

IN THE HIGH COURT OF DELHI AT NEW DELHI
(Reportable)

O.M.P. 409 of 2006

AMRIT PAL AHUJA & ORS Petitioners
Through: Mr. Sacchin Puri with
Ms. Kaadambari, Ms. Ansi Malik and
Mr. Mukesh Singh, Advocates.

Versus

MAHANAGAR TELEPHONE NIGAM LIMITED Respondent
Through: Mr. Sukumar Pattjoshi, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER
25.09.2012

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an impugned Award dated 22nd May 2006 of the learned sole Arbitrator in the dispute between the Petitioners, Mr. Amrit Pal Ahuja, Mr. Parmod Ojha, Mr. Vijay Kumar Ojha, Mr. Rajesh Kumar Jain, Mr. Raj Kumar Jain and Mr. Ravinder Kumar Jain, and the Respondent Mahanagar Telephone Nigam Limited ('MTNL'), arising out of four lease deeds all dated 14th May 1999 executed by the Petitioners in favour of MTNL.

Background facts

2. The Petitioners were the owners of the basement, ground, first and second floor of the property No. S-5, Green Park, New Delhi (hereinafter referred to 'the property in question'). The four lease deeds dated 14th May 1999 executed by each of the Petitioners in favour of MTNL contained identical

clauses. The lease deeds were duly registered and executed for a period of five years, with monthly rent varying from floor to floor. Clause 1.3.1 of each of the lease deeds read as under:

“1.3.1 All municipal taxes in respect of the demised premises will be paid by the lessee or the lessors will make the necessary payments to the Municipal Authority as per their demand and the lessee will reimburse the same to the lessor for the demised premises on the production or the receipt by the lessors and the lessee shall pay the such demand within one month on the receipt of such demand.”

3. Clause 2.4 which is relevant for the present dispute, reads as under:

“2.4 If during this period, the lessors transfers/sells whole or part of the premises to any person/persons, the lessee shall accept the said person/persons as its lawful lessors and will start paying the rent to the new lessor/lessors from the date as intimated by the old Lessors to the Lessee in writing and the other terms and conditions of the agreement shall remain the same.”

4. According to the Petitioners, despite several reminders, MTNL failed to reimburse the amount of house tax paid by the Petitioners in respect of the leased premises. On 6th March 2003 the Petitioners wrote to MTNL stating that they had deposited Rs. 10 lakhs towards tax payable to the Municipal Corporation of Delhi (‘MCD’) as against a demand of Rs. 72,37,309. The original receipts and the bill of the MCD were enclosed with the said letter. The Petitioners requested MTNL to “kindly reimburse the same to us to enable us to again deposit the part payment to MCD and there on till the final payment.” This was followed by a legal notice dated 6th May 2003 issued on behalf of the Petitioners to MTNL requesting reimbursement of the house tax.

5. The Petitioners sent MTNL a third reminder on 28th January 2004. In the said letter it was reiterated that the property tax assessment had been finalized by MCD by an assessment order dated 31st January 2003 for the period 1st April 1999 onwards and that the Petitioners received a bill in the sum of Rs. 69,63,109 for the period 15th May 1999 to 31st March 2003 payable by 31st March 2003. Since MTNL had not paid the demand, the Petitioners had made the part payments of Rs. 10 lakhs to MCD and a further sum of Rs. 20 lakhs on 31st March 2003. Since MTNL, despite the reminders, had failed to reimburse the tax paid, the Petitioners on 26th December 2003 were constrained to make a further payment of Rs. 39,07,243. Consequently, it was stated in the said letter dated 28th January 2004 that the following amounts were due from MTNL to the Petitioners:

“Rs. 69,07,243 - paid by my clients to MCD towards House Tax as per break-ups given hereinabove.

Rs. 18,43,654 - rebate amount to which you are not entitled.

Total amount due Rs. 87,50,897 (Rs. 69,63,109 as per the Bill for the period up to year 2002-2003 and Rs. 17,87,788 towards House Tax Bill for 2003-04).”

6. Accordingly, the Petitioners asked MTNL to pay the aforesaid amount along with interest @ 18% per annum failing which the Petitioners would proceed against it in accordance with law. By a letter dated 18th March 2004 learned counsel for the Petitioners wrote to the Secretary to the Government of India, Incharge of the Bureau of Public Enterprise invoking the arbitration clause in terms of Clause 2.0 of the lease deeds.

7. Prior to the aforementioned letters dated 28th January and 18th March 2004 the Petitioners on 2nd January 2004 sold the property in question to Mr. Amit

Saxena. According to the Petitioners, simultaneously with the execution of the sale deed in his favour, Mr. Saxena gave a written undertaking to the Petitioners in which he acknowledged that they had already paid house tax in respect of the property in question up to 31st March 2004 which was the liability of the MTNL as per the lease deeds dated 14th May 1999. In the said undertaking Mr. Saxena further stated:

“5. That I shall have no claim and rights on the recoveries of the said house tax amount from the MTNL Ltd. by the said sellers.

6. That this undertaking shall be binding upon my legal heirs and successors.

7. That I have executed this undertaking voluntarily without any outside pressure and in my full senses.”

8. By a letter dated 2nd January 2004 the Petitioners informed the MTNL as under:

“We have transferred all our rights, titles, interests in respect of the said property to Shri Amit Saxena and hence forth have no right, title or interest in the said property. You are requested to pay monthly rent, i.e., Rs. 4,63,145 in respect of the said property to Shri Amit Saxena R/o GC-28, Block-G, Hari Nagar, New Delhi – 110058 w.e.f. 1st February 2004 who shall be substituted as lessor in our place and all other terms and conditions in the lease deed will remain unaltered and shall be binding on and shall apply mutates mutandi to the new owner.”

9. The Petitioners also enclosed a copy of the sale deed. The clauses of the sale deed, which are relevant for the present case, read as under:

“Clause 3

That the said property is under the tenancy with MTNL Ltd., therefore, proprietary possession in respect of the said share in the said property has been given by the Vendor to the Vendee through this Sale Deed with the right to receive and recover the

rent, to issue the receipt/s, to get the tenant evicted through the process of law or by negotiation, to take possession, etc. etc.

Clause 5

That the vendor admits that now he has been left with no right, title and interest of any nature whatsoever in the said share in the said property and the vendee has become the owner of the same. He will now enjoy and utilize the said share in the said property in any manner without of disturbances by the Vendor or any other person claiming title through title through or under him.

Clause 9

That the vendor shall pay all the dues, demands, taxes etc. in respect of the said share in the said property up to the date of registration of this sale deed and thereafter the same shall be paid by the vendee. However, the house tax up to 31st March 2004 has already been paid by the vendor.”

10. MTNL handed over the vacant and peaceful possession of the property in question to Mr. Amit Saxena on 11th May 2004. The following discharge was given by Mr. Saxena to MTNL on 18th May 2004:

“There are no outstanding dues of any kind whatsoever against MTNL with respect to aforesaid premises until 11th May 2004 and that whatever was payable, it stands paid to me.

I further declare that in case anyone makes any claim in respect of arrears of rent etc. in respect of aforesaid property, MTNL will not be responsible to pay the same and I will indemnify MTNL of any claim of any kind whatsoever.”

11. The case of MTNL was that with the property in question having been sold to Mr. Saxena by executing a registered sale deed, the Petitioners lost their right to invoke the arbitration clause in terms of the lease deeds. Moreover, the arbitration clause stood assigned along with the lease deeds to Mr. Saxena and thus only Mr. Saxena could have invoked the arbitration

clause.

Arbitral proceedings

12. Pursuant to the invocation of the arbitration clause by the Petitioners, Indian Council of Arbitration ('ICA') by its letter dated 20th October 2004 referred six disputes of common nature between the MTNL and the Petitioners to the arbitration of the learned sole Arbitrator, a former Judge of this Court. The Petitioners filed a statement for claim for a total sum of Rs. 95,06,459 along with interest @ 18% per annum.

13. One of the preliminary objections raised by MTNL in its statement of defence was that the Petitioners had no *locus standi* to file any claim in respect of the property in question since they had already sold it to Mr. Saxena by a sale deed dated 2nd January 2004. After execution of the sale deed Mr. Amit Saxena had substituted the Petitioners as owner/lessor. The Petitioners were no more parties to the lease deeds. In case of any dispute only Mr. Saxena would have the right to initiate the arbitral proceedings. Moreover, Mr. Saxena had given a complete discharge to MTNL by his letter dated 18th May 2004. The question of reimbursing the Petitioners any sum paid by them by way of tax did not arise.

14. In their rejoinder, the Petitioners admitted to having sold the property in question to Mr. Saxena by a registered sale deed dated 2nd January 2004. However, it was asserted that in terms of Clause 1.3.1 of the lease deeds the Petitioners had the *locus standi* to maintain the claim *qua* the property tax paid and the arbitration clause continued despite the subsequent sale of the property in question to Mr. Saxena. Reference was made to the undertaking

given by Mr. Saxena to the Petitioners on 2nd January 2004.

15. The following issues were framed by the learned Arbitrator for consideration:

“(1) Whether the Respondent-MTNL is liable to reimburse house tax paid by the erstwhile landlords/claimants?

(2) Whether there any existing/subsisting arbitration agreement in between the parties?

(3) Relief?”

The Arbitral Award

16. The learned Arbitrator discussed the documents produced by the parties and concluded that the fact that the Petitioners had paid house tax in the sum of Rs. 69,07,243 was not in dispute. However, he held that the question of reimbursement of the said amount by MTNL would depend on whether MTNL was “legally liable” to do so. The learned Arbitrator observed:

“Since it is not claimed that amount of House Tax paid by the claimants has been reimbursed in terms of clause 1.3.1 of the Lease Deeds, if the MTNL is legally supposed to pay the amount, the MTNL would be liable to reimburse the actually paid to MCD. The claimants would not be able to claim that the MTNL would not be entitled to amount of rebate of Rs. 18,43,654 for the claimants are entitled to be reimbursed for what has been actually paid by them. As regards the period between dates of payments till payment, the claimants could be reimbursed by awarding interest at the rate of interest given by National Banks in peculiar circumstances of the case.”

17. The learned Arbitrator next discussed the legal liability of the MTNL to pay house tax. After discussing the provision of Section 120 of the Delhi Municipal Corporation Act, 1957 (‘DMC Act’) and the decision in *OMP No. 409 of 2006*

Municipal Corporation of Delhi v. Shashank Steel Industries (P) Ltd. 100 (2002) DLT 66, the learned Arbitrator observed that legislative intent in enacting Section 120 of the DMC Act was to ensure that property tax was collected only from the lessor/landlord. In the event that the lessee was made to pay property tax or reimburse the property tax paid by the lessor, it would defeat the above legislative intent and “consequently such an agreement would be unlawful and every agreement of which object or consideration is unlawful is void.” The learned Arbitrator discussed the provisions of the Indian Contract Act, 1872 (‘CA’) in light of the decision in ***Gurmukh Singh v. Amar Singh*** (1991) 3 SCC 79 and concluded that the Petitioners could not claim house tax paid to MCD from the MTNL since it was not liable to pay property tax under Sections 120, 121 or 122 of the DMC Act.

18. The further issue considered by the learned Arbitrator was whether the claims of the Petitioners were arbitrable? The learned Arbitrator observed that since the arbitration clause had been assigned in favour of Mr. Saxena with the execution of the sale deed, the arbitration clause could no longer be invoked by the Petitioners. Referring to Section 62 of the CA, the learned Arbitrator concluded:

“Since, in this case claimants were authors of the assignment, in terms of this judgment there is assignment coupled with novation and a new contract between Amit Saxena and MTNL had come into existence and by inevitable conversion MTNL stands relieved of its obligation under the arbitration clause towards the claimants.”

19. The conclusion of the learned Arbitrator was that the earlier lease deeds along with the arbitration agreement ceased to exist once the property in question was sold to Mr. Saxena. The Petitioners had been substituted by

Mr. Saxena. Referring to the decision of the Supreme Court in ***Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya (2003) 5 SCC 531*** it was held that reference of the disputes to arbitration at the instance of the Petitioners was not permissible as there could not be a bifurcation of those who were parties to the arbitration agreement and those who were not. Accordingly, claims of the Petitioners were rejected by the learned Arbitrator.

Submissions of counsel

20. Mr. Sacchin Puri, learned counsel for the Petitioners submitted that the learned Arbitrator having come to the conclusion that MTNL was liable to reimburse the Petitioners the property tax paid by them to the MCD, erroneously declined to pass the consequential orders by holding that such relief would be opposed to public policy in light of Sections 120, 121 and 122 of the DMC Act. It is submitted that when the parties agreed on MTNL reimbursing the Petitioners the property tax paid in respect of the property in question, the learned Arbitrator could not have exceeded the provisions of the said contract. Moreover, this was not even the plea taken by MTNL in its written statement of defence. The point was urged only during arguments. It is submitted by the Petitioners that the learned Arbitrator was not clear about the distinction between the two issues. One was that whether MTNL was liable to reimburse the property tax paid by the Petitioners to the MCD in terms of the lease deeds. The second was whether in hypothetical cases the lessee could be called upon to pay property tax in light of Sections 120, 121 and 122 of the DMC Act.

21. As far as the present case is concerned, since the arbitration clause survived the agreement, the learned Arbitrator was obliged to examine what

the rights and obligations of the parties were in terms of the lease deeds and decide accordingly. It is further submitted that there was no occasion for Mr. Saxena to come forward to seek reimbursement since the sale deeds categorically stated that property tax up to 31st March 2004 already stood paid by the Petitioners. The letter written by Mr. Saxena to MTNL on 18th May 2004 giving a complete discharge was valid only between Mr. Saxena and MTNL and would not preclude the Petitioners from seeking reimbursement of the property tax as already paid in terms of Clause 1.3.1 of the lease deeds dated 14th May 1999.

22. Mr. Sukumar Pattjoshi, learned counsel for the MTNL first submitted that the scope of interference by this Court to the arbitral Award in the petition under Section 34 of the Act was limited. He placed reliance on the decisions of the Supreme Court in ***T.P. George v. State of Kerala AIR 2001 SC 816***, ***M/s. Sudarsan Trading Co. v. The Govt. of Kerala AIR 1989 SC 890***, ***H.P. State Electricity Board v. R.J. Shah and Company (1999) 4 SCC 214***, and ***Food Corporation of India v. Joginderpal Mohinderpal AIR 1989 SC 1263***. He submitted that the view taken by the learned Arbitrator that in light of Sections 120, 121 and 122 of the DMC Act, any decision requiring the MTNL to reimburse the Petitioners of the house tax paid by them would be opposed to the public policy under Section 23 of the CA was a plausible view to take and therefore, did not call for interference. He pointed out that the undertaking given by Mr. Saxena was never proved in the arbitral proceedings by the Petitioners. Mr. Saxena was not examined on this aspect. The request made by the Petitioners by filing a petition in this Court for summoning Mr. Saxena as witness was also rejected.

23. Mr. Pattjoshi submitted that after the assignment of the lease deeds in favour of Mr. Saxena, the expression 'lessor' could refer only to Mr. Saxena. Any obligation of MTNL in terms of Clause 1.3.1 of the lease deeds to reimburse the house tax paid was only towards Mr. Saxena and not the Petitioners. He pointed out that under Clause 9 of the sale deed the Petitioners did not reserve their rights to pay all the dues, demands, taxes etc. in respect of the property in question. Under Clause 3 of the sale deed the right to receive and recover the rent was only of Mr. Saxena. Once Mr. Saxena had, on 18th May 2004, given a complete discharge to MTNL and further stated that in case anyone makes any claim "in respect of arrears of rent etc. in respect of aforesaid property, MTNL will not be responsible to pay the same and I will indemnify MTNL of any claim of any kind whatsoever" no further claim could be made by anyone including the Petitioners against Mr. Saxena or against MTNL.

24. Mr. Pattjoshi further submitted that the Petitioners did not have any right to invoke the arbitration clause once the leases stood assigned to Mr. Saxena. The view taken by the learned Arbitrator, that the property tax payable to MCD could be demanded from and paid only by the lessor, was consistent with the settled law laid down by the High Court in several decisions. Since that view was plausible, the impugned Award did not call for interference.

25. In rejoinder, it is pointed out by Mr. Puri that Article 63 of Schedule I to the Indian Stamp Act, 1899 ('ISA') rightly recognizes "transfer of lease by way of assignment and not by way of under lease", as a distinct species of document for which the duty payable was also separately indicated. Section

5 of the ISA also contemplates “any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act.”

Scope of interference

26. Before examining the above submissions of learned counsel for the parties, it is necessary to recapitulate the law relating to the scope of interference by the Court to the impugned Award under Section 34 of the Act. Section 28 (3) of the Act mandates that the arbitral Tribunal shall decide the disputes in accordance with the contract entered into between the parties. In ***Steel Authority of India Ltd. v. J.C. Budharaja AIR 1999 SC 3275***, the Supreme Court explained:

“The arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator however, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction.”

27. Whereas in the present case the parties voluntarily entered into the lease deeds and were bound by the clauses therein, it was not open to the learned Arbitrator to conclude that the clause in the lease deeds was opposed to public policy. In other words in the absence of such an issue being specifically raised by either of the parties, it was not within the jurisdiction of the learned Arbitrator to examine whether Clause 1.3.1 of the lease deeds

was opposed to public policy. Such relief was in fact not sought before the learned Arbitrator by MTNL. The parties in fact acted on the lease deeds as long as the previous lease deeds subsisted. In the present case certain facts have been mixed up by the learned Arbitrator. The property tax had been paid by the Petitioners even prior to the sale of the property in question to Mr. Saxena.

28. The Petitioners had, however, put the MTNL on notice about the payments made by them of the property tax. With the letter dated 6th May 2003 addressed to MTNL, a photocopy of the notice under Section 126 of the DMC Act, objections, assessment order dated 31st January 2003 and the house tax bills were enclosed. Details of payments were set out in a notice dated 28th January 2004. Therefore, MTNL was aware of the fact that the Petitioners had paid property tax. At no point in time had MTNL resiled from Clause 1.3.1 of the lease deeds or deny its liability to make payment. The fact that such property tax was paid by the Petitioners was not disputed before the learned Arbitrator. The learned Arbitrator, therefore, rightly decided that MTNL would be liable to reimburse whatever amount was actually paid as property tax by the Petitioners to the MCD. However, the learned Arbitrator proceeded to further observe “if the MTNL is legally supposed to pay the amount, the MTNL would be liable to reimburse the actually paid to MCD.”

29. In the considered view of this Court, the discussion by the learned Arbitrator of the object of Sections 120, 121 and 122 of the DMC Act was wholly academic and unnecessary. The fact that the said provisions do not contain a *non-obstante* clause is a pointer to the possibility of parties

deciding on a different arrangement. In other words while the burden of property tax is primarily on the owner of the property, the owner can by an agreement with the lessee pass on the burden of the property tax to the lessee. As long as the revenue of the government is not adversely affected or the liability to pay tax remains that of the lessor, it does not matter if the property tax is by agreement paid by the lessee.

30. In a recent judgment of this Court in ***Raghubir Saran Charitable Trust v. Puma Sports India Pvt. Ltd.*** (decision dated 4th July 2012 in OMP No. 955 of 2011) the said issue was considered in the context of liability to pay service tax arising out of the leasing of the property. It was held that the clause of the contract would actually determine who is to pay the service tax. However, for the purposes of levy and collection of property tax, the statutory authority will raise a demand only on the person liable to make such payment.

31. For instance in the present case irrespective of Clause 1.3.1, MCD could pass an assessment order only *qua* the lessor. Even if the agreement between the parties was that the property tax would be paid by the lessee, as far as the MCD is concerned, it will raise a demand only on the owner of the premises in question. The wording of Clause 1.3.1 of the lease deeds envisages a situation where the lessee will reimburse the lessor the property tax paid by the lessee. Neither Sections 120 to 122 of the DMC Act are violated nor would the MCD be deprived of property tax if under the lease deeds the lessor paid the property tax and sought reimbursement for the lessee. That right which flows from the lease deeds is not restricted by Sections 120 to 122 of the DMC Act.

32. On the other hand if Clause 1.3.1 was to provide that the property tax will be paid only by the lessee, then it might have been possible for MTNL to contend that the said clause was opposed to Sections 120 to 122 of the DMC Act and therefore opposed to the public policy under Section 23 of the CA. However, here the property tax has already been paid by the Petitioners who are seeking reimbursement by virtue of Clause 1.3.1 of the lease deeds.

33. Consequently, this Court is of the view that the learned Arbitrator committed a patent illegality in holding that the enforcement of Clause 1.3.1 of the lease deeds in the present case would constitute a violation of Sections 120, 121 and 122 of the DMC Act. The impugned Award is therefore, opposed to the public policy of India in terms of Section 34 (2) (b) (ii) of the Act.

Arbitrability of the claims

34. On the question of arbitrability of the claims also the decision of the learned Arbitrator was patently erroneous. The law regarding the arbitration clause surviving the contract between the parties is well settled. In ***Branch Manager, Magma Leasing & Finance Limited v. Potluri Madhavalata (2009) 10 SCC 103***, the earlier decisions were analysed and it was reiterated that the arbitration clause of the original contract survived the termination of the contract. It was emphasized that “merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor is rendered inoperative; rather it survives for resolution of disputes arising ‘in respect of’ or ‘with regard to’ or ‘under’ the contract.”

35. The learned Arbitrator overlooked the aforementioned settled legal

position and proceeded to hold that the arbitration clause in the present case ceased once the sale deed was executed by the Petitioners in favour of Mr. Saxena. The learned Arbitrator failed to appreciate that the events in respect of which the claims of the Petitioners were raised took place prior to the execution of the sale deed. The said claims were essentially for reimbursement of property tax paid by the Petitioners which was much prior to the execution of the sale deed on 2nd January 2004. In fact Clause 9 of the sale deed acknowledged that the property taxes already stood paid up to 31st March 2004 by the Petitioners. The claim of the Petitioners was in respect of an event that preceded the execution of the sale deed. The payment of property tax by the Petitioners was made even while the lease deeds between them and the MTNL subsisted. The disputes in relation thereto could therefore be raised in terms of the arbitration Clause 2.4. The assignment of the leases in favour of Mr. Saxena, did not take away the right of the Petitioners to seek reimbursement in terms of Clause 1.3.1. Consequently, the decision of the learned Arbitrator on the question of arbitrability of the claims of the Petitioners is also unsustainable in law.

36. The impugned Award does not call for interference by the Court to the extent that the learned Arbitrator has held that the Petitioners would be entitled to reimbursement of property tax paid by them, if MTNL was otherwise legally bound to do so, and further that the Petitioners are not entitled to recover from MTNL the rebate which they availed from the MCD for timely payment of property tax.

Conclusion and directions

37. In conclusion, the impugned Award is upheld to the extent it holds that

the claim of the Petitioners for a sum of Rs.69,07,243 towards reimbursement of the property tax paid is allowed. The impugned Award to the extent it holds that MTNL is not so legally bound to reimburse the property tax is patently illegal and is therefore set aside. Consequently, the Petitioners are held entitled to Rs.69,07,243 together with simple interest @ 9% per annum from the date of payment as mentioned in the Award till its realization which in any event shall not be later than six weeks from today.

38. The petition is disposed of in the above terms.

S. MURALIDHAR, J.

SEPTEMBER 25, 2012

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