



* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ O.M.P. (COMM) 266/2023, CAV 377/2023, I.A. 13723/2023, I.A. 13724/2023, I.A. 13725/2023, I.A. 13726/2023

Reserved on : 29.08.2023

Pronounced on : 18.09.2023

IN THE MATTER OF:

VIVEK KHANNA

..... Petitioner

Through: Mr. Jitendra Kumar Jha, Advocate

versus

OYO APARTMENTS INVESTMENTS LLP

..... Respondent

Through: Mr. Harsh Kaushik and Ms. Adrija Mishra, Advocates

CORAM:

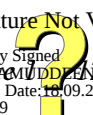
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of present petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter, '*the A&C Act*'), the Petitioner assails the Award dated 31.03.2023 (hereafter, '*the impugned Award*') passed by the Arbitral Tribunal (hereafter, '*the AT*') comprising of Sole Arbitrator in arbitration titled as Vivek Khanna vs. Oyo Apartment Investment LLP.

2. The impugned Award came to be passed in the context of disputes that arose between the parties in respect of Lease Agreement dated 18.02.2019





(hereafter, '*the Agreement*'). In terms of the Agreement, Petitioner had leased out his premises situated at *Plot No. 80, Shakti Khand II, Indirapuram, Ghaziabad* admeasuring 350 square meters (hereafter, '*the Demised Premises*') to the Respondent for a term of 60 months, with a lock-in commitment of 36 months, during which period of 36 months, neither of the parties could terminate the lease. Even though, as per the lease deed, the lease commencement date was 20.02.2019, however the liability to pay rent arose from the rent commencement date, which was decided as 01.06.2019.

3. Commercial terms and conditions of the lease were contained in Schedule II of the Lease Agreement. Clause 10 of the said Schedule II casted an obligation on the Respondent to pay a minimum guaranteed amount of Rs.2,90,000/- or Net Revenue Share, whichever is higher, payable every lease month w.e.f. 01.06.2019. 'Net Revenue Share' was defined as percentage of net revenue share calculated from the Gross Revenue share subject to deduction of withholding tax and other statutory dues as applicable from time to time. However, in terms of Clause 11 of Schedule II, for the first two months the Respondent was obliged to pay only 70% of the Net Revenue earned from the Demised Premises from the time the same was made "live" on Respondent's portal, and was not obliged to pay the minimum guaranteed amount of Rs.2,90,000/- mentioned above.

4. Further, in terms of clause 7 of Schedule II, Respondent paid a sum of Rs.5,80,000/- to the Petitioner towards 'Business Advance'.

6. Respondent terminated the Lease Agreement before the expiration of the 36 months lock-in period, vide termination notice dated 23.11.2019, alleging breach of the Lease Agreement by the Petitioner, who in turn challenged the termination by invoking arbitration. Pursuant to a Section 11(6) petition filed by the Petitioner, the AT comprising of Sole Arbitrator i.e., Justice R.C. Jain (Retd.) was constituted.

7. The arbitral proceedings culminated in the Impugned Award delivered on 31.03.2023.

DISPUTES BEFORE THE AT

8. The Petitioner filed his Statement of Claims (hereafter, the ‘SOC’) raising following nine claims:

Sl. No.	CLAIM/RELIEF	AMOUNT (in Rs.)
1.	Claim No. 1: A sum of Rs.52,99,532/- on account of investment made by the Petitioner as per the instructions of the Respondent.	52,99,532.00
2.	Claim No. 2: A sum of Rs.13,88,288/- on account of arrears of rent for the period till November, 2019.	13,88,288.00

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9. Respondent filed its Statement of Defence (hereafter, the '*SOD*') and further raised the following three counter claims:-

(i) Damages of Rs.25 lacs towards loss of business in respect of its consultancy and managerial services, due to premature termination of the Lease Agreement for the reasons attributable to the Petitioner

(ii) Refund of Rs.5,80,000/- as business advance paid to the Petitioner at the time of entering into the Agreement, and

(iii) Return of the fitting and fixtures supplied by the Respondent to the Petitioner or, in the alternative, a sum of Rs.15 lacs, being the cost of such fittings and fixtures

AWARD

10. The AT held the premature termination of the Lease by the Respondent to be illegal however, disallowed the consequent claims made by the Petitioner, except partially awarding Claim No 2, 5 and 6. AT further awarded interest for all the three periods i.e., pre-reference, pendente-lite and future periods. For pre-reference period, the AT granted interest @ 9% p.a., w.e.f. 01.02.2019 till the date of filing of the claim, whilst noting that there is no agreement between the parties for payment of interest. For pendente-lite and future periods, the AT awarded interest @ 2% higher than the prevalent rate of interest till realisation.



AT also awarded a sum of Rs.4,74,841/- to the Respondent in its counter claim. Claim of costs of either party was rejected by the AT, leaving the parties to bear their own cost.

SUBMISSIONS BEFORE THIS COURT

11. Petitioner confined his challenge to the impugned Award in respect of Claim Nos. 2, 3 and 9, and the award of sum of Rs.4,74,841/- in favour of the Respondent in its counter claim.

12. Petitioner has sought to find fault with the award pertaining to Claim No. 2 which has been partially allowed by the AT. It is contended by the Petitioner that the AT erred in awarding minimum guaranteed amount of Rs.2,90,000/- to the Petitioner only for the months of September 2019, October 2019 and November 2019, whereas under Clause 10, contractually, the liability to pay minimum guaranteed amount commenced from the Rent Commencement Date i.e., 01.06.2019.

13. In so far as Claim No. 3 is concerned, it was contended by the Petitioner that the dismissal of the claim is inconsistent with the finding in the award holding the premature termination of the lease by the Respondent as illegal. According to the Petitioner, the sum claimed under Claim No. 3 is a consequence suffered by him due to pre-mature termination, which the AT held to be illegal. Petitioner would contend that the AT acted contrary to the contract i.e., Lease Agreement, where under Clause 11, Respondent had committed to



pay minimum guaranteed amount of Rs 2,90,000/- payable by it every month, two months after the Rent Commencement Date. Once termination was held to be illegal, AT should have ensured that Respondent honoured its contractual commitment and pay the minimum guaranteed amount for the remaining unexpired lock-in period of 30 months out of the 36 months. It was also contended that having allowed/partly allowed some of its claims, arbitral cost should also have been awarded. The award of counter claim was also contested as being unreasoned.

14. Respondent has not contested the impugned Award. Rather, it has defended the same. Respondent has argued that the scope of interference under Section 34 is very narrow, and that the Petitioner has failed to raise any ground permissible under Section 34, to challenge the findings in the award. Although, Respondent has not itself challenged the findings in relation to Claim No. 2, however, it has sought to question the findings in relation to Claim No. 2 in the submissions before the court, and has denied its liability to pay the sum of Rs. 8,70,000/-, as awarded by the AT.

15. Respondent has countered Petitioner's challenge to the dismissal of Claim No 3, by contending that in the absence of any evidence to show that the Petitioner suffered losses due to termination of Lease Agreement during the lock-in period, Petitioner is not entitled to rent for the remaining lock-in period. Respondent has argued that at best, the restriction in terminating the lease during lock-in period could be equated to the liquidated damages clause in a



contract and it's settled law that a party seeking liquidated damages must prove to have suffered a loss. According to the Respondent, the Petitioner did not produce any evidence showing that he had suffered losses due to termination during the lock-in period and on the contrary, the Petitioner had earned rentals from the Demised Premises by leasing it to a third party soon after the termination of Lease by the Respondent, which fact was suppressed by the Petitioner from the AT.

16. Insofar as award of counter claim is concerned, it was submitted that the Petitioner had admitted receipt of refundable/adjustable sum of Rs.5,80,000/- towards business advances from the Respondent. AT has rightly awarded the outstanding sum of Rs. 4,74,841/-, that could not be adjusted/recovered by the Respondent due to early termination of the lease. Respondent would further argue that the Petitioner approached the AT with unclean hands inasmuch as not only did he swore a false affidavit, but also suppressed material information and documents as to the factum of leasing out the Demised Premises to the new tenants w.e.f. 01.12.2019 i.e., from the very next day when the Respondent vacated, which was concealed till it was put out in the SOD.

REASONS & CONCLUSION

17. Petitioner has confined its challenge to Claim No 2, 3 and 9 and the partial award of counter claim in favour of the Respondent, as discussed above.

18. As far as challenge to Claim No 2 is concerned, Petitioner is unable to fit its challenge within the narrow confines of patent illegality, which is one of the



most invoked grounds to mount a challenge under Section 34. The instances of patent illegality are well known in law now and would include a non judicial approach adopted by the arbitrator or manifest legal perversity in reaching conclusions. Reference in this regard is made to the decision in Ssangyong Engineering and Construction Co. Ltd. v. National Highway Authority of India (NHAI)¹. The appreciation of facts and evidence, produced before the AT, cannot be dislodged by the Court merely on the ground that the Court may have an alternate view in the matter. While deciding Claim No. 2, AT has fairly taken into account the payments made by the Respondent to the Petitioner, in the months of May, June, July and August 2019, and has adjusted the same from the sum of Rs.13,88,288/- claimed by the Petitioner. AT has further taken into account the two months exemption granted to the Respondent in Clause 11 of Schedule II from paying MSG and the recovery of business advance of Rs.5,80,000/- that the Respondent was entitled to make over a period of 6 months from the business proceeds. Such findings are based on appreciation of evidence on record and cannot be said to be legally perverse.

19. Under Claim No.3, the Petitioner had claimed Rs.87 lacs on account of rent towards remaining lock-in period from December, 2019 onwards (i.e., Rs.2,90,000 x 30 months). The sum is claimed as loss suffered by the Petitioner due to early termination of lease by the Respondent. In the SOD, Respondent produced evidence to show that the Demised Premises had been let out by the

¹ (2019) 15 SCC 131



Petitioner from December 2019 onwards. In the affidavit of evidence filed by the Petitioner, he provided a chart showing receipt of amounts towards rental from a third party from December, 2019 onwards. In view of the aforesaid admission by the Petitioner, after initial concealment, AT's rejection of the claim is anything but wrong. However, AT still referred to the decisions in Deepak Chopra v. FLAKT (India) Pvt. Ltd.², Manju Bagai v. Magpai Retail Pvt.³ and Egon Zhender International Pvt. Ltd. v. Namgayal Institute for Research on Ladakhi Art & Culture (Nirlac) & Ors.⁴, to examine the legal position regarding the admissibility of liquidated damages. The AT rightly applied the judgments to reach the conclusion that the sum agreed by the parties as liquidated damages would not dispense with the requirement of proof by the party claiming liquidated damages that it actually suffered a loss.

20. As per the crystallised legal position, sum ascertained as liquidated damages in the contract is not in the nature of penalty, but is a pre-estimate of loss estimated by the parties likely to be suffered by a party in the event of breach of contract by the other party. Loss must be incurred by a party in order to claim the same. Liquidated damages are not payable merely as a penalty for breach of contract, if no loss is suffered. It is the quantification of loss that would require no further ascertainment by court/tribunal, which would quantify the same as per the pre-estimated loss or formula agreed to by the parties as

² 2020 SCC OnLine Del 103

³ 2010 SCC OnLine Del 3842

⁴ 2013 SCC OnLine Del 4288



liquidated damages in the contract. In view of the same, AT's rejection of claim No 3 is consistent with the prevalent legal position.

21. Similarly, no reason to interfere exists in relation to award of cost pertaining to Claim No. 9. The AT has given reason for not awarding cost in favour of the Petitioner and has directed the parties to bear their own respective costs. The decision does not seem to be arbitrary or legally perverse. The AT is fully competent to decide question of costs.

22. As far as Petitioner's objection to the AT awarding a sum of Rs.4,74,841/- in favour of the Respondent, allowing its counter claim, is concerned, Petitioner has argued that once early termination of lease by the Respondent has been held to be illegal by the AT, there was no justification in ordering refund of the outstanding unadjusted business advance paid to the Petitioner, which could be a measure of compensation for the loss suffered by the Petitioner on account of illegal termination. In AT's assessment, no loss has been suffered by the Petitioner due to early termination, even though the same was held to be illegal. Even the Petitioner in his SOC has not made a specific claim to forfeit the business advance paid by the Respondent. In view of the same, AT's decision to direct refund of unadjusted business advance to the Respondent, cannot be characterised as a patent illegality, for this court to intervene, especially in the restrictive jurisdiction under Section 34, where the court must check the temptation to supplant a plausible view taken by the AT, by its own view.

23. This Court finds no ground of interference with the impugned award,



which is upheld. The objections being meritless, the petition is dismissed alongwith pending applications.

(MANOJ KUMAR OHRI)
JUDGE

SEPTEMBER 18, 2023/ga

