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

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Date of Judgment: 08.04.2021

+ **OMP (COMM.) 141/2021 & I.A. 5023/2021**

SUMMIT APARTMENTS PVT LTD.

..... Petitioner

Through: Mr Neeraj Gupta and Mr Kamal
Gupta, Advocates

versus

SATYA PRIYA SAXENA & ANR.

..... Respondents

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

IA 5024/2021

1. Allowed, subject to all just exceptions.

OMP (COMM.) 141/2021 & I.A. 5023/2021

2. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an arbitral award dated 24.12.2019 (hereinafter the 'impugned award') passed by the Arbitral Tribunal comprising of a Sole Arbitrator.

3. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation to a Lease Agreement dated 11.12.2017.

4. Briefly stated, the relevant facts that are necessary to address the controversy are as under:

5. The petitioner is a company incorporated under the Companies Act, 1956, and is engaged in real estate and other related business activities.

6. The petitioner and respondent no. 1 had entered into a Lease Agreement dated 11.12.2017 (hereafter 'the Lease Agreement') in relation to a commercial property bearing Unit No. 302, 3rd Floor, HL Wings, Section XI (MLU), Pkt-4, Plot No. 2 Dwarka, New Delhi - 110075. In terms of the said Lease Agreement, respondent No. 1 had agreed to run the said premises as a 'Restaurant-Bar Lounge and Services' on behalf of M/s Manitya Hospitality Pvt Ltd (Respondent no. 2 Company), of which respondent no. 1 is a promoter.

7. In terms of the Lease Agreement, respondent no. 1 paid an amount of ₹ 9,01,000/- as security deposit along with an additional deposit of ₹4,86,000/- as an advance, to the petitioner.

8. Respondent No. 1 received possession of the aforesaid premises on 13.01.2018. It is the case of the respondents that soon thereafter, they faced difficulties in obtaining the requisite licenses and clearances for setting up the business despite assurances from the

petitioner that all authorizations for running a Restaurant-Bar and Lounge are in place.

9. Respondent no.1 claims that it was impossible for it to run a Restaurant- Bar and Lounge at the leased premises and therefore, it was constrained to terminate the Lease Agreement on 06.07.2018 on account of fraud committed by the petitioner.

10. Thereafter, by a notice dated 06.12.2018, respondent no. 1 invoked the Arbitration Clause and a Sole Arbitrator was appointed by this Court on 22.05.2019 by referring the matter to the Delhi International Arbitration Centre (DIAC).

11. In its Statement of Claims filed before the Arbitral Tribunal on 20.08.2019, the respondents contended that the failure to set up a Restaurant Bar and Lounge at the leased premises was due to the petitioner's inability to make available the requisite licenses and authorizations as assured. The respondents further contended that due to the fraud and misrepresentation on account of the petitioner, it had incurred heavy losses and accordingly, claimed the following: (i) amount incurred towards paying security deposit for the premises amounting to ₹9,01,000/-; (ii) amount incurred in relation to the extra deposit made by respondent no. 1 as an advance amounting to ₹ 4,86,000/-; (iii) amount incurred towards purchasing stamp paper for registration of the Lease Agreement amounting to ₹95,000/-; (iv) amount incurred towards engaging license consultants for securing the requisite licenses for using the premises amounting to ₹1,00,000/-; (v)

amount incurred on account of hiring a Restaurant Manager amounting to ₹ 1,30,000/-; (vi) amount incurred towards hiring a Food Consultant amounting to ₹1,00,000/-; (vii) amount incurred on account of civil, electrical, plumbing, fire, air conditioning and other miscellaneous work amounting to ₹26,30,500/-; (viii) amount incurred towards loss of business amounting to ₹ 25,00,000/-; and (ix) amount incurred towards design fees amounting to ₹ 5,00,000/-.

12. The petitioner was served and time was granted to file the Statement of Defence. However, the petitioner failed to file its Statement of Defence within the prescribed time period and its right was accordingly, foreclosed. The petitioner filed its Statement of Defence on 29.11.2019.

13. The arbitral proceeding was first fixed on 16.12.2019. The petitioner failed to appear before the Arbitral Tribunal on the said date despite the fact that it had been served. The Arbitral Tribunal found that the petitioner had not filed its reply within the stipulated time. The Arbitral Tribunal proceeded *ex-parte* against the petitioner and further directed respondent no.1 to file its affidavits in evidence on or before 23.12.2019.

14. On 23.12.2019, the petitioner once again did not appear before the Arbitral Tribunal. The Tribunal noted that respondent no. 1 had filed its affidavit by evidence and listed the matter for further proceedings on 24.12.2019. On 24.12.2019, the Arbitral Tribunal heard the arguments of the learned counsel appearing on behalf of

respondent no. 1 and thereafter, pronounced the impugned award. Even on the said date, the petitioner had failed to appear.

15. By the impugned award, the Arbitral Tribunal had directed the petitioner to pay respondent No. 1: (i) ₹13,87,000/- on account of security deposit (amounting ₹ 9,01,000) as well as advance deposit (amounting ₹ 4,86,000) which was paid by respondent no. 1 to the petitioner in terms of the Lease Agreement; (ii) interest at the rate of 18% per annum on ₹ 13,87,000/- from 20.08.2019 till the date of payment; (iii) ₹ 1,91,269/- as costs of the arbitral proceedings; and (iv) interest at the rate of 18% per annum on ₹ 1,91,269/- from 27.09.2019 till the date of payment.

16. Mr. Gupta, learned counsel for the petitioner assailed the impugned order on the sole ground that it had been passed in violation of the principles of natural justice as the petitioner had not been heard. He submitted that the Arbitral Tribunal had erred in proceeding *ex-parte* against the petitioner on 16.12.2019 on the erroneous premise that the petitioner had not filed its Statement of Defence. But prior to that date, the petitioner had filed its Statement of Defence, which was ignored.

17. At the outset, it is relevant to note that the Arbitral Tribunal was appointed by an order dated 22.05.2019 passed by this Court in ***O.M.P. (T) (COMM) 16/2019*** captioned ***Satya Priya Saxena v Summit Apartments Pvt. Ltd.***

18. In view of the disputes that had arisen between the parties, the petitioner had unilaterally appointed an Arbitrator. The respondent doubted the impartiality and independence of the said Arbitrator and accordingly, filed a petition before this Court under Section 14 of the A&C Act seeking the termination of the Arbitrator appointed by the petitioner. The respondent also alleged that the said Arbitrator had not filed the requisite declaration under Section 12(5) of the A&C Act. During the course of the proceedings, the counsel had produced (i) the declaration of disclosure made by the learned Arbitrator; (ii) the proceeding sheet recording the arbitral proceedings on 14.02.2019; and (iii) a covering letter. This Court had examined the same on 07.03.2019 and had found that the signature of the learned Arbitrator appearing on the documents were at variance with each other. On the request of the learned counsel for the petitioner (the respondent therein), the hearing of the said petition was adjourned to 26.03.2019. Subsequently, at a hearing held on 22.05.2019, the learned counsel for the petitioner (the respondent therein) had submitted that the respondent had no objection if an independent Arbitrator was appointed to adjudicate the subject disputes. In view of the above, the mandate of the Arbitrator appointed by the petitioner was terminated and Justice (Retd.) K. Ramamoorthy, a former Judge of this Court was appointed as the Sole Arbitrator. It was further directed that the arbitration be conducted under the aegis of the Delhi International Arbitration Centre (DIAC) and in accordance with its rules. The orders passed in the said proceedings (O.M.P. (T) (COMM) 16/2019) are not on record, but are available on the website of this Court.

19. In view of the above, it is clear that the petitioner was aware that the arbitral proceedings would be conducted as per the DIAC Rules. This Court had also granted liberty to the parties to approach the Coordinator DIAC.

20. DIAC had issued a notice to the parties. The respondent filed its Statement of Claims before the DIAC on 19.08.2019. It is not disputed that after the Statement of Claims was filed, DIAC had issued a notice to the petitioner to file a Statement of Defence/Counter Claims in terms of its rules. The said notice is not on record. However, the learned counsel for the petitioner was unable to dispute that the petitioner had not filed the Statement of Defence within the time as stipulated in the notice issued by DIAC.

21. The learned Arbitral Tribunal had held the first hearing on 16.12.2019 and had noted that the respondent (the petitioner herein) was served and was granted time to file a reply but had not done so. The impugned award also records that *“First respondent was served. Time was granted by the Centre to file the Statement of Defence. The first respondent failed to file the SOD within the time granted”*. This Court finds no reason to doubt the said finding. As noted above, the learned counsel appearing for the petitioner does not dispute that the petitioner had not filed the Statement of Defence within the time provided by DIAC.

22. Mr. Gupta, learned counsel appearing for the petitioner submitted that the petitioner had filed its Statement of Defence prior to

16.12.2019 and therefore, the Arbitral Tribunal was incorrect in assuming that the respondent had not done so and proceeded *ex-parte* against the respondents.

23. This court has perused the procedural order recorded by the Arbitral Tribunal on 16.12.2019. Admittedly, none had appeared on behalf of the petitioner before the Arbitral Tribunal on 16.12.2019. The Arbitral Tribunal had thus, decided to proceed *ex-parte* and directed that the affidavits of evidence be filed on or before 23.12.2019.

24. On 23.12.2019, respondent no.1 (the claimant before the Arbitral Tribunal) had filed the affidavit of evidence. On this date as well, none had appeared on behalf of the petitioner. The arbitration proceedings were adjourned to 24.12.2019 and on this date as well no one had appeared on behalf of the petitioner. The Arbitral Tribunal had thereafter, considered the Statement of Claims, documents and the affidavit filed on behalf of the respondent and pronounced the award. Since the petitioner had not participated in the Arbitral Proceedings despite receipt of notice, the decision of the Arbitral Tribunal to proceed *ex-parte*, cannot be, faulted.

25. The petition is unmerited and is, accordingly, dismissed. The pending application is also dismissed.

VIBHU BAKHRU, J

APRIL 8, 2021/pkv