

ARB Nos.160 & 161 of 2021 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of Reserve: 28.10.2022

Date of Decision: 09.11.2022

1. ARB No.160 of 2021 (O&M)

Rohit SawhneyPetitioner

Vs

M/s DLF Power and Services Ltd.Respondent

2. ARB No.161 of 2021 (O&M)

Rohit SawhneyPetitioner

Vs

M/s DLF Power and Services Ltd.Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Ms. Sonia Madan, Advocate with
Mr. R.S. Madan, Advocate
Ms. Swastika Sharma, Advocate and
Mr. Mahender Joshi, Advocate
for the petitioner.

Mr. Rajeev Anand, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Vide this common order, ARB Nos.160 and 161 of 2021 (O&M) are being decided. Rejoinders filed on behalf of the petitioner to the replies filed by the respondent in both the cases are taken on record.

[2]. Both the petitions have been preferred under Section 11(5) of the Arbitration and Conciliation Act, 1996 for appointment of an independent Arbitrator to adjudicate the

dispute between the parties. Since common question of law and facts are involved, therefore, facts are being culled out from ARB No.160 of 2021.

[3]. In ARB No.160 of 2021, a lease deed dated 09.02.2012 was executed between the petitioner and the respondent. The petitioner had invested his amount in purchase of Unit No.MS0302 having super area of 462.77 sq. meters on the 3rd floor in the commercial building known as DLF Mega Mall located at Phase-1, DLF City, Gurgaon. Sale deed was executed on 08.07.2005. The petitioner purchased the said property in order to lease it out so as to generate rental income. Petitioner was approached by the respondent to take the property on lease. Consequently, the lease deed dated 09.02.2012 was executed between the parties. The lease was to start w.e.f. 01.03.2011 and was to expire on 30.06.2022. The entire tenure of the lease was a lock-in period in view of clause 2 of the lease deed. However, the respondent terminated the lease prematurely in violation of the lease agreement and stopped remitting rent since April 2020. According to the aforesaid clause of the lease deed, neither party to the lease deed could have terminated the lease. The respondent was given possession of the property w.e.f. 01.03.2011. The initial rent was Rs.2,73,955/- per month and the same was enhanced

in accordance with the terms and conditions of the lease deed to an amount of Rs.3,64,634.11/- + GST @ 18% per month.

[4]. The respondent continued to remit the rent till March 2020 and thereafter the respondent stopped remitting rent to the petitioner. The respondent did not pay any heed to the communication made by the petitioner. The respondent could not have terminated the lease prior to 30.06.2022 as the entire tenure of the lease was a lock-in period. The respondent in violation of the terms and conditions of the lease deed terminated the lease prematurely and thereafter issued notice dated 03.07.2020 seeking refund of the security deposit of Rs.7,47,150/- furnished by it at the time of commencement of the lease.

[5]. Whereas in ARB No.161 of 2021, the lease deed dated 07.08.2019 was executed between the petitioner and the respondent. The petitioner had invested his amount in purchase of Unit No.MS0303 having super area of 346.80 sq. meters on the 3rd floor in the commercial building known as DLF Mega Mall located at Phase-1, DLF City, Gurgaon. Sale deed was executed on 08.07.2005. Consequently, the lease deed dated 07.08.2019 was executed between the parties. The lease was to start w.e.f. 15.12.2018 and was to expire on 30.06.2022. The respondent was given possession of the property w.e.f.

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15.12.2018. The initial rent was Rs.2,48,431/- per month and the same was enhanced in accordance with the terms and conditions of the lease deed to an amount of Rs.2,73,293/- + GST @ 18% per month. An amount of Rs.7,45,293/- was furnished by the petitioner at the time of commencement of lease as security.

[6]. The respondent without having paid the rent since April 2020 intended to absolve its liability towards the rent due and payable to the petitioner and had issued the aforesaid notice. The said notice was replied by the petitioner vide reply dated 27.07.2020 whereby the respondent was advised to remit the outstanding rent and also to continue paying the rent for the remaining period of lease according to the terms and conditions of the lease. Thereafter the respondent through its personnel approached the petitioner for an amicable resolution of dispute, but ultimately owing to the conduct of the respondent, the effort to resolve the dispute could not fructify.

[7]. Petitioner issued a notice dated 18.01.2021 for initiating arbitration proceedings in accordance with the terms and conditions of the lease deed. Clause No.48 of the lease deed provides for resolution of the dispute through arbitration. The same reads as under:-

“all or any dispute arising out of or touching upon

or in relation to the terms of this Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through Arbitration. The Arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being enforce. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Lessee and whose decision shall be final and binding upon Lessor. The Lessor hereby confirms that it shall have no objection to this appointment even if the person so appointed, as the Arbitrator, is an employee or Advocate of the Lessee or is otherwise connected to the Lessee and the Lessor confirms that notwithstanding such relationship/connection, the Lessor shall have no doubts as to the independence or impartiality of the said Arbitrator.”

[8]. The aforesaid notice was issued for initiating arbitration proceedings in compliance of the law laid down by the Apex Court in **TRF Limited vs. Energo Engineering Projects Limited, (2017) 8 SCC 377** and **Perkins Eastman Architects DPC and another vs. HSCC (India) Limited, (2020) 20 SCC 760** . In view of the ratio(s) of the aforesaid judgments, the procedure for appointment of Arbitrator as per clause in question is no more a valid procedure and the same has been deprecated by the Hon'ble Apex Court by holding that the appointment of Arbitrator/arbitral Tribunal cannot be done

unilaterally by one party or the representative of one party to the agreement. Therefore, the authorisation given to lessee for appointment could not be done and, therefore, the notice dated 18.01.2021 was issued in compliance of the said law. The petitioner nominated the name of Hon'ble Mr. Justice Kailash Gambhir (Retd.) Judge of the Delhi High Court as sole Arbitrator to proceed with the arbitration proceedings between the parties. Petitioner granted 15 days' time to the respondent to accept the said nomination, otherwise it would be deemed to have been accepted at the end of the respondent.

[9]. The respondent in reply to the said notice denied its liability to remit the outstanding amount towards rent for the remaining tenure of the lease and also rejected the name of nominated Arbitrator by the petitioner. However, the respondent did not nominate or suggest any other name on its behalf to be appointed as sole Arbitrator. The respondent in complete violation of the lease, threatened to vacate the premises on 03.02.2021 at 10.00 A.M. and further threatened the petitioner to forcibly take possession of the premises.

[10]. Learned counsel for the petitioner submitted that the petitioner is entitled to the rent for the period commencing from April 2020 to February, 2021 along with interest @ 18% on the said amount from the date of its accrual till final realisation of the

same in question.

[11]. Per contra, learned counsel for the respondent submitted that as per lease deed, the respondent was to make payment of electricity consumption charges and water consumption charges in respect of demised premises directly to the maintenance agency till the expiry of the lease deed. Since the commencement of the terms of the lease, the respondent had been making requisite payment to the petitioner regularly. The construction of DLF Mega Mall of which demised premises is a part was completed in the year 2004. DLF Mega Mall is situated within the municipal limits of District Gurugram and, therefore, provisions of Haryana Urban (Control of Rent and Eviction) Act, 1973 are applicable to the tenancy created in respect of demised premises. The respondent does not wish to continue to occupy the demised premises any longer and, therefore, the respondent proceeded to terminate/revoke the lease in respect of demised premises with immediate effect on the date on which legal notice was issued to the petitioner on 03.07.2020.

[12]. As against the aforesaid, learned counsel for the petitioner again submitted that evidently as per clause 32 of the lease deed, either party shall not be held responsible for any consequences or liabilities under this deed, if the party is

prevented in performing its obligations under the terms of the lease-deed by reason of restrictive government laws or regulations, riots, insurrection, war, terrorist action, strike, public demonstrations, rallies, acts of God etc. and the term of the lease shall automatically stand extended during the operation, occurrence or continuance of these circumstances. Provided always and it was mutually agreed that if demised premises or any portion becomes inhabitable, the lessee shall not be liable for payment of monthly rent until such time the lessor shall have put the demised premises in a habitable condition. Further if, on account of the aforesaid circumstances lessee is unable to use or enjoy the demises premises for a continuous period of 60 days, then the lessee may at its sole discretion terminate or discontinue the lease and lessor shall thereupon forthwith on demand refund to the lessee the amount of security deposits lying with the lessor under this deed.

[13]. Learned counsel further submitted that in the legal notice dated 03.07.2020, the respondent has not pleaded any such event of inhabitable state of thing viz.-a-viz. the property in question nor has any event of *force majeure* been pleaded in the notice. The respondent has come up with a plea that the construction of DLF Mega Mall of which demised premises is a part was completed in the year 2004 and DLF Mega Mall is

situated within the municipal limits of District Gurugram, therefore, Rent Act is applicable to the tenancy created between the parties and the respondent does not wish to continue with the demised premises any more. No ground for terminating the lease deed has been pleaded whereas lease deed in terms of clause 2 specifically provides that the lessee has taken possession of the demised premises from the lessor on the 'lease commencement date' and shall initially execute a lease for the lease period renewable at the option of the lessee for further terms as may be decided by the parties after completion of the lease period. The lessor undertook not to terminate the lease which was from 01.03.2011 to 30.06.2022 under any circumstances and the said period shall operate as 'Lock-in period' for the lessor. The dispute is in respect of interpretation of clause 2 and clause 32 of the lease deed. The legal notice dated 03.07.2020 does not show any such eventuality arising out of clause 32 of the lease deed.

[14]. Learned counsel for the petitioner by referring to para no.49 of the **Vidya Drolia and others vs. Durga Trading Corporation, (2021) 2 SCC 1** (Civil Appeal No.2402 of 2019 decided on 14.12.2020) further submitted that the Hon'ble Apex Court has held that the landlord-tenant disputes are arbitrable as the Transfer of Property Act does not forbid or foreclose

arbitration. However, landlord-tenant, disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Learned counsel submitted that in the very nature of claim made by the petitioner in respect of pending rent from April 2020 till expiry of lease period, the dispute is not covered under the rent legislation.

[15]. Learned counsel also by referring to Arbitration Petition (Civil) No.8 of 2020 titled 'Suresh Shah vs Hipad Technology India Private Limited' decided on 18.12.2020

submitted that the lease deed provides for resolution of the disputes through arbitration. The arbitration clause has already been invoked. Parties have already accepted the terms and conditions of the lease. The dispute is arbitrable. Every civil or commercial dispute either contractual or non-contractual which can be decided by a Court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. There are well-recognized non-arbitrable disputes like disputes relating to rights and liabilities which give rise to or arise out of criminal offences, matrimonial disputes relating to divorce, judicial separation, restitution of conjugal

rights, child custody, guardianship matters, insolvency and winding-up matters, testamentary matters (grant of probate, letters of administration and succession certificate), eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes. The present dispute is not covered by the aforesaid categories of disputes.

[16]. Learned counsel also by referring to **Sunil Kumar Sharma vs. M/s Perfexa Solutions Pvt. Ltd., 2009 SCC Online P&H 889** submitted that proceedings in the designated rent court would be an independent cause of action and has nothing to do with the non-payment of lease amount in pursuance of lease deed executed between the parties. The petitioner has sought arrears of lease amount payable in terms of lease deed dated 09.02.2012. The dispute is to be adjudicated upon in terms of clause 48 of the lease deed that too in the light of ratio of **TRF Limited** and **Perkins Eastman Architects DPC and another's** case (supra). Interpretation of clause 32 whether the non-payment of arrears of rent is on the ground of any such eventuality would remain debatable as the respondent has not pleaded any specific ground of terminating the lease in the legal notice dated 03.07.2020 except to mention

that respondent does not wish to continue to occupy the demised premises any longer. Petitioner has not claimed the eviction of the respondent on any of the grounds available to the landlord under the provisions of Rent Act, 1973. The petitioner has sought recovery of lease amount in terms of lease agreement and such dispute is not a dispute which falls within the exclusive jurisdiction of the Rent Controller under the Rent Act, 1973. Therefore, in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996, this Court is competent to appoint an independent Arbitrator to resolve the dispute.

[17]. On the other hand, learned counsel for the respondent by referring to the rejoinder dated 27.10.2022 submitted that the petitioner has admitted that respondent still continues to hold possession of the premises with its material lying at the said premises under its lock and key, whereas in the notice dated 03.07.2020 after vacating the premises, notice was issued to the petitioner in the month of February, 2021. So in view of rejoinder filed by the petitioner the prayer is in a way to get the premises vacated and the same squarely falls under the jurisdiction of the Rent Act.

[18]. Having heard learned counsel for the parties, I find that as per lease deed, the period of lease started from 01.03.2011

to 30.06.2022. The lessee had taken possession of the demised premises on the lease commencement date. The lessor undertook not to terminate the lease during the period of lease under any such circumstances and the said period was to operate as a lock-in period for the lessor. The terms and conditions of lease deed were accepted by the parties. As per clause 32 of the lease deed, the lease could have been terminated or extended in the contingencies as mentioned in the said clause which are not attracted in the present case. The notice of termination of lease deed dated 03.07.2020 does not specify any ground for terminating the lease deed and the ground no.5 pleaded in the notice does not correspond to clause 32 of the lease deed. Evidently, the petitioner is not seeking ejectment of the respondent, rather claim of the petitioner is only in respect of recovery of rent which is being sought upto 30.06.2022 with liberty to initiate any other remedy for ejectment (if any) in terms of grounds taken in the rejoinder. The pleaded case of the petitioner cannot be read beyond the scope of pleadings. Even otherwise, the Arbitrator can decide his jurisdiction under Section 16 of the Act.

[19]. Keeping in view the nature of controversy involved in the both the cases, I find that the claim of the petitioner in respect of recovery of arrears of lease amount does not fall

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under the ambit of Rent Act, 1973 as the petitioner is not claiming any eviction of the respondent on the grounds available under the provisions of Rent Act, 1973. Petitioner has sought recovery of lease amount in terms of the agreement and such dispute does not fall within the exclusive jurisdiction of Rent Controller, rather can be adjudicated by the Arbitrator. Tentative value of the claim as set up by the petitioner in ARB No.160 of 2021 is Rs.47,32,949/- and in ARB No.161 of 2021 is Rs.35,47,343/- along with interest subject to the final adjudication to be done by the Arbitrator.

[20]. For the reasons recorded hereinabove, I hereby appoint Sh. Inderjeet Mehta, Distt. & Sessions Judge, (Retd.) # 112 Sector 24, Chandigarh as the sole Arbitrator, to resolve the dispute/difference between the parties. The appointment of the Arbitrator shall be subject to the declaration to be made by him/her as required under Section 12 of Arbitration and Conciliation Act, 1996 in respect of his/her independence and impartiality to settle the dispute between the parties.

[21]. The Arbitrator would complete the proceedings within the specified time in terms of Section 29-A of the Act. The Arbitrator shall be paid fee in accordance with the IVth Schedule of the Act as amended from time to time. The fee shall be borne by both the parties equally.

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[22]. The venue of the Arbitration shall be the place as per convenience of the Arbitrator.

[23]. A copy of this order be dispatched to the Arbitrator at the following address:-

Sh. Inderjeet Mehta, Distt. & Sessions Judge, (Retd.)

112 Sector 24, Chandigarh

[24]. Both the petition stand disposed of accordingly.

November 09, 2022

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Whether speaking/reasoned

Whether reportable

**(RAJ MOHAN SINGH)
JUDGE**

Yes/No

Yes/No

सत्यमेव जयते