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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**Judgment pronounced on: **18.12.2023**+ **FAO (COMM) 205/2022 & CM Nos.56694/2022****M/S VARDHMAN PROPERTIES LTD.****..... Appellant**

versus

MUNICIPAL CORPORATION OF DELHI**..... Respondent****Advocates who appeared in this case:**

For the Appellants : Mr Rohit Gandhi, Mr Hargan Singh Kalra and Mr Surender Sheoran, Advs.

For the Respondents : Mr Kunal Vajani, Standing Counsel with Mr Pranav Malhotra and Mr Shubhang Tandon, Advs. for MCD.

CORAM:**HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MS JUSTICE TARA VITASTA GANJU****[Physical Court Hearing/ Hybrid Hearing]****JUDGMENT****TARA VITASTA GANJU, J.:****TABLE OF CONTENTS**

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**PREFACE:**

1. This Appeal assails the judgment dated 31.10.2022 passed by the Court of District Judge (Commercial Court) North District, Rohini Courts in OMP (Comm) No.06/2018 [hereinafter referred to as “Impugned Judgment”]. By the Impugned Judgment, a Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as “Act”] against the Award dated 01.11.2018, was dismissed.

BRIEF FACTS:

2. The brief relevant facts necessary for the adjudication of the present Appeal are:
 - 2.1 The Appellant was a successful bidder for allotment of a property on leasehold basis at AW Block, Sanjay Gandhi Transport Nagar, New Delhi having plot area of 780 sq. meters [hereinafter referred to as “Property”]. On 02.11.2006, Respondent executed a lease deed with respect to the Property [hereinafter referred to as “lease deed dated 02.11.2006”].
 - 2.2 The Appellant deposited necessary lease premium with the Respondent and took possession of the Property. The Appellant paid the lease premium and ground rent from time to time to the Respondent.
 - 2.3 A demand-cum-show cause notice dated 13.09.2013 [hereinafter referred to as “SCN”] was sent by the Respondent to the Appellant demanding a sum of Rs.18,30,838/- towards arrears of ground rent



- with respect to the Property including interest.
- 2.4 On 17.09.2013, the Appellant replied to the SCN challenging the amount for the following reasons:
- (i) The said property was a commercial unit and not a dormitory as mentioned in the SCN;
 - (ii) The ground rent was payable not on the lease premium but on the value of the land;
 - (iii) There was no clause for payment of interest in the terms and conditions of the tender; and
 - (iv) A sum of Rs.19,12,500/- as lease rent was already paid by the Appellant under protest to be adjustable in the future.
- 2.5 Since, a dispute had arisen between the parties, the Appellant sent a notice seeking reference to Arbitration and appointment of an Arbitrator on 17.10.2023 to the Respondent, invoking Clause VI of the lease deed dated 02.11.2016. The Appellant filed a Petition under Section 9 of the Act seeking interim relief which was granted to it on 29.10.2013, by an order passed by District Judge, Rohini.
- 2.6 The disputes between the parties were referred to arbitration to a retired District Judge [hereinafter referred to as “Arbitrator”] by an order dated 12.03.2015 of this Court.
3. The following issues were framed by the Arbitrator:
- (i) Whether the Claimant is bound by the proforma lease deed enclosed with the terms and conditions of Tender auction



[hereinafter referred to as “proforma lease deed”] and not by the terms of the lease deed dated 02.11.2006;

(ii) Whether the Claimant is liable to pay ground rent without interest in terms of the proforma lease deed;

(iii) Whether the Claimant is liable to pay any amount pursuant to the SCN;

(iv) Whether the Claimant is entitled to damages in the sum of Rs.3 lakhs and costs.

3.1 The Respondent filed a counter-claim for payment of a sum of Rs.24,46,228/- for ground rent due from the Appellant, interest on delayed payment and costs.

3.2 By an Award dated 01.11.2018 [hereinafter referred to as “Arbitral Award”], the Arbitrator reached the conclusion that the parties were not bound by the terms and conditions of the proforma lease deed but by the lease deed dated 02.11.2006. The Arbitrator further held that the Appellant had failed to substantiate that fact that it was unaware about the clause pertaining to payment of ground rent for the Property. Relying on Clauses 3 and 5 of the tender documents and Clause IV (1) of the proforma lease deed, it was held that these Clauses make it amply clear that the proforma lease deed and the lease deed dated 02.11.2006 are two separate documents.

3.3 In these circumstances, the Arbitrator dismissed the claim of the Appellant and allowed the counter-claim of the Respondent. It was



directed that Rs.24,46,228/- towards ground rent and interest at the rate of 15% per annum up to 30.10.2015 be paid by the Appellant to the Respondent. It was further directed that from 31.10.2015 till 01.11.2018, ground rent in the sum of Rs.3,82,950/- per annum along with interest was also recoverable. The payment was directed to be made after adjusting the amounts deposited with the District Courts, Rohini. Future interest was also awarded at the rate of 12% per annum by the Arbitrator.

4. The Arbitral Award was challenged in Rohini District Courts, by the Appellant by filing a Petition under Section 34 of the Act [hereinafter referred to as “Section 34 Petition”].
- 4.1 Learned District Judge by the Impugned Judgment held that the Arbitrator has passed the Arbitral Award after taking into consideration all contentions of the Appellant satisfactorily and that the view taken by the Arbitrator is a plausible one which does not merit the interference of the Court. It was also held that the Appellant has approached the Court belatedly claiming novation of contract. Resultantly, the Section 34 Petition was dismissed.
5. Aggrieved by the Impugned Judgment, the Appellant has filed the present Appeal under Section 37 of the Act. Arguments in the present Appeal were heard by this Court and judgment was reserved. Subsequently, written submissions, along with judgments relied upon, were filed by the Appellant.



CONTENTIONS OF THE APPELLANT:

6. The Appellant made the following submissions challenging the Impugned Judgment :
 - 6.1 Clause IV of the Tender document states that the terms of the lease deed as contained in format shall be deemed to be agreed by the allottee. However, the Respondent unilaterally changed some of the terms of the lease deed dated 02.11.2016 without the consent of the Appellant. In terms of principles of novation of a contract under Section 62 of the Indian Contract Act, 1872, [hereinafter referred to as “Contract Act”] a unilateral change or a change without the consent of both the parties is not permissible in law.
 - 6.2 The clauses of the Tender document were binding on the parties. Lease deed dated 02.11.2016 contained terms which did not have the consent and approval of the Appellant. The Arbitrator, despite noting that the terms of the Tender document were changed without notice, dismissed the claim of the Appellant.
 - 6.3 Reliance is placed on the *Zoom Toshali Sands Consortium v. Indian Railways Catering & Tourism Corporation Ltd.*¹ to contend that no unilateral change can be made in the draft agreement which formed part of the tender/bid documents. Any unilateral change by one of the parties shall not be binding upon the other party and shall be in nullity. Thus, The Arbitral Award is

¹ ILR (2013) IV Delhi 2758



in conflict and in contravention with the public and fundamental policy of Indian Law under Section 34(2)(B) of the Act. In this regard, reliance has been placed on *Delhi Development Authority v. Joint Action Committee, SFS Flats*² and *Patel Engineering Ltd. V. North Eastern Electric Power Corp*³.

- 6.4 Further, placing reliance on the Supreme Court judgment in *Veena Singh v District Registrar*⁴, it was contended that the parties to the agreement must be *ad idem* and mere signing of a document does not prove its execution.
- 6.5 There is no delay or laches on part of the Appellant. It is only upon receipt of SCN from Respondent that the Appellant became aware of pending dues. The Appellant had not at any time accepted either in writing or by conduct, the terms of lease deed dated 02.11.2006 and thus, the Appellant was not bound by it.

CONTENTIONS OF THE RESPONDENT:

7. The Respondent, on the other hand, has contended:
- 7.1 That there is no infirmity either with the Arbitral Award or the Impugned Judgment. The Arbitrator has examined the clauses of the Tender document, the proforma lease deed and other documents executed between the parties as well as the evidence produced by the parties in great detail.

² (2008) 2 SCC 672

³ (2020) 7 SCC 167

⁴ (2022) 7 SCC 1



- 7.2 Some of the contentions raised by the Appellant have also been accepted in the Arbitral Award including the issue that the said property in question was not a dormitory but a commercial built-up property.
- 7.3 Since, the Appellant was unable to discharge the burden of proof with respect to the claims made by him, the claims of the Appellant were disallowed.
- 7.4 The proforma lease deed is in the nature of a sample document, to be relied upon only in the case of plots where construction was to be done by a lessee. While the case of the Appellant is that he has been allotted a built-up property by the Respondent.
- 7.5 The Appellant failed to make payment of the amounts due, in time and thus, is liable to pay the interest at the rate of 15 percent per annum as set forth in Clause III of the lease deed dated 02.11.2006.
- 7.6 After the lease deed dated 02.11.2006 was executed between the parties, the Appellant has been in continuous possession, occupation and use of the Property and it is only in 2013, that he has raised objections to the signed and executed lease deed dated 02.11.2006. These objections are, thus, barred by delay and latches.

ANALYSIS:

8. The contentions raised by the Appellant before this Court have also been raised by him before the Arbitrator and the learned District Judge. The Appellant has contended that the Arbitral



Award is in contravention of the fundamental public policy of India in view of the fact that the parties were not *ad idem* to the contract.

- 8.1 Referring to Section 62 of the Contract Act and the judgment of a Coordinate Bench of this Court in the ***Zoom-Toshali*** case, it has been contended that one party cannot unilaterally change the terms of the agreement and unilateral changes made to a draft agreement which is part of a tender or a bid document are not binding on the party who did not consent to such change.
9. Section 62 of the Contract Act provides that where the parties agree to substitute a new contract, the original contract need not be performed. Section 62 of the Contract Act reads:

“62. Effect of novation, rescission, and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.

- 9.1 The facts in the ***Zoom-Toshali*** case are, however, distinguishable. The party aggrieved was awarded a licence for developing and maintaining a hotel at Bhubaneswar. After the grant of licence, an exchange of several communications took place between the parties negotiating the terms of the licence agreement. Thereafter, a proposed licence agreement was sent for signatures. It is contended that there were various material changes in the final agreement sent *vis-a-vis* the documents annexed along with the tender. Subsequently, since the formal licence agreement was not



executed, the licence was cancelled and the security deposit forfeited. The party aggrieved contended that certain clauses of draft agreement were at variance with the formal agreement incorporated as part of the tender document. It was in these circumstances that a Coordinate Bench, while relying on the **DDA-SFS Flats** case, held that since parties were not *ad-idem*, the principle of novation applied.

- 9.2 In the present case, the lease deed was executed by the Appellant on 02.11.2006 and thereafter, the Appellant was put in possession of the Property. No communication has been placed on record to show that at any point in time a protest or challenge was raised by the Appellant that the lease deed dated 02.11.2006 was not in accordance with the proforma lease deed. The only document placed on record by the Appellant in this regard is the Reply to the SCN dated 17.09.2013, a protest almost seven years later.
- 9.3 It is settled law that once a party has benefited from and acted on an agreement, it cannot challenge the same at a subsequent stage. The Appellant has benefitted from the lease deed dated 02.11.2006 and acquiesced to its terms by not taking any action on the change to the terms of the proforma lease deed. As a consequence, it is not open to the party that has acquiesced by its conduct, to insist upon the compliance of the original terms. The Supreme Court in **Union**



*of India v. N. Murugesan*⁵ has held that the Common law/Scots law principle of approbate and reprobate exists to uphold fairness and operates as a form of estoppel tied to a party's conduct, one who benefits from a signed contract cannot be permitted to question the same.

9.4 The relevant extract of the case reads:

" Approbate and reprobate

26. These phrases are borrowed from the Scots law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally."

[Emphasis is ours]

9.5 The Appellant executed lease deed dated 02.11.2006 and obtained possession of the Property and utilised the same, while defaulting on the payment of ground rent. No party can be permitted to

⁵ (2022) 2 SCC 25



approve and reprobate in this manner. Reliance on the *Zoom Toshali* case by the Appellant is misplaced.

10. It has been contended that the Arbitrator and the learned District Judge has erred in disregarding Clause IV of the proforma lease deed which stipulates that the allottee shall be deemed to have agreed to all the terms and conditions present in the document. However, Clause IV begins with the sentence '*the terms and conditions of the lease are contained in the prescribed form of the perpetual lease deed which can be obtained on payment from the office of the M.C.D.*' A plain reading of this Clause shows that there is another document containing terms and conditions of the lease which is to be obtained by a bidder stating that there are other conditions of the lease which are also present. The relevant extract of Clause IV is below:

"IV. LEASE DEED AND OTHER CONDITIONS OF LEASE:

- 1. The terms and conditions of the lease are contained in the prescribed form of the perpetual lease deed which can be obtained on payment from the office of the M.C.D. The allottee shall be deemed to have agreed to all the terms and conditions contained therein. The allottee shall submit the lease deed duly stamped by the Collector of Stamps within a period of two months from the date of payment by him of the balance premium. However, the Commissioner can in his absolute discretion extend this period of two months suitably for good and sufficient reasons.**
- 2. The following are the other main conditions of the lease:...."**

[Emphasis is ours]

- 10.1 In the present case, it is not disputed that once the contract was awarded to the Appellant, perpetual lease deed dated 02.11.2006



was executed by the parties. In fact, the lease deed is duly executed by the Appellant and is signed on each page with stamp of the Appellant also appearing on each page signed.

- 10.2 It is argued on behalf of the Appellant that if the parties are not *ad-idem*, merely signing of documents does not prove execution while relying on the *Veena Singh* case. This Judgment was in a case where a document under challenge alleging fraud and undue influence exercised and the signatory, was a person who did not understand the terms of the agreements but had signed and put a thumb impression. It was in this context that the Supreme Court had held that the meaning of "execution" is that the admission of one's signature on a document is not equivalent to an admission of its execution.
- 10.3 No such plea of undue influence has been taken here by the Appellant. Reliance on this Judgment is, thus, erroneous as well.
11. In support of its contention that the Arbitral proceedings are not barred on account of delay and laches, the Appellant has relied upon Section 17 and 59 of the Limitation Act, 1963 to submit that limitation begins from the date of knowledge and the Appellant only became aware of the change in the terms and conditions after the receipt of the SCN on 13.09.2013, whereupon this change was challenged immediately on 17.09.2013.
- 11.1 This contention of the Appellant is completely misconceived. A review of the SCN shows that the Appellant made the following



payments to the Respondent:

- (i) Rs.3,82,950/- on 06.06.2006;
- (ii) Rs.7,65,000/- on 29.12.2009; and
- (iii) Rs.7,65,000/- on 10.10.2011.

11.2 These payments were made by the Appellant without protest or demur but belatedly and in accordance with the terms of the lease deed dated 02.11.2006. Clause I of the lease deed dated 02.11.2006 provides that yearly rental in advance at the rate of 2.5% of the premium shall be paid. The premium paid for this property is Rs.1,53,18,000/-. Thus, 2.5% of the ground rent is Rs.3,82,950/-, which is the amount paid by the Appellant.

11.3 The periodic payments made have been in the sum of Rs. 3,82,500/- or multiples thereof, by the Appellant. There was no reason for the Appellant to make payment as has been made by him from June, 2006 onwards, at 2.5% of the premium for the Property, if he was not aware of the same.

12. There is another fact which is of relevance. It has initially been stated in the pleadings before the Arbitrator that the changed and modified terms as stated in the lease deed dated 02.11.2006 were never brought to the knowledge of the Appellant by the Respondent and that he has become aware around "2011". The contents of paragraph 10 of the Rejoinder / Replication filed by the Appellant before the Arbitrator is extracted below:

" 10. The contents of preliminary objection No. 10 as stated are not



correct. The changed and modified terms and conditions as stated in the lease deed were not noticed by the claimants and were never brought to their knowledge by the respondents. The claimants relying upon the fact that the respondents were State Municipal Corporation and would not try to act in an under hand manner, never doubted the fact that the terms and conditions of the lease would be changed from the terms and conditions of the lease advertised with the tender bid. The said fraud which was committed by the respondents at the back of the claimant came to the knowledge of the claimants only around the year 2011 when an issue as regards non payment of ground rent arose between the parties...."

[Emphasis is ours]

12.1 The Appellant in the Section 34 Petition filed, contended that certain payments were made from time to time, "on account" by the Appellant after execution of the lease deed. There is no reference to knowledge in 2011. Paragraph 18 of Section 34 Petition reads:

"18. That the petitioner over the period, after execution of the lease deed, even deposited the necessary lease premium with the respondent authority from time to time and paid certain amounts to them as ground rent, on account."

[Emphasis is ours]

12.2 However, in the Appeal paper book, it is contended in paragraph 8 (viii) and (ix), that the Appellant gained knowledge upon receipt of the SCN. Clearly the stand taken by the Appellant has varied before various fora and cannot be believed as genuine.

13. The Appellant has contended that the Arbitral Award is in contravention of the public policy of India and is perverse and patently illegal. It is contended that the findings of the Arbitrator



that the Respondent was not bound by the terms of the Tender document, is perverse. Thus, the Arbitral Award is liable to be set aside.

- 13.1 In exercise of powers under Section 37 of the Act, the scope of interference of the Courts is narrow. Where the Arbitrator has assessed the evidence and material placed before him while considering the objections to the Award, the Court does not sit as a Court of Appeal or re- appreciate and re-assess the evidence. Unless there is a patent illegality or perversity, interference by the Court is not warranted. Merely because another view is possible, the Court will not interdict the Award.
- 13.2 The Supreme Court in *Delhi Airport Metro Express (P) Ltd. v. DMRC*⁶, has held that the Arbitral Tribunal is the final authority both on facts and in law and contravention of law not linked to public policy is beyond the scope of judicial interference under “patent illegality”.::

*“28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. **There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent**”*

⁶ (2022) 1 SCC 131



illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality".

[Emphasis is ours]

CONCLUSION:

14. In view of the foregoing discussion, we find that there is no patent illegality in the Arbitral Award which goes to the root of the matter nor is there any contravention of law linked to public



policy/public interest. We, therefore, find no ground to interfere with the Impugned Judgment.

15. The Appeal and all pending Application(s) are thus, dismissed.

(TARA VITASTA GANJU)
JUDGE

(RAJIV SHAKDHER)
JUDGE

DECEMBER 18, 2023/r