

Court No. - 19

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 3 of 2022

Applicant :- M/S Moksh Innovations Inc. Thru. Manager
Jitendra Singh Bisht

Opposite Party :- E-City Property Management And Services
(P) Ltd. And Others

Counsel for Applicant :- Desh Mitra Anand, Piyush Kumar
Agarwal

Counsel for Opposite Party :- Pushpila Bisht

Hon'ble Jaspreet Singh, J.

Heard Shri Piyush Kumar Agarwal, learned counsel for the petitioner and Ms. Perna Jalan learned counsel appearing under the authority of Ms. Pushpila Bisht, learned counsel for the respondent.

The instant petition has been preferred by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act of 1996", for short) seeking appointment of an independent sole Arbitrator.

It is the contention of the learned counsel for the petitioner that a maintenance agreement was entered between the respondent No.2 and the petitioner. The petitioner has been granted a licence for 'Rest 2' on third floor, having a carpet area of 240 ft. meters, in Mall-cum-Entertainment Complex popularly known as 'Fun Republic Mall' from where the petitioner was carrying out its business of restaurant and bar under the brand name Rodeo. The maintenance agreement was for a period of three years and it also contained an arbitration clause in Clause 22(s).

It is further urged by the learned counsel for the petitioner that apart from the maintenance agreement, the parties had also entered in a Leave and Licence Agreement which was also dated 01.02.2007. The petitioner was put in possession and it was running its business, however, on 01.08.2007 a huge canopy in the Fun Republic Mall on account of some manufacturing defect caved in as a result the petitioner's premises which was the subject matter of Leave and Licence Agreement was affected as the entire area under the Leave and Licence Agreement of the petitioner was cut off.

It is also stated that on 21.05.2008, the respondents through

their Manager and other 10-12 undesirable persons reached the premises under the Leave and Licence Agreement and threatened the petitioner to vacate the premises failing which they would ensure that the petitioner is dispossessed.

On 23.05.2008, the respondents disconnected the electricity supply which also compounded the business woes of the petitioner. The petitioner being under an eminent threat of dispossession filed a suit bearing No.797/2008 before the Civil Judge (Senior Division), Lucknow. However, during visit of the Advocate's Commissioner to the premises under the Leave and Licence Agreement of the petitioner, it was found that the premises was locked and there were two locks on the door. Apparently, one placed by the petitioner and the other by the respondents and in this fashion the respondents had effectively curtailed the petitioner for utilizing and running its business.

The petitioner also filed a petition under Section 9 of the Act of 1996 and the same is pending before the Commercial Court bearing Arbitration Case No.28/2009.

In the meantime, the respondents invoked the arbitration clause and since the Leave and Licence Agreement contained an arbitration clause which had its venue and seat at Mumbai. Consequently, upon the invocation of the same, an Arbitrator was appointed, who initiated proceedings and it culminated in an ex-parte award dated 04.07.2012.

The petitioner being aggrieved with the said ex-parte award preferred a petition under Section 34 of the Act of 1996 which is engaging attention of the appropriate Court. The respondents in terms of the ex-parte award are also pressing their execution, which is being contested by the petitioner. However, insofar as the maintenance agreement is concerned, the petitioner noticing that the same also contains an arbitration clause, by means of its notice dated 02.02.2022 by referring to the agreement dated 01.02.2007 invoked the arbitration clause. The respondents sent a reply to the said notice and clearly indicated that the instant request for appointment of an Arbitrator was patently time barred including the claims and as such no Arbitrator can be appointed.

It is in the aforesaid backdrop that the petitioner has approached this Court for appointment of a sole Arbitrator.

Per contra, Ms. Jalan, learned counsel for the respondents while controverting the submissions made by the petitioner has pointed out that intrinsically two simultaneous agreements dated 01.02.2007 were executed between the parties.

One Leave and Licence Agreement in terms whereof the petitioner was granted the privilege of utilizing the premises demised for running a restaurant and bar under the brand name Rodeo. This agreement too was for a limited duration and also contained an arbitration clause in terms whereof the venue and seat of Arbitrator was at Mumbai.

It is further urged that insofar as the Leave and Licence Agreement is concerned, the respondents had already invoked the arbitration clause in terms whereof the arbitration proceedings were held and it culminated in an award dated 04.07.2012 and in terms of the said award, the petitioner was directed to pay a sum of Rs.98,08,105/- along with 18% interest w.e.f. June, 2007 till realization, arbitration fee and cost of Rs.40,000/- and Rs.4,000/- as administration fee which was to be equally shared by the parties.

It is urged that in the aforesaid backdrop and from a bare perusal of the pleadings as indicated in the petition, it would clearly amplify that the agreement was dated 01.02.2007 and it was for a period of three years. The incident regarding falling of the canopy took place in 2008 and in terms whereof the petitioner was compensated by the respondents. However, the respondents unnecessarily raised disputes which prompted the petitioner to invoke the arbitration clause and as indicated above it resulted in the award dated 04.07.2012 which has been challenged by the petitioner by filing a petition under Section 34 of the Act of 1996 before the Court in the year 2012 itself.

The contention of the learned counsel for the respondents is that once the petitioner was made aware of the award dated 04.07.2012 which has been assailed by the petitioner himself coupled with the fact that the Leave and Licence Agreement had already come to an end in the year 2010 and as per the case of the petitioner himself he was not utilizing the premises and the maintenance agreement which is now being relied upon for invoking the arbitration clause all claims arising therefrom are patently time barred in the sense that under the maintenance agreement it was the petitioner who had to pay the maintenance charge. The respondents were to receive the maintenance and this has not been claimed by the respondents and thus it cannot be said that the petitioner was in any way aggrieved by the maintenance agreement rather a deliberate attempt has been made to invoke the arbitration clause especially after a gap of ten years that too without any demand being made by the respondent and after the agreement had expired by efflux of time and despite the petitioner contesting the issues before the various Courts challenging the award dated 04.07.2012 as well as resisting the execution application. In this context, the

reference is apparently time barred and no reference can be made, consequently, the petition deserves to be dismissed.

In response thereto, Shri Agarwal, learned counsel for the petitioner submits that both the agreements dated 01.02.2007 i.e. Leave and Licence Agreement and maintenance agreement of the same date relate to the same premises and were interconnected and since the maintenance is a continuing cause of action, accordingly, the petition cannot be said to be time barred. Moreover, the issue of limitation is a mixed question of law and fact which can be considered by the Tribunal, however, the reference Court in exercise of powers under Section 11(6) of the Act of 1996 may not go into the merits of the matter which may effect the rights of the parties concerned. Shri Agrawal in support of his submissions has relied upon the decision of the Apex Court in **Bharat Sanchar Nigam Limited and another v. Nortel Networks and Private Limited, (2021) 5 SCC 738**.

The Court has heard learned counsel for the parties and also perused the material on record.

Certain facts which are undisputed are (i) Two agreements relating to demised property both dated 01.02.2007 were executed in between the parties and both contains an arbitration clause, (ii) One was Leave and Licence Agreement and the other was maintenance agreement and in terms of Leave and Licence Agreement, the petitioner was permitted to operate his outlet subject to the terms and conditions contained in the said agreement whereas the scope of maintenance agreement was different inasmuch as the petitioner was required to pay maintenance charges for operating his outlet and use of common facilities in the Mall, (iii) the disputes had occurred between the parties in 2008 when a canopy fell which affected the operations of the business of the petitioner. Since, the premises were placed under lock one by the petitioner and the other by the respondents, consequently no effective work or business could be carried out by the petitioner nor the said premises could be used gainfully by the respondents; (iv) since, the respondents who were claiming the licence fee for the use and occupation of the premises had invoked the arbitration clause in the Leave and Licence Agreement which culminated in an ex-parte award and the same was challenged by the petitioner in proceedings under Section 34 of the Act of 1996 as well as the petitioner has been resisting the execution proceedings filed by the respondents for getting the award implemented.

In the aforesaid backdrop, if the submissions of the respective parties is seen, it would be found that insofar as the licence fee

and maintenance charge is concerned, the same was receivable by the respondents and payable by the petitioner. Since, the respondents could not get the premises and nor it could get the licence fee, hence, it invoked the arbitration clause and culminated in an ex-parte award which is under challenge in proceedings under Section 34 of the Act of 1996 at the behest of the petitioner. The respondents has not raised any demand of maintenance and even from a perusal of the notice issued by the petitioner invoking the arbitration dated 02.02.2022 it would be found that there is no clarity or categoric averment made by the petitioner as to how he appeared to be aggrieved for the maintenance agreement. Moreover, no clear reference has been made as to which agreement is being mentioned in the notice i.e. the Leave and Licence Agreement or the maintenance agreement for which the petitioner sought the appointment of an Arbitrator.

Another important aspect which is to be noted is the fact that dispute had already erupted in the year 2008 and moreover the Leave and Licence Agreement and maintenance agreement, both came to an end sometime in the year 2010.

In light thereof, once the respondents had already escalated the matter and had invoked the arbitration clause leading to passing of an ex-parte award dated 04.07.2012 which was in the notice of the petitioner and he had filed a petition under Section 34 along with resisting the petition under Section 36 filed by the respondents, but did not take any measure to invoke the arbitration clause for raising any dispute in terms of the maintenance agreement coupled with the fact that both the agreements had outlived its utility and had expired by efflux of time in the year 2010. Moreover, the fact that the petitioner was not able to utilize the premises and there has been no demand made by the respondents seeking any maintenance charge from the petitioner, hence, apparently after ten years moving a letter for invoking the arbitration and that too for non-existing demand regarding the maintenance the attempt of the petitioner does not display bonafides.

The contention that maintenance is continuing cause of action has also no legs to stand since the agreement had expired by efflux by time and moreover the aggrieved party if any could have been respondents who were entitled to maintenance charge which they have not claimed and thus after contesting proceedings and not raising any issue of maintenance at any point of time by the petitioner and only resorting to it in the year 2022 apparently display lack of bonafide and the contention also does not sound reasonable.

The Apex Court in **Nortel Networks** (supra) in Para 53 has given its conclusion which are being reproduced hereinafter for ready reference.

"Conclusion

53. Accordingly, we hold that:

53.1. The period of limitation for filing an application under Section 11 would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. The period of limitation will begin to run from the date when there is failure to appoint the arbitrator. It has been suggested that Parliament may consider amending Section 11 of the 1996 Act to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings.

53.2. In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.

54. In view of the aforesaid, the present civil appeals are allowed, and the impugned orders dated 13-10-2020 [Nortel Networks (India) (P) Ltd. v. BSNL, 2020 SCC OnLine Ker 18662] and 14-1-2021 [BSNL v. Nortel Networks (India) (P) Ltd., 2021 SCC OnLine Ker 2375] passed by the High Court are set aside. The application filed under Section 11 by the respondent before the High Court is consequently dismissed."

Taking cue from the aforesaid decision of **Nortel Networks** (supra), this Court while exercising powers under Section 11(6) of the Act of 1996 prima-facie after examining the entire matter is of the clear opinion that the claim as sought to be raised by the petitioner are ex-facie time barred and in this context alone there is no subsisting dispute as there is no demand of maintenance made by the respondent against the petitioner. Though if this is seen from the side of the petitioner then it is hit by limitation. Accordingly, this Court is not inclined to make any reference for arbitration.

For the aforesaid reasons, the petition is dismissed.

Costs are made easy.

Order Date :- 18.11.2023

Rakesh/-