

(2013) 10 DEL CK 0176

Delhi High Court

Case No: O.M.P. 1004 of 2013

Themes Learning Expressions
Pvt. Ltd.

APPELLANT

Vs

DLF Ltd.

RESPONDENT

Date of Decision: Oct. 7, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 31(6), 34
- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 6, Order 15 Rule 1, 151
- Evidence Act, 1872 - Section 91, 92

Citation: (2013) 4 ARBLR 341 : (2013) 204 DLT 306

Hon'ble Judges: Rajiv Shakdher, J

Bench: Single Bench

Advocate: Abhinav Vashist and Mr. Attin Shankar Rastogi, for the Appellant; Rajeev Virmani Ms. Meghna Mishra, Ms. Fareha A. Khan, Mohit Mudgal and Ms. Niyati Kohli, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Shakdher, J.

IA No. 16072/2013 (Exemption)

Allowed subject to just exceptions.

OMP No. 1004/2013

1. This is a petition filed u/s 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) which is directed against an interim award dated 18.09.2013 passed by the learned arbitrator. The interim award came to be passed on an application moved by the petitioner u/s 31(6) of the Act read with Order 12 Rule 6, Order 15 Rule 1 and Section 151 of the Code of Civil Procedure, 1908 (in short the Code). The impugned

award, in short, allowed the aforementioned application of the respondent for claiming recovery of possession of the premises in issue being: Shop Nos. 218, 219, 220, 221, 221A, 222 and FFK3 situate on the first floor of DLF Place, Saket, New Delhi having a super area of 706.521 sq. mtrs. (approximately) (hereinafter referred to as the demised premises).

2. The impugned award primarily is based on the construction of documents to which I will make a reference hereinafter. It is pertinent to note that there is no dispute as between the parties either as regards the execution of the documents or their contents.

3. The respondent herein is admittedly the owner/developer of the mall known as DLF Place, in which the demised premises is situate. The parties herein, evidently, decided to enter into a relationship of a lessor and lessee. Consequent thereto, three documents of even date, i.e., 18.05.2010 were executed. The first document was a terms sheet; the second, a draft lease deed; and the third, an addendum.

3.1 In the background of the execution of the three documents referred to above, a registered lease deed was executed between the parties, which is dated 28.05.2010. The registered lease deed provided a tenure of three years, which commenced from 20.05.2010. The lease, thus, came to an end by efflux of time on 19.05.2013. Admittedly, the registered lease deed in clause (1) provided for an option to the petitioner to renew the lease deed on the same terms and conditions subject to increase in rent etc. as provided in clause (4) of the said lease deed for a further term of three years.

3.2 Evidently, a notice for renewal of lease deed dated 22.03.2013 was served on the respondent followed by a reminder dated 15.04.2013.

3.3 The respondent, however, took the stand that the notice was not in terms of the registered lease deed, in particular clause 33(a), which according to it, required the petitioner to give at least six (6) months prior written notice, if it opted for renewal of the lease, failing which the lease deed would stand terminated on the expiry of the lease tenure. The central issue, therefore, which arose for consideration before the learned arbitrator, was precisely this. Therefore, all that the learned arbitrator was required to do, was to construe the import of the three documents placed before him.

4. I may only record that though the terms sheet, the draft lease deed and the addendum bear the same date, i.e., 18.05.2010, apparently, the term sheet was executed first in point of time, followed by the draft lease deed and lastly by the addendum.

4.1 Therefore, for the sake of convenience I propose to refer to various clauses in each of the three documents followed by the relevant clause in the registered lease deed.

4.2 Clause 2 of the terms sheet provided for a tenure of three years after the expiry of 90 days from the date of issue of the said term sheet which is referred to as letter. The clause went on to confer an option for renewal of lease for a further, singular term of three years on the same terms and conditions as contained in the draft lease deed, subject to increase in rent, as referred to in clause 9 of the terms sheet. Notably, there is no reference to an obligation to issue a prior written notice for renewal of lease.

4.3 The draft lease deed, in clause 1, while providing a tenure of three years, also gave the petitioner an option to renew the lease "for two further terms of three years each, on the same terms and conditions, but subject to an increase in rent etc. as provided in clause 4 of the said lease". However, in clause 33(a) a specific provision was made that the petitioner shall give at least six (6) months prior written notice to the respondent if it chooses to exercise the option of renewing the lease, failing which, the lease deed shall stand terminated on expiry of the current term of the lease deed.

4.4 The addendum in clause 1 followed the aforesaid line which was to grant a tenure of three years from the lease commencement date and further vested in the petitioner an option to renew a lease for a further term of three years on the terms and conditions as provided in the lease deed subject to an escalation in rent etc., unless it was otherwise communicated by the petitioner to the respondent, and in the absence of any existing breach or non-observance of covenants by the lessee i.e. the petitioner.

4.5 The second and third recitals in the addendum are relevant. The second recital notes the fact that parties had mutually agreed to "the additional terms and conditions to the said terms sheet and draft lease deed...", the third recital records that the addendum shall form part and parcel of the terms sheet and draft lease deed and in case of conflict between the provisions of the addendum and those of the terms sheet and draft lease deed, or otherwise; the terms of the addendum shall prevail over the provisions of the terms sheet and the draft lease deed, which shall be deemed to be modified to the limited extent expressed therein.

4.6 Pertinently, the addendum considered various clauses of the draft lease deed. A perusal of the addendum would show that the parties herein did a clause by clause analysis and in the process deleted and/or modified various clauses of the lease deed. Quite interestingly, no amendment was made to clause 33(a) of the draft lease deed, though amendments were made, amongst others, in respect of clauses preceding and those succeeding clause 33(a) of the draft lease deed. For instance, amongst others, amendments were made in clauses 21(q) and 34(b) of the draft lease deed.

4.7 In the registered lease deed, thus, the only change which was made in clause 1 and 33(a) was that, the option to renew the lease was confined to a singular term of

three years in consonance with the provisions of clause 1 of the addendum. In effect, the provision in the draft lease deed, i.e., in clause 33(a) which required a prior written notice of six (6) months to be served upon the respondent, in order to trigger the option of renewal of lease, was retained in the corresponding clause in the registered lease deed.

4.8 In addition to the above, clause 35A provided in subclause (a) that parties had mutually agreed to the additional terms and conditions contained in the terms sheet and the draft lease deed vide the addendum dated 18.05.2010, while in subclause (b) it was provided that not only the said addendum shall form part and parcel of the lease deed, but that "express terms" of the addendum shall "prevail" over (I would assume the terms of the lease deed) "in case of any conflict/discrepancy between the provisions of the addendum and the provisions of the lease deed or otherwise, which shall be deemed to be modified to that limited extent".

5. Based on the above, the learned arbitrator came to the conclusion that the petitioner was required to give six (6) months prior notice to the respondent under clause 33(a) of the registered lease deed as that was a mandatory requirement for triggering the option of renewal for a further term of three years. The learned arbitrator rejected the argument advanced on behalf of the petitioner that the provisions of clause 33(a) of the registered lease deed were in conflict or in variance with any express terms of the addendum. In view of the fact that the petitioner had not issued a notice in line with clause 33(a) of the registered lease deed the tenure of the lease expired on 19.05.2013, and therefore, it had no right to remain in the occupation of the demised premises.

6. Before me, Mr. Abhinav Vashist, learned senior counsel for the petitioner, argued that the learned arbitrator has come to an erroneous conclusion. His argument was based on the language contained in clause 1 of the lease deed, which conferred the option of renewal only upon the lessee, i.e., the petitioner.

According to Mr. Vashist, clause 33(a) of the registered lease deed conjointly conferred the right both on the lessee, i.e., the petitioner and the lessor, i.e., the respondent. Mr. Vashist thus contended that there was a discrepancy, if not a conflict, and therefore, in terms of clause 35A of the registered lease deed, the provisions of the addendum would prevail over the provisions of clause 33(a) of the registered lease deed which required the petitioner to give six (6) months prior notice if it chose to exercise the option of renewal, in the absence of, any such requirement contained in clause 1 of the addendum.

6.1 Mr. Vashist further argued that intention of the parties could only be gathered once evidence was led, and therefore, there was no occasion to pass an interim award based on the documents placed on record before the learned arbitrator, on the principles akin to passing of decree on admissions under Order 12 Rule 6 of the Code.

7. Mr. Virmani, learned senior counsel for the respondent, on the other hand said that there was no conflict with any express term of the addendum. The draft lease deed contained an identical clause as included in the registered lease deed, both of which required the petitioner to serve upon the respondent a prior notice of at least six (6) months, if it chose to exercise the option of renewal of the lease. The addendum, consciously, skirted clear of making any alternation in clause 33(a) of the draft lease deed. In other words, it was Mr. Virmani's submission that the parties intended to include the provision for a six (6) months prior notice in the registered lease deed.

8. Having heard the learned counsels for the parties and perused the relevant record, I am of the view that following clearly emerges from

the record:

(i) After the terms sheet was drawn up, a draft lease deed was prepared in respect of which, each party, had its say. The draft lease deed was quite clearly examined clause by clause which resulted in the generation of an addendum. The agreed version of terms and conditions, by which parties chose to be governed, got transmuted into a registered lease deed.

(ii) Quite clearly, no attempt was made to alter clause 33(a) of the draft lease deed, which got reflected in a corresponding clause in the registered lease deed.

9. Based on these facts, the argument of Mr. Vashist with regard to conflict/discrepancy requires to be considered. For this purpose, it may be relevant to advert to the relevant portion of clause 1 of the addendum and clause 1 and 33(a) of the registered lease deed.

Clause 1 of Addendum:

... The Lessee shall however have the option to renew the lease for a further term of 3 years on the terms and conditions as provided in the Term Sheet, Lease Deed and this Addendum (including escalations in Rent etc. as provided herein), unless otherwise communicated by the Lessee to the Lessor; provided always that there shall not be at that time any existing breach of non-observance of any of the covenants on the part of the Lessee herein contained.

Clause 1 of Registered Lease Deed:

1. ... The Lessee shall however have the option to renew the lease for further term of three years on the same terms and conditions, but subject to an increase in rent etc. as provided in clause 4 hereunder. At the time of renewal, fresh lease deed or deeds, as the case may be, shall be stamped, executed and registered between the parties hereto.

Clause 33(a) of Registered Lease Deed.

33. RENEWAL

(a) That the lease shall be renewed for further term of three years unless otherwise communicated by the parties to each other provided always that there shall not be at that time any existing breach or non-observance of any of the covenants on the part of the Lessee herein contained. The Lessee shall give at least six (6) months prior written notice to the Lessor for such renewal, failing which the Lease Deed shall stand terminated on expiry of the current Term of the lease period

(emphasis is mine)

10. According to Mr. Vashist a reading of clause 1 of the addendum would show that the option whether or not to renew the lease deed for a further term of three years was vested only in the lessee, i.e., the petitioner. The lessor, i.e., the respondent had no say in it. Whereas clause 33(a) of the registered lease deed provided that even the lessor, i.e., the respondent, could express its disagreement with the renewal of the lease for a further term of three years. Therefore, according to Mr. Vashist, since there was a conflict/discrepancy in terms of clause 35A(b) of the registered lease deed, the terms of clause 1 of the addendum would prevail. Meaning thereby that, in order to exercise its option of renewal, the petitioner was not required to give six (6) months prior written notice to the respondent.

11. In my view, the submission is clearly untenable. As indicated above, in the facts of this case, the addendum consciously steered clear of the provisions of clause 33(a) of the registered lease deed which required the petitioner to give at least six (6) months prior notice to the respondent, if it chose to exercise the option of renewal of the lease in issue. Admittedly, the respondent has not contended nor did it communicate at any time to the petitioner that under the terms of the registered lease deed, his option to renew was dependent on its consent/agreement. The limited stand that the respondent took, based on the plain reading of the terms of clause 33(a) of the registered lease deed, was that, in order to trigger the option of renewal, the petitioner was required to give six (6) months prior written notice. The intent of the parties can only be determined by the language used in the contract obtaining between them, in absence of ambiguity. In respect of the obligation on the part of the petitioner to give a prior written notice of six (6) months, there is no ambiguity. Therefore, in my view, the conclusion reached by the learned arbitrator was the correct conclusion.

11.1 The counsel for the petitioner sought, in my view, to raise a ghost, and then, in a sense proceeded to slay it, by raising the spectre of conflict and discrepancy, by adverting to clause 1 of the addendum which, ostensibly excluded the respondent qua the issue of renewal.

11.2 When closely examined the expression "unless otherwise communicated by the lessee to the lessor", is preceded by reference to the terms and conditions provided in the term sheet, draft lease deed and the addendum itself. It is at best a case of

poor drafting, but it cannot deride from the fact that the latter part of clause 33(a) of the registered lease deed, which required that if, the petitioner were to exercise its option of renewal of lease, it had to give six (6) months prior written notice to the lessor, i.e., the respondent.

Undoubtedly, there can be no other meaning ascribed to the plain words contained in that behalf in clause 33(a) of the registered lease deed. If that is the conclusion, then surely clause 35A of the registered lease deed cannot get triggered so as to override the relevant part of the provisions of clause 33(a) of the registered lease deed, which required the petitioner to give at least six (6) months prior written notice. Clearly, the petitioner could not have been allowed to lead evidence contrary to the plain terms of clause 33(a) of the registered lease deed if one were to take aid of the principles analogous to the provisions of Sections 91 and 92 of the Evidence Act, 1872.

12. The other submission of Mr. Vashist that the interim award could not have been passed based on the purported evidence emanating from the documents placed on record, in my opinion, is also untenable. Admissions can be gleaned by an adjudicating authority not only from pleadings but also from documents placed on record. As stated at the very outset, neither the factum of execution of documents referred to above nor the contents thereof were disputed by the petitioner. The difference lay though in the interpretation of the documents by the parties herein.

13. Therefore, in conclusion, this is also one of the reasons which persuades me to reject the challenge to the interim award. At the end of the day, all that the learned arbitrator has done, is that, he has given a particular interpretation to the documents placed before him, which is a plausible interpretation. There is no patent illegality in the impugned award, which would require intercession by me, while exercising jurisdiction u/s 34 of the Act. [See observations made in [Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.](#),] For the reasons given above, I find no merit in the petition. It is, accordingly, dismissed. However, parties shall bear their own costs.