
(2011) 05 DEL CK 0457

In the Delhi High Court

Case No : Arbitration Petition 304 of 2010

Som Datt Construction Company and Another

APPELLANT

Vs

HDFC Bank Limited and Others

RESPONDENT

Date of Decision : 23-05-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2011) 2 ARBLR 444 : (2011) 182 DLT 424 : (2011) 6 RCR(Civil) 450

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Manoj Kumar, for the Appellant; Rishab Raj Jain, for the Respondent

Judgement

Manmohan Singh, J.—By this order I propose to decide the present petition filed u/s 11 of the Arbitration and Conciliation Act, 1996, praying the following prayer:

(a) A proper person as this Hon''ble Court deems fit and proper be appointed as the arbitrator to adjudicate upon all the disputes and differences between the parties under the arbitration clause in the Lease Deed dated 12th September, 2009, including the disputes stated hereinabove;

(b) Ad-interim orders in terms of prayers above;

(c) Costs of and incidental to this application be paid by the Respondents;

(d) Such further or other order or orders be made and direction or direction be given as to this Hon''ble Court may deem fit and proper.

2. It is contended by the Petitioners that since the Respondent No. 1 has refused to concur in the appointment of an arbitrator in terms of the Lease Agreement despite due service of notice in that respect and the same is done by the Respondents in order to unnecessarily delay the adjudication of the dispute between the parties, which has caused severe loss and prejudice to the Petitioners. Therefore, the present petition has been filed by the Petitioners seeking reliefs as mentioned above.

3. The Respondent No. 1 is a banking institution and by lease dated 12.09.2000, the Petitioner No. 1, being the owner of the property, leased out an aggregate super area of 3345 sq. ft. located on the right side of ground floor of the building known as Some Datt Tower, bearing DWG No. CD-K2-04 situated in Sector 18, Noida (hereinafter referred to as "demised premises"), to the predecessor in interest of Respondent No. 1 for a period nine years commencing from 12.09.2000 on the terms and conditions contained in the lease deed.

4. On 30.09.2002, a supplementary agreement was entered into by the Petitioner No. 1 and Respondent No. 1 thereby appointing M/s Som Datt Power Ltd., the Petitioner No. 2, to carry out maintenance work in respect of the demised premises on the terms stipulated therein. The period of subsistence of the said agreement was co-terminus with the lease deed. The predecessor in interest, i.e., Lord Krishna Bank, was taken over by Centurion Bank and latter was again taken over by the Respondent No. 1, i.e., HDFC Bank in May, 2008, and, therefore, the Respondent No. 1 was allowed to use the demised premises as successor in interest of Lord Krishna Bank and the Respondent No. 1 became a tenant/lessee of the Petitioners. Admittedly, the said lease deed along with the supplementary agreement expired on 12.09.2009 by efflux of time and demised premises continued to be in occupation of the Respondent No. 1 without any fresh lease deed executed between the parties and the Respondent No. 1 continued to avail the services at the old rate, without execution of the maintenance agreement.

5. Despite correspondence between the parties, various meetings and some consensus having been arrived at on the material terms, neither fresh lease deed was executed nor lease deed dated 12.09.2000 was renewed between the parties. By relying upon Clause 17 of the lease-deed, which contains arbitration clause, prescribed legal notice dated 17.05.2010 was issued by the Petitioners for appointment of Arbitrator in order to adjudicate the disputes and the same was replied by the Respondent No. 1 on 06.07.2010 denying the allegations of the Petitioners. Therefore, the Petitioners have filed the present petition u/s 11 of the Arbitration and Conciliation Act, 1996.

6. From the pleadings and material placed on record by the parties, it is clear that after the expiry of the term with effect from 12.09.2009, the Respondent No. 1 has been in constant touch with the Petitioner No. 1 for renewal of the lease of the premises in question. It has already been admitted by the Petitioners that numerous correspondences have been exchanged along with the draft lease deed but the terms were not agreed to. The case of the Respondents is that due to the pendency of the approval of the terms of the standard lease deed at the end of the Petitioner No. 1, the Respondents could not have released the rent, maintenance charges and other charges on the ad-hoc basis and the Respondents had been requesting the Petitioner No. 1 to approve the standard lease deed so that the same could immediately be executed and registered as per law. It was Petitioner No. 1 who was adamant and not ready to agree with

the terms of standard lease deed, hence, the Respondents were left with no alternative but to vacate the premises. The Respondent No. 1 had handed over the vacant and peaceful possession of the premises to the Petitioners on 30.11.2010. It is not in dispute that the Respondent No. 1 had already cleared all dues of rent, maintenance charges, diesel charges, late hour charges and restoration charges which were paid to the Petitioners. The Petitioners had accepted the said amount without prejudice to their claims. It is also not disputed by the Petitioners that the possession was handed over by the Respondent No. 1 to the Petitioners on 30.11.2010. Now, the question before this Court is as to whether prayer made by the Petitioners in the petition to refer the disputes the arbitrator for adjudication is to be allowed or not.

7. Before considering the said prayer made in the petition, this Court has to examine the facts from the pleading of the parties and material placed on record as well as the requisite clauses of the lease deed in order to come to the conclusion as to whether there is any live dispute as it is the duty of the Court to examine the same.

8. In the present case, there is a Clause 5(c)(v) of the lease deed between the parties which provides that in the eventuality, wherein the Respondents do not hand over the possession of the premises to the Petitioners even after expiry/ termination/determination of the lease deed, how the said clause would operate between the parties. Clause 5(c) (v) of the lease deed between the parties reads as under:

5. Termination

a) ...

b) ...

c) Consequences of termination:

i) ...

ii)

iii)....

iv)....

v) Consequences of failure to deliver possession - In the event the LESSEE fails to deliver possession of the Demised Premises upon expiry of the lease or its earlier termination while the lessor has offered to refund the unadjusted Rent and maintenance charges paid in advance and any other amounts remaining due to the LESSEE, the LESSEE shall be liable to pay Rent at the enhanced rate which shall be 25% more than the last months rent during the term of the lease and shall be subject to enhancement at the end of every two years by 50% of the last total amount payable every month till such time the Premises are actually handed over to the LESSOR. The payment of the said enhanced Rent shall be

without prejudice to the right of the LESSOR to take steps to recover possession of the Demised Premises from the LESSEE.

9. The said clause clearly indicates that after expiry of the lease deed, in the event that the Respondents do not hand over the vacant and peaceful possession of the premises to the Petitioners, then the Respondents would have to pay an additional 25% over and above the last month's rent paid which would subsist for two years and after that it would be payable at 50% extra. In view of the said clause, it is clear that there is no other claim to be raised by the Petitioners apart from recovery of possession and the amount due in view of Clause 5(c)(v) of the lease deed after expiry of the lease deed pertaining to the rent.

10. The learned Counsel for the Respondents referred to the order dated 22.02.2011 passed earlier wherein it was indicated that the Respondents were ready to hand over two demand drafts; (i) bearing No. 345119 dated 27.12.2010 for a sum of Rs. 11,11,792.05 paisa towards balance rent and after TDS and (ii) bearing No. 345120 dated 27.12.2010 for a sum of Rs. 1,92,118.11 paisa towards balance maintenance charges and after TDS, to the Petitioners towards the full and final settlement. However, the same was not accepted by the Petitioners. The copies of the bank drafts have also been placed on record.

11. The Petitioners, on the other hand, have argued that the Petitioners are entitled to recover a market rent @ Rs. 167 per square feet subsequent to the expiry of the lease deed as the Respondents continued in possession for any reason after the determination of the lease deed dated 12.09.2000. The amounts claimed by the Petitioners are divided under the following categories:

A. Rent (arrears of increase in rent @ 167/- per square feet and interest on the same);

B. Maintenance Charges (arrears of increase in rent @ 20/- per square feet and interest on the same);

C. Service Tax;

D. Unbanked Cheque;

E. Other Outstanding.

12. The Respondent No. 1 has dealt with the claim of the Petitioners in its reply which reads as under:

A. For the Claim under Head A: The Respondent has already paid rent @ 100.95/- square feet to the Petitioner for the period September, 2009 to November 2010 and for the increase of rent [as per Clause 5(c)(v) of the Lease Deed dated September 12, 2000] the Respondent had offered to pay an additional 25% over and above the last month rent paid at time of handing over the possession as well as during the hearing before this Hon'ble Court on February 22, 2011. However, the same was not acceptable to the Petitioners, which is apparently an attempt on the part of the Petitioners to unduly enrich

themselves, and/or indulge in unnecessary and frivolous litigation.

B. For the Claim under Head B: The Respondent has already paid maintenance charges @ 16.02/- per square feet to the Petitioner for the period September, 2009 to November 2010 and for the increase of maintenance charges the Respondent had offered to pay an additional 25% over and above the last month paid maintenance charges at time of handing over the possession as well as during the hearing before this Hon''ble Court on February 22, 2011. It is pertinent to note that the amount that is being offered to the Petitioners is more than what they are claiming. However, the same was not acceptable to the Petitioners, which is apparently an attempt on the part of the Petitioners to unduly enrich themselves, and/or indulge in unnecessary and frivolous litigation.

C. For the Claim under Head C:

SERVICE TAX ON RENT The Service Tax on rent till the month of July 2010 has already paid to the Petitioner No. 1 by the Respondent. For the period from July 2010 to November 2010 i.e. till the date of handing over the possession of the Property, the service tax on rent for a sum of Rs. 1,73,905/- (Rupees One Lakh Seventy Three Thousand Nine Hundred and Five Only) has been paid by the Respondent to the Petitioner No. 1, vide cheque No. 496514 dated March 11, 2011 drawn on HDFC Bank Ltd., which has been sent to the Petitioner No. 1 on March 17, 2011.

SERVICE TAX ON THE MAINTENANCE CHARGES With regard to the Service Tax on the Maintenance Charges, tax till the month of July 2010 already stands paid to the Petitioner No. 2. For the period from August 2010 till November 2010 i.e. till the date of handing over the possession of the Premises, the payment of the service tax on Maintenance Charges i.e a sum of Rs. 22,076/- (Rupees Twenty Two Thousand and Seventy Six Only) is under process with the concerned department of the Respondent and the same shall be paid shortly to the Petitioner No. 2.

It is pertinent to note that the Service Tax on the Rent and Maintenance is on the amount of Rent and Maintenance Charges, which are calculated at the rate that the Respondent is ready and willing to pay; in terms of the Lease Deed dated September 12, 2000.

D. For the Claim under Head D: The Petitioner are already in possession of Unbanked Cheque and as per the information received, the same has already been encashed by the Petitioners.

E. For the Claim under Head E: The Respondents has already paid and settled the other outstanding (i.e. Diesel Charges, Late Hour Charges) with the Petitioners, which is evident from the Letter dated January 31, 2011.

Apart from the above, at the time of handing over the possession, the Respondent has also paid a sum of Rs. 2,50,000/-; towards onetime payment of the Restoration charges. From the above, it is evident that no legitimate claim

whatsoever (apart from one as stated above) remains for the Petitioners to claim from the Respondent; as per the terms of the Lease Deed dated September 12, 2000.

13. During the course of hearing, the learned Counsel for the Respondents again gave the offer to the Petitioners that the Respondent No. 1 is still ready to pay the additional 25% over and above the last month's rent paid in terms of Clause 5(c)(v) of the lease deed dated 12.09.2000 as well as maintenance charges. But the Petitioners maintained the earlier stand and pressed for relief sought in the petition for appointment of an arbitrator. After having considered the pleadings, documents and particularly Clause 5 (c) (v) of the lease deed, I am of the considered view that there is hardly any dispute left between the parties which requires adjudication by the arbitrator in view of the statement made by the Respondents in the Court as the Respondent No. 1 is ready to comply the requirement of Clause 5(c)(v) by paying the rent as well as the maintenance charges.

14. One of the arguments of the Petitioners is that the Respondents have not offered any interest on the amount withheld by the Respondents after the date of expiry of the lease deed as well as at the time of offering the additional 25% over and above the last month's rent and maintenance charges. The reply of the Respondents is that in view of Clause 5(c)(v) of the lease deed, the due amount was offered from time to time and order dated 22.02.2011 shows the bona fide of the Respondents and it is the Petitioner No. 1 who had not accepted the same and always insisted upon taking the rent @ Rs. 167/- per square feet after the expiry of the lease deed till the date of handing over the possession.

15. After having considered the rival submissions of the parties on the aspect of the interest, it appears that the offer was made by the Respondents in the Court in the month of February, 2011, although the demand drafts were prepared in December, 2010. The lease deed expired on 12.09.2009 and thereafter both the parties were negotiating for lease deed but unfortunately it did not materialize and the vacant possession was handed over to the Petitioners in November, 2010 by the Respondent No. 1 who also cleared all dues of rent as per lease deed, maintenance and other charges but the additional 25% amount of rent was neither given by the Respondent No. 1 to the Petitioners at the time of handing over the possession nor it was offered. Thus, I am of the view that the Petitioners are entitled for the interest of the amount due @9% per annum from the date of 12.09.2009 i.e. the date of expiry of lease deed till the date of payment.

16. The present petition is disposed of with the direction that the Respondent No. 1 shall pay a sum of Rs. 11,11,792.05 paisa towards balance rent and after TDS and a sum of Rs. 1,92,118.11 paisa towards balance maintenance charges and after TDS, being 25% over and above the last paid rent as well as the maintenance charges as per Clause 5(c)(v) of the lease deed dated 12.09.2000 to the Petitioners along with interest @9% per annum from the date of expiry of

the lease deed, i.e., 12.09.2009, till the date of payment which shall be made by the Respondent No. 1 within four weeks from the date of passing of this order. In case the said payment is not paid within four weeks, the liberty is granted to the Petitioners to revive this petition.