award of the Arbitral Tribunal but modified it to the extent of holding that the claimants were not entitled to the amounts covered by the bank guarantees given by them.

17. The Honourable Supreme court in the decision reported in 2019 7 SCC 236 [Parsa Kente Collieries Ltd., vs. Rajasthan Rajya Vidyut Utpadan Nigam Ltd.] (Civil Appeal No.9023 of 2018), while considering the question as to whether the Division Bench of the High Court is justified in interfering with the award passed by the learned Arbitrator, confirmed by the learned Commercial Court, in an appeal under Section 37 of the Arbitration Act, observed as under:-

" 9.1. In the case of Associate Builders (supra), this Court had an occasion to consider in detail the jurisdiction of the Court to interfere with the award passed by the Arbitrator in exercise of powers under Section 34 of the Arbitration Act. In the aforesaid decision, this Court has considered the limits of power of the Court to interfere with the arbitral award. It is observed and held that only when the award is in conflict with the public policy in India, the Court would be justified in interfering with the arbitral award. In the aforesaid decision, this Court considered different heads of "public policy in India" which, inter alia, includes patent illegality.

After referring Section 28(3) of the Arbitration Act and after considering the decisions of this Court in the cases of McDermott International Inc. v. Burn Standard Co. Ltd., reported in (2006) 11 SCC 181 (paras 112-113) and Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran, reported in (2012) 5 SCC 306 (paras 43-45), it is observed and held that an arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a 19 reasonable manner, it will not mean that the award can be set aside on this ground. It is further observed and held that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

It is further observed by this Court in the aforesaid decision in paragraph 33 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. It is further observed that 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. 9.2 Similar is the view taken by this Court in the cases of National Highways Authority of India v. ITD Cementation India Limited, reported in (2015) 14 SCC 21(para 25) and Steel Authority 20 of India Limited v. Gupta Brother Steel Tubes Limited, reported in (2009) 10 SCC 63 (para 29)."

18. Based on the material evidence in this case on hand, the Arbitrator found that the 1st respondent/tenant expressed his termination of lease and that he was going to deliver the possession on 31.08.2005. The agent of appellant also had inspected the property and taken delivery of keys and handed over one of the keys to the 1st respondent to carry out

the repair work and for that purpose, the 1st respondent had taken one of the keys and also carried out repair work and subsequently delivered the property. The appellant also had taken possession of property on 27.01.2006 and deducted Rs.1,00,000/- for damages. The Arbitrator also confirmed the said deduction of Rs.1,00,000/- towards damages. The 1st respondent did not challenge that portion. That apart, the appellant further deducted a sum of Rs.2,75,000/- for overstayal of the 1st respondent/tenant in the leased premises.

But the Arbitrator found that the possession of the first

respondent for the subsequent period was for the benefit of the appellant, the 1st respondent carried out the repair work and further there was no express contract in respect of payment of rent after termination of the lease. The deduction amount of Rs.2,75,000/- on the head of overstaya, was directed to be refunded by the Arbitrator. Therefore, the award passed is based on facts and merits and for that, the Arbitrator had also given cogent reasons. Section 34(2)(b) of the Act is not attracted in this case. The learned Single Judge had rightly appreciated the award passed by the learned Arbitrator and dismissed the Original Petition filed under Section 34 of the Act. Therefore, this court is not inclined to interfere with the award passed on merits and based on factual aspects.

19. The contention of the learned counsel for the appellant that the award passed by the 2nd respondent/Arbitrator is against public policy and against substantive law is not acceptable and further contention that the award passed is against Section 108 of the Transfer of Property Act, is also not sustainable since Section 108 of the Transfer of Property Act is applicable only when there is no express contract. The above section itself says that in the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules.

20. On facts, Clause 5 of the agreement provides for deductions by the Lessor due to damages, in violation of the agreement. As such, the appellant ought to have deducted the amount for damages on 31.08.2005 itself. Instead of deducting the amount for damages at that point of time, the appellant allowed the 1st respondent to carry out the repair work. Therefore, the possession of the 1st respondent of the premises after 31.08.2005, cannot be considered to be as overstaya. It is only for the purpose of carrying out the repairing work in the interest of the appellant. The first respondent had not occupied the premises from 01.09.2005 to 26.01.2006 as a tenant or it was continuing its business from the said premises. Therefore, the findings of the learned Arbitrator is not perverse.

21. On a careful perusal of the entire records and the award passed by the learned Arbitrator and also the order passed by the learned Single Judge in the Original Petition, we are of the opinion that Section 108 of the Transfer of Property Act is not applicable to the facts of the present case. In this case, there is an agreement i.e., there is a contract between the parties. Therefore, in the agreement itself, the rights and liabilities of the parties have been reduced into writing in terms of the contract. The Arbitration clause is also provided in the agreement. In such circumstances, there is no perversity in the award passed by the 2nd respondent/learned Arbitrator. Therefore, in view of

the decisions rendered by the Honourable Supreme court in the above referred to cases and also taking into consideration the facts and circumstances of the present case on hand, this court does not find any merit in the appeal and hence, the appeal is liable to be dismissed.

22. In the result, the Original Side Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

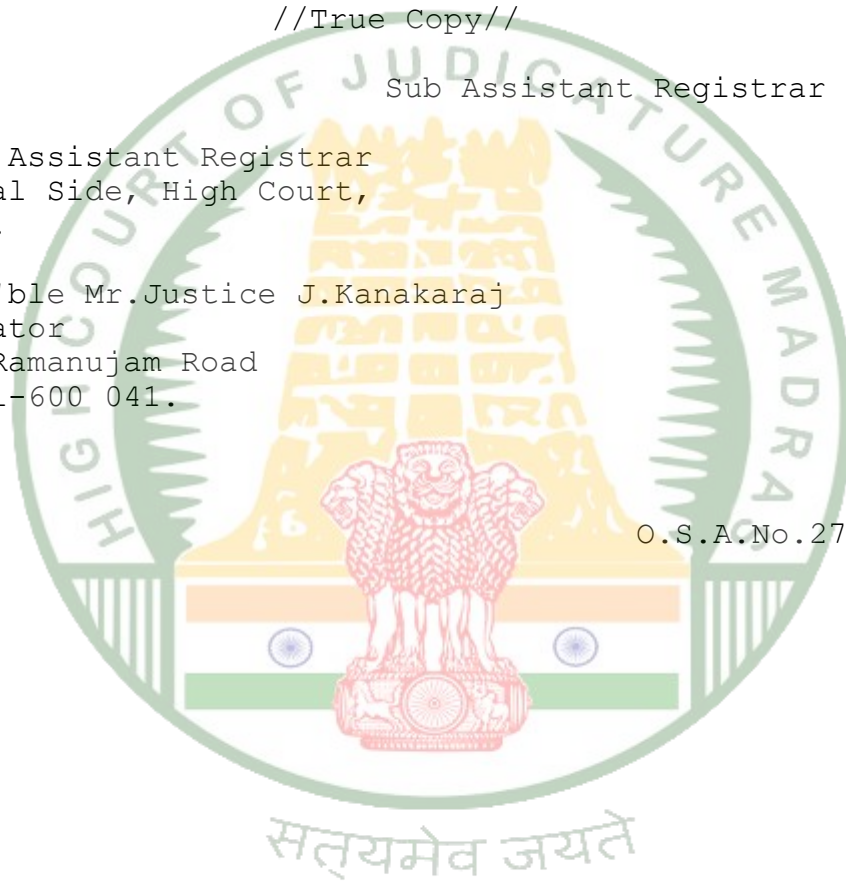
To

1.The Sub Assistant Registrar
Original Side, High Court,
Madras.

2.The Hon'ble Mr.Justice J.Kanakaraj
Arbitrator
No.7, Ramanujam Road
Chennai-600 041.

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O.S.A.No.278 of 2013



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