

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

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Decided on: 4th April, 2022

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FAO (OS)(COMM) 164/2017

M/S. MOVIE TIMES CINEPLEX PVT. LTD.

..... Appellant

Represented by:

Mr.Harish Malhotra, Sr. Advocate
with Mr.Rajender Agarwal and
Mr.Anoop Kumar, Advocates.

Versus

M/S. MRG DEVELOPERS PVT. LTD. & ORS.

..... Respondents

Represented by:

Mr.Attin Shankar Rastogi,
Advocate with Mr.Rajesh
Ranjan, Mr.Prateek Yadav,
Mr.Archit Chuhan, Advocates for
R1 and R3.
Mr.S.Khan, Advocate with
Ms.Jayanti Prasad, Advocate for
R2.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

MUKTA GUPTA, J. (ORAL)

1. In this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), the appellant impugns the order dated 12.07.2017 passed by the learned Single Judge of this Court in OMP(COMM) No. 169/17 and IA NO. 11146/16 thereby dismissing the objections filed by the appellant under Section 34 of the Act seeking setting aside of the arbitration award dated 01.06.2016.

2. Movie Times filed a suit (being CS (OS) 451/2008) against the respondents seeking injunction and recovery of rent against the respondents in respect of the leased premises. The same was disposed of vide order dated

07.10.2009, directing Movie Times to take recourse to arbitration, resulting in the appointment of the sole arbitrator to adjudicate the disputes between the parties, who passed the Arbitral award dated 01.06.2016 (hereafter the impugned award') in relation to the disputes in respect of the Lease deed. Aggrieved by the said Award, the appellant filed a petition under Section 34 of the Act for setting aside the said award. The said petition was dismissed vide the impugned judgment dated 12.7.2017 passed by the single Judge of this Court in OMP (Comm) No. 169/2017 and IA No. 11146/2016, resulting in the filing of the present appeal.

3. Disputes between the parties relate to the extent of the area leased to Movie Times under the Lease Deed dated 24.07.2006 (hereinafter 'the Lease Deed'). Though numbers of claims were raised in arbitration, however, the appellant challenged the arbitral award only on two counts. It is the case of Movie Times that in terms of the said lease deed, the Appellant was authorised/entitled to use the area of 16000 sq.feet, however it was given possession of an area ad-measuring 13235 sq. ft. instead of 16000 sq. ft. and therefore, it was entitled to a proportional reduction in the lease rentals and also entitled to recover the excess amount paid in respect of Common Area Maintenance (CAM) charges. On the other hand, the respondents raised counterclaims, inter alia, seeking the rental withheld as well as unpaid CAM charges along with interest.

4. The Learned Arbitrator, in his award rejected the plea of Movie Times of occupying an area less than 16000 sq. ft. Contention of Movie Times that the area of the leased premises could not have been measured despite having access to it for two years was not accepted by the Arbitrator. The arbitrator proceeded to hold that during the subsistence of the lease, Movie Times is

liable to pay rent, service tax, interest on delay in payment of rent, maintenance and other recurring charges for electricity & water, as stipulated in the Lease Deed and the Adherence Deed. Further, the counterclaim for recovery of possession of the leased premises was rejected in view of the order dated 25.11.2010 passed in OMP 675/2009, allowing Movie Times to continue to pay rent. The arbitrator also observed that Movie Times had appropriated to itself the genset provided by ANM in discharge of its obligations. ANM was held not liable for the disconnection of electricity or the non-provision of maintenance services to Movie Times. Thus, all the claims filed by Movie Times were declined vide the impugned award.

5. The arbitrator had rejected Movie Times' claim as the arbitrator was of the view that Movie Times had failed to establish that the area in its occupation was less than 16000 sq. ft. The learned single Judge agreed with the reasoning of the arbitrator who noted that Movie Times and MRG had entered into an agreement on 23rd June, 2004 whereby the area to be leased to Movie Times was specifically demarcated. When possession of the demised premises was handed over to Movie Times, there was no claim or assertion that any further area remained to be handed over to Movie Times. Movie Times had, thereafter, carried out the fit-outs and was in occupation of the premises for more than two years, only whereafter Movie Times entered into the Lease Deed on 24.07.2006. Thereafter, Movie Times, MRG and SLG entered into the Adherence Deed on 01.04.2007. At none of these stages was any protest made by Movie Times regarding the extent of area occupied by it.

6. Next claim examined by the Learned Single Judge was whether the decision of the arbitrator to award CAM charges till the date of the award was perverse and patently illegal. According to Movie Times, it had paid CAM charges till November 2011 and had stopped paying the same since MRG/ANM had stopped maintenance facilities in June 2011. This was disputed by MRG/ANM and according to them, the maintenance facilities continued. However, it was not disputed that after October 2012, electricity was discontinued by the utility provider. Movie Times claimed that in this view, there could be no dispute that maintenance services had not been provided. The Learned Arbitrator noted that Movie Times was using the genset, a property of ANM, for generation of electricity. The arbitrator also found that in the given circumstances, "disconnection of the electricity connection was invited by the claimant" (Movie Times). Plainly, there was disruption in the maintenance services as the electricity connection had been disconnected by the utility provider. However, the arbitrator did not accept that maintenance services had "totally stopped", as was the case set up by Movie Times. Indisputably, MRG/ANM had installed elevators, escalators, common light fixtures, equipment, AHU, chiller plants that were necessary to provide the services. Movie Times had appropriated the genset for the purposes of backup power. Maintenance charges would also include certain charges towards equipment and infrastructure provided as well as salaries of staff and employees. The Learned Single Judge observed that the CAM charges were for a bundle of services including elevators, common air conditioning, power backup, etc. The necessary equipment for such services had been installed and such services had also been availed of by Movie Times to the full extent in the past. Movie Times was itself responsible for

disconnection of electricity (disruption in the services) and thus was itself liable for non-availability of services, the arrangement for which was made by MRG/ANM. Thus the learned Single Judge held that the award of CAM charges was neither perverse nor opposed to the fundamental policy of Indian law.

7. Learned counsel for appellant submits that the learned Single Judge has erred in not appreciating the fact that the arbitral Tribunal was required to go into the question whether the area let out was 16000 ft or was less, and if less, how much was the area which was handed over to the appellant. It is the submission of learned counsel for the appellant that the learned Arbitral Tribunal has failed to call for the completion plan, which was in the control and custody and possession of respondent No. 1 and thus by not calling for the completion plan, the Arbitrator has mis-conducted the entire proceedings. It has been urged before this Court that the learned Single Judge has failed to appreciate that the maintenance charge which was liable to be paid in terms of the lease was for use elevators, AC, lighting facility for common areas, parking and other common facilities etc., whereas on account of the non-availability of electricity, no such facility could have been provided to the appellant. Learned Counsel contends that the learned single Judge further failed to appreciate that the Arbitrator has simply provided maintenance on the ground that since the appellant was using the generator which belonged to respondent No.1, therefore it cannot be said that no maintenance was provided.

8. We have heard learned counsels for the parties. It is no longer *res integra* that the scope for interference in an appeal under section 37 (1) (c) of the Act is narrow. In order to succeed, the appellant must establish

that the finding of the Arbitrator is based on no evidence or the Arbitrator has taken into account material which is irrelevant or has ignored vital evidence. The argument which has been raised before us is that the arbitral Tribunal was required to call for the completion plan, which was in the control and custody and possession of respondent No. 1. In this regard, the learned Single Judge as also the learned Arbitrator have observed that in the circumstances wherein Movie Times, after having taken possession of the area in question had occupied it for over two years before executing the Lease Deed and the Adherence Deed, then the onus to establish that the area in question is in fact less than what was stated in the Lease Deed falls squarely on Movie Times, and Movie Times failed to discharge the said burden. Further, with regards to the arbitrator awarding CAM charges till the date of the award, it is not disputed that after October 2012, electricity was discontinued by the utility provider. The Learned arbitrator has also noted that Movie Times was using the genset, a property of ANM, for generation of electricity. MRG/ANM had installed elevators, escalators, common light fixtures, equipment, AHU, chiller plants that were necessary to provide these services. MRG/ANM could not be expected to continue incurring expenditure on electricity consumed by Movie Times. In the circumstances, the Learned Single Judge as also the learned arbitrator did not accept the plea that maintenance services were totally stopped. We do not find that these findings are in any manner perverse or unsustainable.

9. We may also note that it has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. The

position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act.

10. While deciding an appeal it must be kept in mind that the Arbitrator/Tribunal is the final arbiter on facts as well as law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. Hon'ble Supreme Court of India has consistently held that an arbitration award should not be lightly interfered with. (*See Renusagar Power Co. Ltd. v. General Electric, (1994) Supp. 1 SCC; ONGC v. Saw Pipes, (2003) 5 SCC 705, Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445; and Associate Builders v. DDA, (2015 3 SCC 49).*)

11. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted, than while deciding a petition under Section 34 of the Act. Hon'ble Supreme Court in the decision reported as (2006) 11 SCC 181 McDermott International Inc. v. Burn Standard Co. Ltd. and Ors held as under:-

"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the

arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

12. In view of the discussion above, we find no infirmity, illegality or impropriety in the award and order of the learned Single Judge, which would require interference in the present appeal. Appeal is accordingly dismissed.

13. The amount deposited by the appellant before the Registrar General of this Court vide order dated 28th August 2017 be released to the respondent along with the interest that has accrued thereon.

14. Order be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

APRIL 04, 2022/skb