
(2013) 05 DEL CK 0126

In the Delhi High Court

Case No : Arbitration Petition No. 103 of 2012

P.L. Kalra

APPELLANT

Vs

Braham Dutt Saini

RESPONDENT

Date of Decision : 31-05-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(4), 11(5), 11(6), 37
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Citation : (2013) 05 DEL CK 0126

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Neeraj Jain, for the Appellant; Shalabh Gupta, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Singh, J.—The abovementioned petition has been filed by the petitioner u/s 11 of the Arbitration & Conciliation Act, 1996 for appointment of Arbitrator (hereinafter referred to as "the Act"). Brief facts as mentioned in the petition are that the petitioner is the owner of the property bearing No. Z-45/2, Okhla Industrial Area, Phase-II, New Delhi. By agreement dated 1st July, 1999, the petitioner let out the covered space measuring 2330 Sq.ft. out of the total covered area of the said property to the respondent for the purposes of running his factory for dyeing and packaging. The respondent was to pay a sum of Rs. 9,000/- per month along with the increase of 10% in the monthly rental after every two years for the said let out portion.

2. The case of the petitioner is that the respondent illegally encroached and took possession of the mezzanine floor (measuring 600 sq. ft.), the open space (measuring 4000 sq. ft.) of the said property about which he came to know in May, 2002 thereby he immediately got a notice served, which however duly served but was neither replied nor complied by the respondent who kept on promising to vacate, pay the entire arrears of rentals.

3. The petitioner thereafter, terminated the tenancy vide notice dated 27th January, 2004 with effect from 28th February, 2004 and demanded the vacant possession of his property along with the entire rentals due up to date in respect of the portion let out also for the portion illegally encroached, occupied by the respondent.

4. As the respondent paid no heed to the above notice, the petitioner was constrained to file a suit for recovery of rent and damages. During pendency of the said proceedings, the respondent challenged the framing of issues by way of filing the Civil Revision Petition wherein this Court by order dated 31st January, 2007 appointed the sole Arbitrator to adjudicate the dispute between the parties in view of the arbitration clause in the agreement. The sole Arbitrator published/ passed award dated 23rd November, 2007 holding the respondent liable to pay arrears of rent along with damages on account of use of Mezzanine floor, open space, along with interest.

5. As the respondent continued to be in possession of the property despite passing of the award but the same was vacated, possession was handed over on 16th December, 2009 on the intervention/direction of this court therefore the contention of the petitioner is that the respondent is liable to pay the rent along with damages for unauthorized use, occupation of their property during the period 23rd November, 2007 up till 16th December, 2009.

6. The respondent challenged the award by filing of OMP No. 142/2008. The same was dismissed by order dated 4th January, 2011.

7. In respondent's appeal u/s 37 of the Act, being FAO(OS) No. 119/2011 against order dated 4th November, 2011 dismissing O.M.P. No. 142/2008 was dismissed by the Division Bench vide order dated 13th October, 2011 along with costs of Rs. 1 lac. Thereafter the respondent filed SLP in the Supreme Court being SLP No. 31327/2011 which was also dismissed on 28th November, 2011.

8. Prior to dismissal of appeal by the Division Bench and SLP, a notice dated 2nd April, 2011 was served upon the respondent by the petitioner demanding total sum of Rs. 29,21,497/- alongwith simple interest @ 24% per annum till the payment on various heads, the details of the same are given in paras 10 to 13 of the notice which reproduce here below:

10. That for the period 23.11.2007 to the date of vacation i.e. 16.12.2009 you are liable to pay (1) on account of rent for area measuring 2330 sq.ft. a sum of Rs. 3,40,233/-, (2) damages for unauthorized use and occupation of mezzanine floor measuring 600 sq. ft. @ Rs. 18/- per sq. ft. Rs. 2,22,900/- (3) damages for unauthorized use and occupation of open space admeasuring 4,000 sq. ft. @ Rs. 10/- per sq. ft. Rs. 9,90,659/-, totaling to Rs. 15,53,792/- alongwith interest on the above sum @ 24% from the date of vacation i.e. 16.12.2009 till 31.03.2011 amounting to Rs. 4,82,695/-, the sum total on this account being Rs. 20,36,487/-.

11. That in addition you are liable to pay the bill for the electricity consumed by you as per the bill dated 21.2.2008 amounting to Rs. 1,67,890/-.

12. That further in addition to the above and in accordance with clause 6 of the agreement, you are liable to pay 50% of the penalty imposed by DDA on account of subletting charges in the sum of Rs. 7,17,120/- (Total penalty imposed being Rs. 14,34,240/-).

13. In the premises, mentioned above, I hereby call upon you, the notice by way of this legal notice, to immediately and not later than 15 days from the date of receipt of this notice, take all possible steps to pay to my client a sum of Rs. 29,21,497/- alongwith further simple interest @ 24% per annum till the date of payment.

9. By the present petition, the petitioner seeks the appointment of an independent arbitrator to adjudicate the liability of the respondent. Some interim order is also sought for appointment of Receiver and interim injunction against the respondent. The petitioner valued his claim now at Rs. 35,35,012/- which includes the demanded amount as per notice and interest accrued @24% up to 15th February, 2012.

10. In his reply, various objections have been taken by the respondents; the first one is that no notice for appointment of a new arbitrator was served by the petitioner who has failed to take any step to seek consent of the respondent for appointment of a common Arbitrator in terms of Clause 14 of the Business Collaboration Agreement dated 1st July, 1999 between the parties.

11. Second submission is that the petitioner should have opted to take recourse as available in law against the said award, however he never challenged the said award which obtained finality also he never demanded the alleged rent or damages for the period 23rd November, 2007 to 16th December, 2009 either before the Single Judge or division bench of this court or even before the Supreme Court of India so now by filing the present petition he is trying to challenge the said award indirectly which isn't permissible.

12. His third argument is that the petitioner ought to have included his entire claims in his earlier claim petition before the learned sole Arbitrator. After passing of the award, now the same very claims are barred under Order II Rule 2 of the Code of Civil Procedure, 1908 and the petitioner is now precluded to raise said claims.

13. Lastly, it is submitted by the respondent that the actual possession, control of the premises in question was already with the petitioner as the award reads as, "He is therefore liable to leave the premises as the actual physical possession and control of the said premises has always been with the claimant" and the respondent only handed over the duplicate set of keys to the petitioner so the petitioner cannot be termed as unauthorized occupant of the said premises moreover as no award relating to the claims of the applicant till the date of

handing over of the constructive possession of the premises in question has been passed in favour of the petitioner thus no liability arises towards him of any such alleged damages. He has already paid amount towards the electricity consumed as per sub-meter to the petitioner in terms of clause 12 of the said agreement moreover he had closed the business from the said premises but was only having a duplicate set of keys so there was no occasion for him to pay any of the electricity bills for consumption of the electricity which he never used.

14. As far as the arguments addressed by both parties with regard to the merit of the case are concerned, it is not necessary to decide all the submissions raised by them. The respondent has disputed the fact that there was an agreement between the parties which contained the Arbitration clause. It is also denied by the counsel for the respondent that after passing the award, the petitioner has raised certain disputes. His submission is that in any case, if the disputes are arbitrable, the notice under Clause 14 of the Agreement was mandatory. It is evident from the record that no notice was served upon the respondent in terms of Clause 14. The notice dated 2nd April, 2011, if perused there is no whisper about the compliance of Clause 14. It is merely mentioned that if the amount due is not paid, the petitioner would take civil and criminal action against the respondent.

15. Learned counsel appearing on behalf of the petitioner has argued that the present proceedings are, in fact, in continuation of earlier proceedings, therefore, it is not necessary to issue specific notice to invoke arbitration proceedings. As there was no compliance of award on the part of the respondent who failed to pay amount due towards rent and damages for the subsequent period, the petitioner left with no option but to file the present petition. Learned counsel relied upon paras 12 and 13 of the decision of this Court in the case of Civtech Engineers Pvt. Ltd. Vs. M.N. Securities (P) Ltd. passed in Arb. P. No. 93/2010. Relevant paras are as under:

12. No doubt, if the notice of invocation of arbitration is not issued to the appointing authority, calling upon him to appoint the arbitrator, then a petition filed u/s 11(6) would not be maintainable, and the same would be rejected at the threshold by the Chief Justice or his nominee. However, if in a given situation, a petition u/s 11(6) has been entertained and notice of the petition issued to the respondent/appointing authority on the basis of averments made in the petition, the appointing authority would be obliged to take cognizance of the petition, treat it as a notice invoking arbitration, and to perform his duty to appoint the arbitrator.

13. In such a case, if, despite the issuance of the Court notice on a petition u/s 11(6), the appointing authority fails to constitute the arbitral tribunal, and by the time the petition u/s 11(6) is taken up for consideration by the Chief Justice or his nominee the time reserved under the agreement for the purpose of appointment, or a reasonable time (in other cases) has expired, the right to make the appointment would stand forfeited and the Court would appoint the

arbitrator.

16. The decision referred, as mentioned above, has no application to the facts and circumstances of the present case, as the facts are materially different. In the present case, the petitioner has not followed the procedure stipulated in Clause 14 of the agreement which says that any misunderstanding/dispute between the principal and supervisor would be settled by the common arbitrator of both the parties.

17. In view of such situation, rather the judgment referred by the respondent is squarely covered to the facts of the present case, the same is Kailash Prajapati Vs. Citicorp Finance(I) Ltd., Relevant paras 6 and 7 are reproduced below:

6. I have heard counsel or the petitioner and also perused the petition. In my view the petitioner has failed to satisfy the basic ingredients essential to the very maintainability of the present petition u/s 11(6) of Arbitration and Conciliation Act, 1996. The fact that the respondent had filed a petition u/s 9 of Arbitration and Conciliation Act, 1996, against the petitioner herein as also keeping in view that in a notice issued by respondent to the petitioner, the respondent had stated that in case the petitioner does not pay the amounts appropriate action would be initiated would not amount to issuance of notice for appointment of an Arbitrator in terms of Section 11(4) of Arbitration and Conciliation Act, 1996. Not only it is mandatory for the petitioner to issue a notice prior to the filing of the petitioner u/s 11(6) of Arbitration and Conciliation Act, the contents of the notice should be clear and unambiguous and further the petitioner must place on record reasonable proof of service [See 2005 Arb.LR. 225 : R.A.J. 132 (Del) Varun Associates Vs. Army Welfare Housing Organisation,

7. A bare reading of the Section would show that there has to be strict adherence to the conditions prescribed in Section 11(5) of Arbitration and Conciliation Act as not only the communication must be issued for putting the other side on notice, the party must also wait for thirty days before invoking the jurisdiction of the Chief Justices designate.

18. Therefore, in the absence of requirement, the present petition is not maintainable. However, the petitioner is not precluded from filing a fresh petition after the compliance is met with, under Clause 14 of the agreement. The present petition is disposed of accordingly. No costs.