

(2009) 07 DEL CK 0431

In the Delhi High Court

Case No : CS (OS) 647A of 1998 and 715A of 1998

Selected Marble Home and Others

APPELLANT

Vs

Arun Kumar Kamal Kumar and Others

RESPONDENT

Date of Decision : 24-07-2009

Acts Referred:

Arbitration Act, 1940 — Section 14, 15, 16, 17, 20
Civil Procedure Code, 1908 (CPC) — Section 152
Delhi Rent Control Act, 1958 — Section 25B
Transfer of Property Act, 1882 — Section 108

Citation : (2009) 07 DEL CK 0431

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Kuljeet Rawal, for the Appellant; Rakesh Khanna, Sr Advocate and Reetesh Singh, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—CS(OS) 647A/1998 was filed by the petitioners M/s Selected Marble Home, Shri Anil Kumar Jain and Shri Bhim Sain Jain under Sections 14 and 17 of the Arbitration Act, 1940 for the reliefs of filing of arbitral award dated 16th March, 1998 in this Court and issuance of notice thereof to the parties. The arbitrator independently filed the award in this Court and which was registered as CS(OS)715A/1998 and notice thereof issued to the parties. Thereafter CS(OS) 647A/1998 was merely adjourned from time to time alongwith the CS(OS) 715A/1998. Upon notice of filing of the award being issued to the parties, two sets of objections came to be filed. IA. No. 5421/1998 has been preferred under Sections 15, 16, 30 and 33 of the 1940 Act by the Respondents M/s Arun Kumar Kamal Kumar, Shri Arun Kumar Gupta and Shri Kamal Kumar Gupta. IA. No. 5568/1998 also under Sections 15, 16, 30 and 33 of the Act was filed by M/s Nathu's Sweets, Bengali Market. The petitioners did not file any objections to the award and have supported the award. The petitioners in reply to the objections of M/s Nathu's Sweets pleaded that the said Nathu's

Sweets was not a party to the arbitration proceedings and there was no award against them and they had no right to prefer objections; it was further contended that the position with respect to the said Nathu's Sweets had been clarified in the award. The record shows that none has been appearing for the said Nathu's Sweets in the present proceedings and none appeared to address arguments also. The petitioners also do not claim any relief against the said Nathu's Sweets under the award. The award is also not found against the said Nathu's Sweets. Nathu's Sweets are not impleaded as party even in CS(OS) 647A/998. IA. No. 5568/1998 is thus dismissed. IA. No. 5421/1998 of the respondents is for consideration.

2. The petitioner No. 3 Shri Bhim Sain Jain, it may be recorded, died during the pendency of the proceedings before this Court and vide order dated 29th November, 2007 his legal representatives were substituted.

3. The disputes arose out of two agreements both dated 27th August, 1990 containing an arbitration clause. In both the agreements the respective petitioner/s party thereto are described as the licensors and the respondents as the licensee. Under the said agreements the petitioners as licensors allowed use of their premises at 1/26-A, Lalitha Park, Vikas Mark, Laxmi Nagar, Delhi on commission basis to the respondents as licensee, for sale of goods under the trademark Nathu's Sweets. The said agreement records the relationship between the parties to have commenced w.e.f. 1st August, 1990. The respondents as licensee, inter alia, agreed to pay to the petitioners/licensors total commission under the two agreements, of 11% of the gross sales i.e., net of sales tax.

4. Disputes and differences having arisen between the parties with respect to the two agreements, Suit No. 3708A/1991 u/s 20 of the Act came to be filed by the petitioners against the respondents. Vide order dated 18th September, 1995 in the said suit a retired judge of this Court was appointed as the arbitrator.

5. The arbitrator has, vide award dated 16th March, 1998, inter alia, held:

i. that the respondents were licensees under the petitioners with respect to the premises. The claim of the respondents of being a tenant in the said premises under the petitioners was negated;

ii. that the respondents are liable to pay to the petitioners a sum of Rs 12,793/- and Rs 5072/- respectively, i.e., total Rs 17,865/- towards balance commission for the period 15th August, 1990 to February, 1991;

iii. that the respondents are also liable to pay to the petitioners compensation for the period from March 1991 to October, 1995 during which period the shop/ premises admittedly remained closed. The arbitrator found that the commission in terms of the agreements was paid from 15th August, 1990 to February 1991 at an average rate of 59,000/- per month and after reopening of the shop commission was due from November 1995 to November, 1997 at an average rate of Rs 67,736/- per month. The arbitrator held that the compensation payable for

the period in between i.e., from March 1991 to October 1995 was to be the average of commission for the period prior to the closure of the shop and on reopening of the shop and thus directed payment for the said period @ Rs 63,368/- per month;

iv. that commission from November 1995 to November 1997 of Rs 16,93,407.75p was due from respondents to petitioners. The said commission was computed as per the statement of accounts for the said period filed by the respondents and not objected to by the petitioners. It may be clarified, this amount was arrived at after deduction of tax at source and for which requisite certificate directed to be issued by respondents;

v. the arbitrator also awarded commission from December 1997 to the date of the award to the petitioners against the respondents @ Rs 67,736.31p per month, being the average commission per month calculated from the statement of accounts for the period November 1995 to November 1997 furnished by the respondents;

vi. interest @ 16% was also awarded;

vii. the respondents were directed to deliver peaceful vacant possession of the premises to the petitioners;

viii. the respondents upon failure to deliver possession of the premises to the petitioners within a month of the award were held liable to pay a sum of Rs 1 lac per month to the petitioners till the date of delivery of possession;

ix. the arbitrator further found that the connected electricity load in the premises was not sufficient for the respondents to run their business;

x. that the closure of the shop of the respondents in the said premises from March, 1991 to October, 1995 was not attributable to the petitioners;

xi. that the respondents are not entitled to any damages from the petitioners.

6. I have hereinabove not enumerated the other findings/awards on the claims of the petitioners which were dismissed and / or with respect where to no objections have been preferred or which are not relevant for the present purposes.

7. As far as award of delivery of possession is concerned it may be noticed that during the pendency of the proceedings before this Court on 13th March, 2000 the respondents delivered and the petitioners accepted the possession of the premises without prejudice to their respective rights and contentions. Similarly, on 12th March, 1999 and as recorded in the order of that date, the respondents agreed to pay to the petitioners the award amount for the balance commission from 15th August, 1990 to February 1991, the commission from November 1995 to 15th March, 1998. The record (orders dated 11th May, 1999 and 1st July, 1999) shows the amount of Rs 17,45,810/- to have been deposited by the respondents and released to the petitioners. Thus, the dispute survives with respect to the amounts awarded from March, 1991 to October, 1995 when the

shop remained closed and for the period of post award i.e. from 16th March, 1998 till 13th March, 2000 when possession was delivered and for interest. The senior counsel for the respondents has also confined his submissions to the surviving aspects alone.

8. The award records and it is not disputed that the arbitrator had directed the respondents to file before the arbitrator their statements of sales w.e.f. November, 1995 onwards to determine the commission payable in terms of the agreement to the petitioners. The respondents, in response to the said direction, filed a statement showing the sales from November, 1995 to November, 1997. The respondents in the said statement also showed the expenses incurred by them on the diesel generator set installed in the premises. The respondents deducted the expenses towards the said diesel generator set from the sales shown and arrived at the figure of sales net of expenses incurred on running the diesel generator set and accordingly calculated the commission i.e. of 5% of the share of petitioner No. 1 and 6% of the share of the petitioner No. 3. The said statement is reproduced by the arbitrator at internal page 30 of the award. The petitioners did not file any objections to the said statements filed by the respondents and the arbitrator accordingly accepted the same and on the basis thereof passed an award for commission for the said period in favour of the petitioners and against the respondents and payment whereof as aforesaid has also been made.

9. The contention of the senior counsel for the respondents, inter alia, is that a mistake occurred in the said statement submitted by the respondents to the arbitrator. It is urged that the sales shown therein are gross sales and not net of sales tax as was the agreement. It is further contended that the expenses on the diesel generator set were erroneously deducted from the sales shown, while the same ought to have been deducted from the commission found due to the petitioners. It is contended that if the said corrections are carried out, the average commission per month for the period November 1995 to November 1997 will be about Rs 29,000/- per month instead of Rs 67,736.31p as computed by arbitrator on basis of said statement; resultantly the compensation payable for the period March 1991 and October 1995, calculated by the arbitrator on basis of same will also considerably come down.

10. The senior counsel for respondents further urges that the aforesaid are mathematical errors and apparent on the face of the record.

11. Per contra, the counsel for the petitioners has urged that there is no mistake and the contention now of the respondents is an afterthought. He urges that the respondents have not only themselves filed the statement with which they are bound but have also deducted at source and paid taxes on the commission shown to be due in the statement aforesaid. This contention is not controverted by the senior counsel for the respondents. All that has been said is that the statement was given as per the books of account of the respondents and since the mistake had occurred in the books of account also, tax was deducted and

paid in accordance with the said mistake only and that is no ground for not interfering with the award.

12. I have inquired from the senior counsel for the respondents as to whether any material has been placed on record to show that there is any such mistake viz as to how much sales tax was paid for the months aforesaid or returns filed with various authorities showing the sales. The senior counsel has stated that though no such material has been placed on record but the record must be existing and upon opportunity being given, the said material will be placed on record. The matter being old, the usual issues having been framed on 3rd August, 2005 and the parties having already availed the opportunity of filing affidavits by way of evidence, the request for further time was declined. I may notice that in the affidavit by way of evidence filed by the respondents before this Court except for a bare averment in this regard no proof of any mistake in the statement submitted by the respondents themselves before the arbitrator has been placed. Thus, there is no material in support of averment that there is a mistake.

13. The statement filed by the respondents before the arbitrator has been perused by me. The same merely gives the figures under the columns described as "sales" and not as "gross sales". The respondents who are astute businessmen are presumed to have made the statement showing "sales" as sales which were to be accounted for the purpose of computation of the commission i.e., net of sales tax and there is nothing before this Court to presume otherwise. This is without considering, if at all the respondents can be permitted to withdraw admission at this stage of the proceedings.

14. The counsel for the respondents, after conclusion of hearing has handed over in the court a written note of arguments alongwith case law (which was not cited during hearing). Reliance therein is placed on:

a) Alopri Parshad and Sons Ltd. Vs. Union of India (UOI), on the principle of quantum meruit.

The reliance on this judgment is misconceived. Here the petitioners were merely to provide their premises with electricity to the respondents and which was so provided. The arbitrator has held the closure of shop to be not attributable to petitioners. For electricity, the expenses of generator set were accounted for by the respondents themselves. Thus no question of quantum meruit arises.

b) Bharat Coking Coal Ltd. Vs. Annapurna Construction, on arbitrator being not competent to award damages beyond the terms of agreement.

This question also does not arise in present case. The arbitrator has made the award as per statement submitted by respondents and which the respondents are presumed to have prepared as per terms of agreement. The question here is whether the respondents are entitled to withdraw their statement at this stage.

c) Tilak Raj Vs. Baikunthi Devi (D) by LRs., where mistake in decree in

description of immovable property owing to such mistake in plaint itself was held to be of clerical nature and correctible u/s 152 CPC.

Reliance on this judgment is also misconceived. In that case there was no dispute as to the identity of the property and error was only in description. Here, the respondents in spite of reopening of the shop failed to pay any commission to petitioners. The arbitrator determined the same on basis of statement furnished by petitioners and on which basis petitioners had also paid tax. Now, belatedly in challenge to award mistake is alleged. Such mistake cannot be equated to mistake in case before the Supreme Court.

d) American Refrigeration Co. Ltd. Vs. The All India Institute of Medical Sciences,
This was also not a case of correction of any mistake in a statement filed by the party before the arbitrator.

e) Ajanta Builders v. BHEL (2007) 93 DRJ 545.

In this case calculation errors in the award were corrected by the court. The question in the present case is of allowing the respondents to withdraw their admission before the arbitrator and on basis whereof monies have been awarded against respondents.

f) The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board, holding mistake in calculating market value by wrongly excluding certain payment to be misconduct of arbitrator.

In this case, the arbitrator valued an electric undertaking acquired by the State Govt. The court interfered with the award for the reason of not finding valuation in the award in accordance with the provisions of Indian Electricity Act, 1910. The mistake was qua the statute and not as in the present case i.e. in making admission before the arbitrator.

15. The other mistake pointed out of deduction of expenses on diesel generator set from sales rather than from commission payable, even if made out, also cannot be permitted to be withdrawn at this stage especially when the respondents have already deducted and paid taxes on the basis of said statement. Under the agreement the electricity and water charges of the premises were to be borne by the petitioners. Admittedly the premises/shop on reopening were without electricity and diesel generator set arranged. There is no dispute that the expenses therefore were to be borne by the petitioners. The respondents while furnishing the statement to arbitrator, did direct the same. The objections now that such deduction was wrongly done is not tenable.

16. The mistake is alleged not on the face of the award but in admission made before the arbitrator. Mistake is sought to be corrected by withdrawal of the admission made before the arbitrator. In my view the same is not permissible.

A. Firstly the law with respect to pleadings before court is now well settled that admissions cannot be permitted to be withdrawn. The statement of accounts filed

by the respondents before the arbitrator was in the nature of pleadings on the claim of petitioners for damages/compensation/commission.

B. Secondly the arbitrator has found and is also borne out as discussed below that the average commission payable/paid between August 1990 and February 1991 was @ Rs 59,000/- per month. It seems probable/believable that average commission after nearly five years from November 1995 to November 1997 was Rs 67,736/- per month. It is highly improbable, as now contended that the commission would be Rs 29,000/- per month.

C. Thirdly the respondents even in the objections preferred by them before this Court and the time for preferring which is of 30 days only from receipt of notice of filing of the award, did not plead any such mistake. The said plea was taken much belatedly and for the first time only in IA. No. 3907/2000. Such belated plea also creates serious doubts as to the correctness thereof and the possibility of the same being a figment of imagination or creation of advocacy skills cannot be ruled out. If there had been any mistake, the same even if committed ought to have been detected at the time of finalization of the annual accounts or at the time of filing the income tax and other returns for the relevant period. Nothing of this sort is shown to have happened. There is nothing to indicate as to how and when and on what material the respondents realized that such a mistake had occurred.

D. With respect to Section 25B of the Delhi Rent Control Act, providing for a limitation of 15 days for filing application for leave to defend the petition for eviction, this Court in Vinod Industries (P) Ltd. Vs. Suraj Kumari and in Chetan Lal Jain Vs. Manohar Lal Vohra, has taken a view that after 15 days the application cannot be permitted to be amended, specially to withdraw admissions or to take inconsistent pleas. The purpose of arbitration is expediency. Only 30 days limitation is provided for preferring objections to the award. New objections cannot be permitted to be taken after the limitation has expired and merely because the matter is pending.

E. I also find that the respondents have willingly on 12th March, 1999 agreed to pay the commission awarded for the period from November, 1995 till 15th March, 1998 @ Rs 67,736/- per month. The award to that extent already stands implemented / executed. The respondents cannot now be heard to contest the same.

F. Lastly, in my view the respondents after having deducted and paid the tax and made the payments to the petitioners in accordance with the said statements are now not entitled to poke holes in the same and objection in that respect is rejected.

17. The senior counsel for the respondents next contended that the finding of the arbitrator of average commission for August 1990 to February 1991 being of Rs 59,000/- per month is not correct. However, the counsel for the petitioners has demonstrated that it was the admitted case of the parties before the arbitrator

that for the said period commission of Rs 1,58,134/- to one of the petitioners and of Rs 2,01,285.82p to the other petitioner was due. The balance commission of Rs 17,865/- for the said period was awarded on this basis. Thus, the commission for about six months from 15th August, 1990 to February 1991 works out to Rs 3,59,419.82p i.e. of Rs 59,903/- per month. The senior counsel for the respondents did not dispute the said position. Moreover, I find that the respondents have in the order dated 12th March, 1999 accepted the award for the balance commission of Rs 17,865/- for the said period and for this reason also the respondents are now not entitled to challenge the finding of the arbitrator of the commission per month for the said period being Rs 59,000/- per month.

18. The senior counsel for the respondents has also drawn attention to Section 15(c) of the 1940 Act and contended that the court is empowered to correct the mistakes. However, the said provision deals with clerical mistakes or errors arising from an accidental slip or omission contained in the award. It is not the case here that there is any clerical mistake or error in the award. The mistake is alleged in the statement of accounts of the respondents themselves filed by the respondents before the arbitrator. The same would be outside the ambit of Section 15(c) of the Act.

19. The senior counsel for the respondents also sought to challenge the jurisdiction of the arbitrator to award damages/compensation to the petitioners for the period the shop remained closed. It was urged that it was a term of the agreement that no rent was payable by the respondents to the petitioners. The arguments appears to be that commission was payable only when sales were effected from the premises and not when there were no sales i.e., when the shop was lying closed.

20. I find it has been the case of the respondents that the transaction between the parties was of tenancy and not of a licence. It is so pleaded in the objections also. Even if the respondents consider themselves to be tenants at the rent equivalent to commission @ 11% per month, the respondents would u/s 108 of the Transfer of Property Act have continued to remain liable for payment of rent, notwithstanding not carrying on business in the premises. It has been held by the Division Bench of this Court in *State Bank of Patiala v. Chandermohan* 1996 RLR 404 held that a tenant continues to be liable for rent/damages even if the premises are destroyed and the only option of the tenant if desirous to stop the running of rent is to surrender the premises. Thus as per the respondents own understanding of the relationship also, the respondents were liable for payment of rent.

21. The arbitrator has given a factual finding of the closure of the shop being owing to the respondents own exigency and being not attributable to the petitioners. Such finding of the arbitrator has neither been challenged nor is challengeable under Sections 30/33 of the Act. The counsel for the petitioners also after conclusion of hearing has filed copies of judgments, of which reference may

be made to Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others, laying down that error of facts committed by arbitrator are not amendable to correction. That being the position, the respondents would certainly be liable to compensate the petitioners and no error can be found with the said logic, reasoning and law applied by the arbitrator.

22. Though no other ground has been urged by the respondents during the hearing but I find that the respondents have in IA. No. 5421/1998 pleaded other grounds also. The other grounds pleaded are found to be in the nature of an appeal to this Court against the award and which is not permissible in law. The respondents had signed the documents with the petitioners whereunder they had agreed to carry out business in the premises of the petitioners as licensee and had expressly ruled out tenancy. The respondents cannot be heard to contend otherwise. It was not even the case that the writing was a sham or was created for any collateral purposes. The respondents are astute businessmen and are presumed to know the effect of their writing. In the absence of any plea to explain the agreement, no error can be found with the award finding the respondents to be licensees and not the tenants. Moreover, I find that with the respondents having of their own volition, during the pendency of the present proceedings having delivered possession, the said objection is not relevant. As aforesaid even if the respondents were the tenants they would still be liable to pay the rent to the petitioners as landlords. The respondents have also pleaded that the Collector of Stamps on reference being made in the suit u/s 20 of the CPC had found the documents liable to stamp duty as a lease. This Court nevertheless thereafter referred the disputes to arbitration and the arbitrator having found the relationship to be of a licensee and licensor and not of landlord/tenant no error/misconduct can be found therewith on the ground of the view expressed by the Collector of Stamps. Objections taken with respect to Nathu's Sweets who chose themselves not to pursue their application also loose significance. There is no award against Nathu's Sweets nor has the arbitrator dealt with a dispute not submitted to him. The other challenges with respect to the factual findings of the arbitrator cannot be gone into at this stage, specially as no other argument has been urged.

23. IA. No. 5421/1998 is accordingly dismissed. The arbitral award dated 16th March, 1998 is made a rule of the court and judgment pronounced in terms thereof. Decree sheet be also drawn up.

24. I also find that vide order dated 5th February, 2001, a sum of Rs 1 lac deposited by respondents was ordered to be kept in fixed deposit. The same with interest accrued thereon be released to the petitioners.