Celebrity Fitness (India) Pvt. Ltd. Vs JMD Ltd. and Another

Court: Delhi High Court

Date of Decision: Aug. 13, 2009

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 9

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: Ravi Gupta, Jenis Francis, Gaurav Bhal and Tahir Nizami, for the Appellant; Anil Grover and Rakesh Garg for R-1, Rakesh Munjal and S.P. Singh, for R-2, for the Respondent

Judgement

Shiv Narayan Dhingra, J.
By this application u/s 9 of the Arbitration & Conciliation Act, 1996 the petitioner has made a prayer that the

respondents be restrained from disconnecting the electricity/water supply of the petitioner and withdrawing the maintenance services including inter

alia chilled water supply, lifts, escalators, parking etc., which were being provided by the respondents to the petitioner, till the time Respondent

No. 1 has complied with terms of the Agreement dated 8th July, 2008 or till the time arbitration proceedings take place and are decided and the

respondents be also restrained from issuing/pasting/publishing in any manner any notices prejudicial to the interests of the petitioner.

2. The petitioner had entered into an agreement titled as Agreement to Lease with respondent No. 1 on 8th July, 2008 whereunder it was agreed

between the parties that the petitioner would be given on lease a built up super area of 38,000 sq. feet on third and fourth floors of the JMD

REGENT ARCADE for running a fitness center in the name and style of Celebrity Fitness. At the time when Agreement to Lease was entered

into, the occupancy certificate had not been received by the respondent however respondent represented that this was likely to be received

shortly. The petitioner and respondent No. 1 had agreed that a separate lease agreement shall be entered into between the parties as and when the

hurdles in letting out the premises are overcome. It was also agreed that the rent payable by the leasee to the lessor shall commence on 1.9.2008

or from the date of commercial business operation of leasee''s fitness center under the name and style of Celebrity Fitness in the said commercial

complex, whichever was earlier, provided 65% of the shops including Celebrity Fitness Center in the commercial complex were open for business

operations. The petitioner paid a sum of Rs. 75,24,000/- towards interest free refundable security deposit qua the premises. Out of the aforesaid

amount the lessor (respondent No. 1) retained a sum equivalent to two months. rent qua the demised premises as interest free refundable security

deposit and transferred the remaining security deposit to the other owners, since the super area agreed to be leased out was owned partly by

respondent No. 1 and partly by other persons. The agreement further provided that the petitioner shall, in addition to the monthly rent, pay monthly

maintenance charges @ Rs. 22 per sq. ft. for running the Centre from 6 am to 12 midnight amounting to Rs. 8,36,000/- per month to the lessor or

to the appointed Maintenance Agency towards maintenance, preservation, upkeep of the said Complex, operation of common services and

management of common areas including parking space, services and cost of lift operation, lighting of common passages, cost towards common air-

conditioning, power back up, maintenance of sanitary conditions, common security arrangements in the Complex including the parking area,

firefighting equipment, capital replacement funds etc. This amount was either payable to the lessor or to the Maintenance Agency rendering

services and a separate agreement was to be entered into with the Maintenance Agency. The facts as pleaded and as revealed during arguments

show that the petitioner though had started its fitness center and a club and also had its equipment in place in a part of the area under agreement to

lease. but claimed that it was not liable to pay the rent in view of the fact that 65% of the commercial space was not being commercially utilized in

the Mall. It is also not disputed that the maintenance service was handed over to respondent No. 2 and the maintenance services were being

provided by respondent No. 2 to the petitioner and other users in the shopping mall. The petitioner states that it was not liable to pay the

maintenance @ Rs. 22 per. Sq. ft. of the super area in view of Clause 10.1 which provided that common area maintenance charges shall

commence from the rent commencement date and before that the lessee shall pay the actual power charges consumed by the lessee during fit out

period.

3. The respondent has taken objection to the jurisdiction of the Court on the ground that property was situated in Gurgaon (Haryana) and

injunction was being prayed by petitioner in respect of property in Gurgaon. The other objection taken by respondent No. 2 is that respondent

No. 2 was not a party to the agreement. Respondent No. 2 was the company providing maintenance services in the Mall and the petitioner had not

entered into a maintenance agreement with respondent No. 2 and therefore, respondent No. 2 could not be made a party to the application u/s 9

as there was no arbitration clause. Respondent No. 1 has also submitted that the petitioner was deliberately not paying rent of the premises on one

or the other pretext and was not even willing to pay the maintenance charges for the services of which it was taking benefit whereas the petitioner

was running his fitness center and the respondents cannot be forced to provide maintenance to the petitioner free of charge.

4. It may be that the petitioner was not liable to pay rent/lease amount as agreed in on the ground that 65% of the commercial space was not being

commercially utilized but the petitioner cannot force respondent No. 2 to provide all those facilities stated in annexure D. of the agreement, free of

charge because of dispute on payment of rent. The facilities being provided include Central Air conditioning, Security services, providing of power

back up/uninterrupted power supply, cleaning and sanitary services, common area lighting up services, lift service etc. as enumerated in the

agreement. These services do not come for free. Any operator/provider has to spend on these services. It has to pay salary to the employees, to

pay for the diesel to provide power back up when electricity cut is there, it has to provide for lift operations, caretaking staff etc. etc. The

assessment of maintenance charges @ Rs. 22/- per sq. ft. was made by the lessor on the assumption that the entire Mall would be on lease. When

even according to petitioner, the entire mall is not on lease and the total commercial space is not occupied, the maintenance expenses being spent

by the lessor would be much more than what the lessor would be able to recover from the shop owners/commercial space occupiers because the

entire area of the Mall has to be Centrally Air-conditioned, lifts are to be kept operational in the entire Mall, security has to be there on all gates

and at the parking whether the commercial space is being fully utilized or not. Recovery of maintenance charges could be done from all the shop

keepers according to their occupied space, if the entire space was being utilized. The petitioner has not been asked to pay more than what has

been agreed in the initial agreement i.e. @ Rs. 22/- per sq. feet. It is true that the agreement provides that the petitioner would not be liable to pay

maintenance at this rate till the commencement of the operations/rent but there is a dispute between the parties about date of commencement of the

rent. The petitioner has claimed that rent has not commenced while the respondent No. 1 claims that rent had already commenced. This dispute is

to be decided by the Arbitrator. Pending adjudication of the dispute, the respondents cannot be forced that the entire premises in occupation of the

petitioner should be maintained and all facilities should be provided to petitioner free of cost or it would be liable only to pay electricity charges

whereas it would be entitled to get all facilities.

5. The plea that the respondent No. 2 was not a necessary party is not tenable because it is provided in the agreement to lease that the

maintenance would be provided either by lessor or an agency of the lessor. It is clear that the agency created by the lessor was bound by the

agreement and it cannot be said that the agency created by the lessor for maintenance would not be bound by the agreement when it has been

specifically provided in the agreement that lessor or agency created by the lessor shall be doing the maintenance.

6. In view of my above discussion, in case the petitioner clears arrears of maintenance and continues to pay maintenance at the agreed rate of Rs.

22/- per sq. feet on super area, the respondents shall continue to provide all facilities and maintenance in accordance with annexure D. to the

agreement.

This payment by the petitioner shall be without prejudice to its rights and the petitioner can raise this issue before the Arbitrator. With above

directions, the petition is disposed of.