NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8980 OF 2017

M/S ARUN KUMAR KAMAL KUMAR & ORS. ... APPELLANT(S)

VERSUS

M/S SELECTED MARBLE HOME & ORS. ... RESPONDENT(S)

J U D G M E N T

S. ABDUL NAZEER, J.

1. In this appeal, the appellants have questioned the legality and correctness of the final judgment and order dated 11.02.2010 passed by the High Court of Delhi in FAO(OS)No.450/2009 whereby the Division Bench of the High Court dismissed the appeal filed against the judgment of the Learned Single Judge of the High Court dated 24.07.2009 passed in C.S.(OS)NO(s).647-A/1998 and 715-A/1998 whereby the Learned Single Judge had rejected the

objections of the appellants and made the Award dated 16.03.1998 the rule of the court. However, vide the impugned judgment the Division Bench reduced the rate of interest from 16% per annum to 9% per annum as applicable to future interest i.e. from the date of the Award, 16.03.1998, till the date of the judgment. This reduction was made subject to the appellants paying the complete decretal amount to the respondents on or before 30.06.2010, failing which the Award along with interest would stand as it is.

2. The appellants are in the business of running of restaurants/eateries and manufacture & sale of sweets and other food items. The appellants are running their business under the brand name "Nathu's Sweets". In the year 1990, the appellants entered into two separate licence agreements with the respondents whereunder it was agreed that the appellants will operate and run a restaurant cum sweets shop at the respondents' premises and make payment to the respondents on commission basis. The first licence agreement dated 27.08.1990 was executed between appellant no. 1-M/s. Arun Kumar Kamal Kumar through appellant no.2-Arun Kumar Gupta and respondent no.1 M/s. Selected Marble

Home through respondent no.2-Anil Kumar Jain and two other partners of the said respondent no. 1 firm and the second agreement of the same date was executed between appellant no. 1-M/s. Arun Kumar Kamal Kumar through appellant No.2-Arun Kumar Gupta and respondent no.3-Bhim Sain Jain.

3. According to the appellants, the respondents started violating the terms of the agreements after commencement of the business and raised obstacles in the smooth running of the business. The premises which were handed over to the appellants had only two electricity connections – one meter of 1 KV and the other of 0.25 KV respectively. Since the sanctioned capacity of the said connections was less than required, the appellants allege that the respondents had agreed to apply and obtain electricity connection with a sanction to load of 2.5 KV. However, in order to harass the appellants, the respondents did not make arrangements for sufficient electricity supply. On the other hand, it was due to their acts of omission and commission that the then Delhi Electricity Supply Undertaking (DESU) disconnected electricity supply to the entire building on 22.10.1990. The business could not be operated

and the same was stopped in February 1991. The shop thereafter remained closed from March 1991 to October 1995.

4. On account of the appellants' non-payment of commission and failure to handover the vacant possession of the premises to the respondents, the respondents filed Suit NO.3708-A/1991 before the Delhi High Court under Section 20 of the Arbitration Act, 1940 (for short, 'the Act'). Vide Order dated 18.09.1995, the High Court appointed the Arbitrator to adjudicate upon the dispute between the parties.

5. During the pendency of the arbitration proceedings, the business was restarted from November 1995 and continued in operation till March 2000 when possession of the same was handed over by the appellants to the respondents.

6. In the arbitration proceedings, learned Arbitrator framed as many as 16 issues. The parties agreed to file their respective affidavits which were read as examination-in-chief, after which cross-examination took place. After the conclusion of the arguments of the appellants and during the arguments of the

respondents, learned Arbitrator framed an additional issue No.15-A which reads as under:

> "Whether the claimants are entitled to any damages?
> If so, for what period and to what amount."

7. After the arguments were concluded, the respondents filed a statement of account calculating the commission that became payable to the appellants after restarting of the business, as directed by learned Arbitrator. This statement was not objected to by the respondents and was then taken by the Learned Arbitrator as the basis for calculating damages for the period during which the business was closed but the appellants had retained possession of the respondents' premises. It is the case of the appellants that in this statement of accounts submitted before the Learned Arbitrator, inadvertent errors had crept in. Firstly, the appellants argue that the sales tax paid on the sales was inadvertently not deducted to arrive at the commission payable. Secondly, the expenses incurred on electricity and water bills were inadvertently deducted from the sales instead of deducting the same from the amount of commission payable to the respondents, as the same were their liability as per

Clause 14 in both of the Agreements entered into between the parties. Learned Arbitrator published his award on 16.03.1998.

8. The appellants challenged the said award before the High Court. The Learned Single Judge vide judgment and order dated 04.11.2004 rejected the objections and made the award of the Arbitrator rule of the court. As noticed above, the Division Bench of the High Court has confirmed the judgment of learned Single Judge, apart from allowing a reduction in the rate of interest applicable to post-award interest.

9. We have heard learned counsel for the parties. Appearing for the appellants Mr. Rakesh K. Khanna, learned senior counsel, has submitted that the appellants were not liable to pay any rent. He argued that the parties had only agreed to pay commission on the gross sales and that there was no clause in the Agreement which contemplated payment of damages for the use and occupation of the premises. Therefore, the Arbitrator was not justified in declaring the Agreements as Licence Agreements and awarding damages on the basis of commission paid prior to the closure of the premises before March 1991 and the commission payable after re-

starting of the business after 1995. He has further argued that learned Single Judge erred in holding that the appellants were liable to pay damages and further holding that even if the appellants' argument is accepted and they are deemed to be tenants, even then would have been liable to pay rent even if the shop remained closed and there were no sales. It was further argued that the Agreements did not contain any clause for damages. Therefore, the awarding of damages is not justified. Secondly, it was argued that in the statement of accounts submitted by the appellants, the errors had crept in inadvertently. The sales-tax paid on the sales was not deducted to arrive at the commission payable. Further, the expenses incurred on electricity and water were deducted from the sales instead of deducting the same from the commission of the respondents as the same was their liability. Thus, it was argued that the courts below have failed to consider this aspect. These were mathematical errors and apparent on the face of the record. Had these corrections been carried out, the compensation payable would have been considerably lesser.

10. Learned counsel for the respondents submits that there were no mistakes in the statement of accounts and these contentions have now been urged as an afterthought. The appellants have not only themselves filed the statement with which they are bound but have also deducted at source and paid taxes on the commission shown to be due in the aforesaid statement. On the question of damages, learned counsel submits that by taking into account the plea of the appellants, learned Single Judge has concluded that they are liable to pay damages for use and occupation of the premises for the period during which the business was not running and no commission payments were made. Thus, it was argued that the findings of fact recorded by the courts below do not call for interference in this appeal.

11. We have carefully considered the submissions of the learned counsel made at the Bar and perused the materials placed on record.

12. As per Clause 10 of both the Agreements, in case of any dispute, it was incumbent on the appellants to handover vacant possession of the premises to the respondents. On this issue, it is

clear that disputes had arisen between the parties. However, it is an admitted position that possession of the premises was not handed over to the respondents by the appellants until the arbitration proceedings had commenced and has, in fact, only been handed over on 13 March 2000. Therefore, the Arbitrator framed Issue No. 15-A regarding damages payable to the respondents. The Learned Arbitrator has rejected the plea of the appellants that they had to close the business because of the obstructionist tactics adopted by the respondents and for that reason the business activities remained closed from April, 1991 to November, 1995. On a detailed consideration of the materials on record, the Learned Arbitrator had come to the conclusion that the appellants are liable to pay the damages.

13. This question was again considered by the learned Single Judge. The learned Single Judge noticed the plea of the appellants that the transaction between the parties was of tenancy and not licence. After dealing with this plea, the learned Single Judge upheld the award of damages by the Learned Arbitrator. The

finding of the learned Single Judge in this regard is in paragraph 20 which reads as under:

> "I find it has been the case of the respondents that the transaction between the parties was of tenancy and not of a licence. It is so pleaded in the objections also. Even if the respondents consider themselves to be tenants at the rent equivalent to commission @ 11% per month, the respondents would under Section 108 of the Transfer of Property Act have continued to remain liable for payment of rent, notwithstanding not carrying on business in the premises. It has been held by the Division Bench of this Court in **State Bank of Patiala v. Chandermohan –** 1996 RLR 404 held that a tenant continues to be liable for rent/damages even if the premises are destroyed and the only option of the tenant if desirous to stop the running of rent is to surrender the premises. Thus as per the respondents own understanding of the relationship also, the respondents were liable for payment of rent. "

14. We do not find any error in the said finding of the learned Single Judge.

15. After finding the appellants liable to pay damages, the Learned Arbitrator has arrived at the quantum of damages as per the statement of accounts, furnished by the appellants based on their audited accounts, that too after deduction of TDS for a period of

pre-closure i.e. 15.08.1990 to 22.02.1991 and post-closure i.e. November 1995 to November 1997. The payment of damages for the closure period i.e. March 1991 to October 1995 has been arrived at as an average of commission actually paid pre-closure and the commission payable post-closure as per the statement of accounts of the appellants, after deducting TDS.

16. There is also no merit in the contention of the learned senior counsel for the appellants that the appellants' statement of accounts erroneously deducted expenses incurred on electricity and water from the sales instead of deducting the same from commission of the respondents. The admitted position is that there was no electricity supply and the appellants used generator set for electricity. The contention of the appellants is that the expenses incurred towards generator ought to have been deducted from the gross commission payable and not from the gross sale amount and then the commission should have been calculated at the contractually stipulated rates of 6% and 5%. This plea has been dealt with by learned Single Judge as under:

> "The other mistake pointed out of deduction of expenses on diesel generator set from sales rather

> than from commission payable, even if made out, also cannot be permitted to be withdrawn at this stage especially when the respondents have already deducted and paid taxes on the basis of said statement. Under the agreement the electricity and water charges of the premises were to be borne by the petitioners. Admittedly, the premises/shop on reopening were without electricity and diesel generator set arranged. There is no dispute that the expenses therefor were to be borne by the petitioners. The respondents while furnishing the statement to arbitrator, did direct the same. The objections now that such deduction was wrongly done is not tenable?"

This contention has been raised on the ground that the statement filed by the appellants was not correct since the appellants were only liable to pay commission at 6% and 5% under two agreements on the gross sales and the responsibility to provide electricity was on the respondents. We are of the view that the appellants cannot be permitted to withdraw their own statement made before the Learned Arbitrator which is predicated to on a mode of calculation, the same not being disputed by the respondents and accepted by the Arbitrator as correct. We are also of the view that the appellants are not justified in raising a contrary plea other than what was their defence and statement of counter claim in the arbitral proceedings.

17. We are also of the view that the Learned Arbitrator has rightly relied on the appellants' statement of accounts for awarding commission for the period when the business was restarted post-closure between November 1995 and November 1997. The formula adopted by the Learned Arbitrator for arriving at this commission amount as well as the damages has been accepted by learned Single Judge as also the Division Bench of the High Court.

18. In view of above, we do not find any merit in this appeal which is accordingly dismissed. There shall be no order as to costs.

19. The Division Bench of the High Court while dismissing the appeal has reduced the rate of interest from 16% per annum to 9% per annum from the date of the Award till the date of its judgment, subject to the appellants paying the decretal amount to the respondents on or before 30.06.2010. We are inclined to give a similar benefit to the appellants herein. Accordingly, the rate of interest is reduced from 16% per annum to 9% per annum from the date of the Award till this date, subject to the appellants paying the complete decretal amount to the respondents on or before

31.12.2020 failing which the Award along with interest would stand as it is.

...J.
(N.V. RAMANA)

...J.
(S. ABDUL NAZEER)

...J.
(SURYA KANT)

New Delhi;
October 01, 2020