

**AN ARBITRATOR CANNOT OVERLOOK THE DOCTRINE OF MITIGATION OF LOSS WHEN CONSIDERING A CLAIM OF COMPENSATION EVEN WHEN SUCH DEFENSE WAS NOT TAKEN**

**INTRODUCTION:**

The Bombay High Court in a recent decision in ***Prema V. Shetty and Ors. Vs. Saraswat Cooperative Bank Ltd.***<sup>1</sup>, observed that the Arbitrator had a duty to consider the aspect of mitigation of damages, even where such defense had not been taken.

**FACTS:**

The Original Lessor and the Respondent herein as Lessee entered into a Lease Deed dated 23<sup>rd</sup> April, 2016 for a period of five years from 1<sup>st</sup> April, 2016 till 31<sup>st</sup> March, 2021 ("**Lease Deed**") to use and occupy the premises situated at Mumbai ("**subject property**").

The lock-in period was from 26<sup>th</sup> October, 2017 to 31<sup>st</sup> March, 2019, in terms of the Lease Deed dated 23<sup>rd</sup> April, 2016.

On 12<sup>th</sup> May, 2016, the Respondent was handed over the subject property, however disputes arose between the Respondent and the Original Lessor.

The Original Lessor passed away sometime around 1<sup>st</sup> March, 2017.

The Petitioners (being the heirs of the Original Lessor) claimed that the Respondent had without the permission of the Original Lessor carried out several internal and external alterations to the subject property, causing leakages.

The Respondent in turn claimed that it had not carried out any alterations.

The Respondent addressed a letter dated 12<sup>th</sup> April, 2017 stating that it would be terminating the Lease Deed with effect from 1<sup>st</sup> July, 2017, as it was not safe for the Respon

dent to continue to remain in possession of the subject property.

In reply to the letter addressed by the Respondent, the Petitioners denied the allegations contained therein and *inter alia* claimed an amount of Rs. 1,62,34,454/- (Rupees One Crore Sixty-Two Lakhs Thirty-Four Thousand Four Hundred and Fifty-Four only), being the compensation towards the remainder of the lock-in period under the said Lease Deed.

Thereafter, the Petitioners filed an Application under Section 11 of the Arbitration and Conciliation Act, 1996, before the Bombay High Court ("**said Act**") on 25<sup>th</sup> January, 2018 and the matter was referred to Arbitration.

The arbitral proceeding culminated in an Arbitral Award dated 20<sup>th</sup> September, 2019 passed by the Sole Arbitrator ("**Award**") inter alia granting compensation only for the period of three months and not for the entire lock-in period

<sup>1</sup> Commercial Arbitration Petition No. 502 of 2021

which was from 26<sup>th</sup> October, 2017 upto 31<sup>st</sup> March, 2019.

Being aggrieved by a portion of the award, the Petitioners preferred to challenge the Award before the Bombay High Court vide a Petition under Section 34 of the said Act, on the ground that the Arbitrator had committed a patent illegality by granting compensation for only three months of the lock-in period, despite there being no issue raised insofar as mitigation of damage was concerned.

### **ISSUE FOR CONSIDERATION:**

The main issue for consideration before the Bombay High Court was as follows:

Whether an Arbitrator was bound to consider the doctrine of mitigation of loss when deciding compensation payable even when there was no specific issue in regard to the same?

### **SUBMISSIONS ON BEHALF OF THE PETITIONERS**

It was submitted on behalf of the Petitioners that the Arbitrator had by incorrect invocation of law committed a patent illegality in the portion of the Award granting compensation for only three months of the lock-in period.

It was submitted that despite there being no issue raised insofar as mitigation of damage is concerned, the Arbitrator proceeded to determine this issue and placed the onus on the Petitioners of proving that adequate steps were taken to mitigate loss caused due to termination of the said Lease Deed during the lock-in period.

It was further submitted that while mitigation of loss was a rule to be considered while assessing

damages, the onus to prove mitigation of damages was on the Respondent and not on the Petitioners. Only when the Respondent discharged this burden, would the onus shift on the Petitioners. Various authorities were relied upon in support of the aforesaid submissions in ***K.G. Hiranandani Vs. Bharat Barrel & Drum Mfg. Co. Pvt. Ltd.***<sup>2</sup>, ***Kerala High Court in Arya Autherjanam Vs. Kerala State Electricity Board***<sup>3</sup>, ***MMTC Ltd. Vs. M/s H.J. Baker & Bros., Inc.***<sup>4</sup>, ***Rainbow Ace Shipping S.A. Panama Vs. Lufeng Shipping Co. Ltd.***<sup>5</sup>, ***Goetze (India) Ltd., & Anr., Vs. H.R. Thimappa Gowda***<sup>6</sup> and ***S.M. Murray Vs. M/s Fenner India Ltd.***<sup>7</sup>

It was further submitted that factors taken into consideration by the Arbitrator while computing the compensation for unexpired/balance period of lock-in were contrary to the legal position that once it was held that the termination within the lock-in period by a lessee was illegal, no further proof of loss was required and an order ought to be made directing payment of the rent/license fee for the balance duration of the lock-in. The decision of the Bombay High Court in ***India Bulls Properties Pvt. Ltd. Vs. Treasure World Developers Pvt. Ltd.***<sup>8</sup>, was relied upon in support of this submission.

### **SUBMISSIONS ON BEHALF OF THE RESPONDENT**

It was submitted on behalf of the Respondent that inspite there being no specific issue regarding mitigation, it was the duty of the Arbitrator to consider the doctrine of mitigation of loss and that the same could not be overlooked. The decision of the Hon'ble Bombay High Court in ***Shah Jagshi Jethabai vs. J.N.***

<sup>2</sup> AIR 1969 Bom 373

<sup>3</sup> AIR 1996 Ker 309

<sup>4</sup> 2009 SCC Online Del 2143

<sup>5</sup> (2020) 2 Bom CR 135

<sup>6</sup> ILR 2016 Kar 1057

<sup>7</sup> ILR 1988 Del 619

<sup>8</sup> (2014) 4 Bom CR 76

**Construction**<sup>9</sup> was relied upon in support of this submission.

Accordingly, the Arbitrator was bound to decide the issue of mitigation of loss even if the defence was not taken.

It was submitted that it was the duty of the Petitioners to plead and prove mitigation of loss. The decision of various authorities in **Manju Bagai Vs. Magpie Retail Ltd.**<sup>10</sup>, **Tower Vision India Vs. Procall Pvt. Ltd.**<sup>11</sup>, **Pannalal Jugatmal Vs. State of M.P.**<sup>12</sup> and **Auto Craft Engineers Vs. Akshar Automobiles**<sup>13</sup>, were relied upon in support of the aforesaid submission.

It was further submitted that as the Petitioners failed to discharge the onus of proof, no onus of proof could shift on the Respondent to prove that the Petitioners failed to mitigate their losses.

#### **JUDGMENT:**

The Bombay High Court observed that the Arbitrator was justified in deciding the issue of mitigation of loss even when the defense had not been taken.

Relying upon **Shah Jagshi Jethabai (supra)**, the Arbitrator was obligated to consider mitigation of loss.

The Bombay High Court further observed that the Petitioner had failed to take steps to mitigate alleged loss suffered during the lock-in period and hence, the Petitioner could not have been awarded the claim for compensation without such pleading and proof.

The Bombay High Court relied upon the decision in **Tower Vision India (supra)** wherein the Delhi

High Court had considered a similar case of claim of compensation during the lock-in period in a Leave & License Agreement and had held that if the licensor had not taken reasonable steps to minimize the loss, the licensor was not entitled to the claim of compensation during the lock-in period.

The Bombay High Court observed that it was the duty of the Petitioners to plead and prove mitigation of loss. The Petitioners had themselves led evidence that they were unable to lease the subject property to any third party despite several attempts. It was after considering the evidence, the Arbitrator granted the Petitioners compensation equivalent to three months' rent. The view taken by the Arbitrator based on the evidence led by the Petitioner was a possible view and could not be interfered with in a Petition under Section 34 of the said Act.

The Bombay High Court observed that the Arbitrator had a duty to consider the aspect of mitigation of damages and had taken a possible view based on the authorities relied upon and evidence led on behalf of the Petitioners and such possible view cannot be interfered with under Section 34 of the said Act.

The Petitioners had invited such a finding on mitigation of damages by leading evidence of their witness on this issue. Thus, the Arbitrator was duly bound whilst determining compensation payable to the Petitioners to decide the issue of mitigation of loss, even where such defense was not taken.

The Bombay High court observed that there was no illegal invocation of law and / or patent illegality as contended on behalf of the

<sup>9</sup> Arbitration Petition No. 348 of 2009

<sup>10</sup> (2010) 175 DLT 212

<sup>11</sup> (2014) 183 Company Case 364

<sup>12</sup> AIR 1963 MP 242

<sup>13</sup> 2016 SCC OnLine Bom 5185

Petitioners and accordingly, disposed of the Commercial Arbitration Petition.

---

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*