

(2023) 08 DEL CK 0108
In the Delhi High Court
Case No : ARB. A. (COMM.) 25 Of 2023

Swatika Jain

APPELLANT

Vs

Asian Hotels North Ltd.

RESPONDENT

Date of Decision : 14-08-2023

Acts Referred:

Code of Civil Procedure, 1908 — Order 3 Rule 1

Arbitration and Conciliation Act, 1996 — Section 11, 13, 13(2), 13(3), 17

Citation : (2023) 08 DEL CK 0108

Hon'ble Judges : Sachin Datta, J

Bench : Single Bench

Advocate : Ajay Jain, Aakanksha Kaul, Aman Sahani, Vursha Singh

Final Decision : Dismissed

Judgement

Sachin Datta, J

IA No. 11663/2023 (for restoration)

1. This application has been filed seeking setting aside of the order dated 31.05.2023 and restoration of appeal i.e. ARB. A. (COMM.) 25/2023 and IA No. 10851/2023. The applicant/appellant claims to be represented through an authorized representative i.e. Mr. Ajay Jain, who is the husband of the applicant/appellant. The said authorised representative has been heard for some time. He has broadly contended as under:-

i. That the counsel for the appellant withdrew the appeal on 31.05.2023, without any instructions and as the result of which, the applicant/appellant has been prejudiced.

ii. Attention has been drawn to an order dated 15.04.2023 passed by the concerned Arbitrator on an application under Section 13(2) and 13 (3) of the Arbitration and Conciliation Act, 1996 (the "A&C Act"), on the same day on which the impugned order was passed. It is submitted that during the pendency of the

application under Section 13 before the concerned Arbitrator, the said Arbitrator ought not to have considered/disposed of the application under Section 17 of the A&C Act till the controversy regarding alleged bias was resolved.

iii. It is further submitted that the mandate of the Arbitrator who passed the impugned order has since been terminated and therefore, on that ground itself, the impugned order ought to be set aside and the new/substitute Arbitrator be directed to decide the Section 17 application afresh.

iv. It is further submitted that since many articles of the applicant/appellant are lying in the shop in question, the appellant's case cannot be equated with the facts of other case/s, in the context of which the Supreme Court passed an order dated 13.01.2023 in Special Leave to Appeal (C) No(s). 356/2023. As such, it is contended that the present appellant should be accorded differential treatment.

v. It is next submitted that no repairing activities have been carried out by the respondent in respect of any shops despite directions passed by the Supreme Court vide order dated 13.01.2023, in terms of which six months time was granted to carry out the requisite repairing work. As such, no relief on similar lines should be afforded to the respondent.

vi. Lastly, it is submitted that if at all the goods of the appellant are required to be removed from the shop in question, the responsibility of the same should be on the respondent.

2. On contrary, learned counsel for the respondent has submitted as under:-

i. The order dated 31.05.2023 was a consent order and the attempt on the part of the appellant to resile out of the same should not be permitted. It is further emphasized that the proceedings under Section 13 of the Act against the previous Arbitrator has no bearing whatsoever on the validity of the impugned order which has to be assessed on its own merit. Attention is once again drawn to the fact that in the context of identical application/s under Section 17 of the A&C Act filed with respect to other shops in the premises, the matter came to be eventually considered by the Supreme Court and the following order dated 13.01.2023 came to be passed:-

" Having heard Shri Shyam Divan, learned Senior Advocate appearing on behalf of the petitioner(s) in SLP(C) No. 496/2023, other learned counsel appearing on behalf of the respective petitioner(s) in the respective Special Leave Petitions and Ms . Aakanksha Kaul, learned counsel appearing on behalf of the contesting respondent(s) in the respective Special Leave Petitions and having gone through the impugned judgment and order(s) passed by the High Court, we dispose of the Special Leave Petitions as under-

1. That the respective petitioner(s) shall remove the goods whatever lying in the premises in question within a period of two weeks from today and for that purpose, the respondent(s) to open the lock and seal and the respondent(s) shall cooperate the petitioner(s) in taking away the goods lying in the premises in

question;

2. Thereafter, the licensor/contesting respondent (s) herein is permitted by way of interim arrangement to carry out the repairs required to preserve the properties, preferably within a period of six months from the date of removal of the goods, as above;

3. That the representative(s) of the respective petitioner(s) may remain present at the time of repair, as and when required periodically, however, shall not in any manner obstruct the respondent(s) in carrying out the repairs;

4. That after the repairs are carried out, the premises in question shall again be put to lock/seal by both the sides, subject to the award that may be passed by the learned Arbitrator.

5. The aforesaid interim arrangement is without prejudice to the rights and contentions of the respective parties in the pending arbitration proceedings and by way of interim arrangement only and subject to the final Award that may be passed by the learned Arbitrator.

6. We direct the learned Arbitrator to conclude the arbitration proceedings within the time stipulated under the Arbitration and Conciliation Act, 1996.

With this, the Special Leave Petitions stand disposed of.

Pending application(s) shall stand disposed of.”

It is emphasized that the directions issued by the learned Arbitrator in the present case, and also the directions contained in the order dated 31.05.2023 passed by this Court, are perfectly in accord with the aforesaid directions passed by the Supreme Court.

ii. It is submitted that the repair activities in the shops in question are underway and efforts are being made to complete the same expeditiously. It is submitted that the respondent is duty bound to carry out the repair in the terms of the directions contained in the Supreme Court’s order and the conduct of the appellant is to obstruct the same.

iii. It is submitted that there is no reason to accord differential treatment to the appellant qua other similarly situated persons. It is further submitted that the conduct of the appellant in casting aspersion on the learned Arbitrator who passed the impugned order must not be countenanced.

3. Having considered the rival contentions of the parties, I find no merit in the contentions raised by the authorised representative of the appellant/applicant.

4. There is simply no justification for the appellant to insist that a separate dispensation should be provided to the appellant at variance with the interim arrangement prescribed by the Supreme Court in the context of similarly placed persons. It is noted that vide order dated 13.01.2023, it was specifically directed by the Supreme Court that the respective appellants in those cases shall remove

their good lying in the premises in question. Thus, the distinction sought to be drawn by the appellant on the assertion that in the present case the appellant's goods are lying in the shop in question, whereas this was not so in the case/s before the Supreme Court, is incorrect.

5. Further, the linkage sought to be drawn between the order passed by the concerned Arbitrator, while dealing with an application under Section 13(2) and 13(3) of the A&C Act, and the impugned order passed under Section 17 of A&C Act, is thoroughly misconceived. There is no legal basis whatsoever for the assertion that when an Arbitral Tribunal is seized of an application under Section 13(2) and 13(3) of the A&C Act, it is precluded from considering any pending application under Section 17 of the A&C Act. If such a plea were to be accepted, then it would become open for a recalcitrant party to seek to frustrate/prevent consideration of an application under Section 17 of the A&C Act, by simply filing an application under Section 13 of the A&C Act. This can never be countenanced.

6. The power and duty of the Arbitral Tribunal to pass appropriate orders of interim measures in exercise of the jurisdiction under Section 17 of the A&C Act is not eclipsed or denuded simply on account of any application being filed under Section 13 of the A&C Act by any of the parties.

7. There is also merit in the submission of Ms. Aakansha Kaul, learned counsel for the respondent, that the order dated 31.05.2023 was a consent order and the attempt on the part of the appellant to resile out of the same is not bonafide.

8. As is evident from the perusal of the order dated 31.05.2023, the same was passed after elaborate hearing. The circumstances in which the ARB.A.(COMM) 25/2023 was withdrawn on 31.05.2023 is also clearly set out in the said order.

9. This court expresses its dismay at the attempt of the appellant to seek to re-agitate the same issue/s which stood foreclosed by the order dated 31.05.2023, by seeking to blame the counsel who appeared on behalf of the appellant on that day. The law does not permit a litigant to resile out of concessions or factual statements made before a court during the course of the proceedings. In this regard, reference may be made to BSNL v. Subash Chandra Kanchan (2006) 8 SCC 279, where the Supreme Court has held as under:-

"20. Furthermore, in terms of Order 3 Rule 1 of the Code of Civil Procedure, a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom. The matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client. Here, however, despite the stand taken by the appellant in its written statement before the High Court the learned advocate consented to appointment of a person as an arbitrator by the High Court in exercise of its jurisdiction under Section 11 of the 1996 Act, in our considered view, the same should not be permitted to be resiled from. A person may have a legal right but if the same is waived, enforcement

thereof cannot be insisted.”

10. In *Vimaleshwar Nagappa Shet v. Noor Ahmed Shariff* (2011) 12 SCC 658, the Supreme Court has again held that a concession made by a counsel on a question of fact is binding on the client. Similar observations have been made in *Paul Properties Pvt. Ltd. & Anr. v. Estate Officer Life Insurance Corporation of India & Anr* MANU/DE/1511/2010 and *Om Prakash v. Suresh Kumar* (2020) 13 SCC 188.

11. As such, no merit whatsoever is found in the present application. The applicant/ appellant has strenuously expressed the apprehension that (i) the respondent has not carried out the requisite repair/s as contemplated in the order dated 13.01.2023 passed by the Supreme Court; (ii) there are insurmountable logistical constraints, besides huge expenditure involved, in shifting the applicant/ appellant's goods lying in the shop in question. Needless to say, the appellant is at liberty to move an appropriate application before the concerned Arbitrator highlighting the above aspects, and seek appropriate relief/s; any such application would be considered by the learned arbitrator on its own merits and in accordance with law.

12. The present application is, accordingly, dismissed. There shall be no order/s as to costs.