

In the High Court of Judicature at Madras

Dated : 23.04.2015

Coram :

The Hon'ble Mr.Sanjay Kishan Kaul, Chief Justice

O.P.No.638 of 2014

M/s.Shri Nidi Holding,
A Partnership Firm
through its partner Karthik Sabanayagam,
No.79, Chamiers Road,
R.A. Puram,
Chennai-600 028. ... Petitioner

-vs-

M/s.Sir John Demonte Trust,
represented by its Sole Trustee
Archbishop of Madras - Mylapore,
No.41, Santhome High Road,
Chennai-600 004. .. Respondent

Petition filed under Section 11 (5) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator to resolve the disputes that have arisen between the petitioner and the respondent under the Lease Agreement/Agreement registered on 18.1.2012.

For Petitioner : Mr.R.Venkatavaradan

For Respondents : Mr.Sriram Panchu
Senior Counsel
for
Mrs.Auxilia Peter

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O R D E R

The petitioner, through its partner has instituted this petition under Section 11 (5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act') as a consequence of the disputes arising from the lease

deed dated 18.01.2012 with the respondent Trust, through its Trustee, Archbishop of Madras-Mylapore. The subject matter of the lease deed is a property situated at Door Nos.331 and 333, Demonte colony, TTK Road, Alwarpet, Chennai-600 018.

2. The disputes had given rise to filing of an application under Section 9 of the said Act bearing Application No.3775 of 2014 before this Court seeking interim direction, and when an endeavour was made to resolve the disputes through meeting between the parties, the application was withdrawn with liberty to approach this Court for interim relief with the hope that the disputes would be settled. Unfortunately, the hopes were belied.

3. The petitioner relies upon the dispute resolution clause, which is as under:-

"18. Dispute Resolution:

18.1 Any dispute with regard to either the interpretation or implementation of any of the provisions of the Deed of Lease or the breach in any of the covenants herein contained shall first be settled by mutual discussions, failing which the same shall be referred to a Single Arbitrator to be mutually agreed and appointed by both the LESSOR and the LESSEE.

18.2 The Award passed by the Single Arbitrator shall be final binding on the parties.

18.3 The parties agree that the venue for arbitration shall be Chennai and the Language for arbitration shall be English."

letter dated 05.09.2014, the petitioner sought concurrence of the respondent for appointment of a Judge named by them as the sole arbitrator, there was no response even after the passage of 30 days from the date of receipt of the notice.

4. The petition is opposed by the respondent on two grounds, viz.,

(1) Lease deed dated 18.1.2012 is in the teeth of an injunction order passed by the Hon'ble Supreme Court in Civil Appeal No.3052 of 2006 and thus, is non-est and unenforceable in law.

(2) The respondent Trust has invoked the jurisdiction of this Court on the Original Side by filing an application under Section 7 of the Charitable and Religious Trusts Act, 1920 (hereinafter referred to as 'the Trusts Act').

5. A perusal of the counter-affidavit shows that there is a discussion of factual controversy, which to my mind is not germane to determine the present petition, other than the aforesaid two aspects. This being so, there is a reference to some earlier Memorandum of Agreement being executed with another partnership firm M/s.Shri Nidhi Holding LLP. The fact, however, remains that invocation of the arbitration clause is qua the lease deed entered into *inter se* the parties.

6. The learned Senior Counsel for the respondent submits

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that the Archbishop of Madras-Mylapore then had given an

undertaking before the Hon'ble Supreme Court, not to dispose of or part with or lease or deal with the properties of the Trust unless necessary permission is obtained from the competent Court under Section 7 of the Trusts Act. This undertaking is recorded in the order dated 14.12.2011 and the copy of the order was made ready on 19.01.2012, as per the endorsement on the reverse of the certified copy of the order. It is, thus, submitted that the execution of the lease deed on 18.01.2012 appears to be an endeavour to over reach the undertaking.

7. It is also contended by the learned Senior Counsel for the respondent that such a lease deed is hit by the provisions of Section 23 of the the Indian Contract Act, 1872 (hereinafter referred to as 'the Contract Act'). The said provision reads as under:-

"23. What considerations and objects are lawful, and what not.- The consideration or object of an agreement is lawful, unless -

it is forbidden by law, or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy

object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

It is, thus, submitted that the lease deed is both forbidden by law in view of the orders of the Hon'ble Supreme Court and also opposed to public policy.

8. On the other hand, the learned counsel for the petitioner submits that the petitioner was not a party to those proceedings, the then Archbishop entered into a lease deed, monies were paid under the lease deed not only to the earlier Archbishop, but even to the present Archbishop, much after the lease deed was executed, though it is the claim of the learned Senior Counsel for the respondent that after having appropriated that amount, the same was refunded. The refunded amount, as per the learned counsel for the petitioner, has not been encashed. The learned counsel for the petitioner submits that in any case, all these aspects are for the arbitrator to determine as to what is the consequence of the undertaking given before the Hon'ble Supreme Court and the lease deed being executed, apart from the fact that there are various alternative reliefs available for the arbitrator to grant in case the lease deed cannot be specifically unenforced. He submits that on the basis of the lease deed, sub-lease deeds have been executed with third parties and the rights of those third parties are affected.

9. In respect of the second plea, the learned Senior

Counsel for the respondent submits that there would be conflict of view in case an arbitrator was to be pineotherwise than what

is the view of the Court under Section 7 of the Trust Act, which reads as under:-

"7. Powers of trustee to apply for directions.- (1) Save as hereinafter provided in this Act, any trustee of an express or constructive trust created or existing for public purpose of a charitable or religious nature may apply by petition to the Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon:

Provided that the Court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal.

(2) The Court on a petition under sub-section (1), may either give its opinion, advice or direction thereon forthwith, or fix a date for the hearing of the petition, and may direct a copy thereof, together with notice of the date so fixed, to be served on such of the persons interested in the trust, or to be published for information in such manner, as it thinks fit.

(3) On any date fixed under sub-section (2) or on any subsequent date to which the hearing may be adjourned, the Court, before giving any opinion, advice or direction, shall afford a

reasonable opportunity of being heard to all persons appearing in connection with the petition.

(4) A trustee stating in good faith the facts of any matter relating to the trust in a petition under sub-section (1), and acting upon the opinion, advice or direction of the Court given thereon, shall be deemed, as far as his own responsibility is concerned, to have discharged his duty as such trustee in the matter in respect of which the petition was made."

Be that as it may, the learned Senior Counsel submits that the petition is premature, as it would be advisable to wait for the result of the proceedings initiated by the respondent under the said provision.

10. On the other hand, the learned counsel for the petitioner has drawn the attention of this Court to the fact that this petition has been filed almost a month after the jurisdiction of this Court under the said Act was invoked. He submits that this provision is in the nature of an advisory view of the Court and the Court is having the right to decline the same. He further submits that in order to avoid the arbitration proceedings, for some reason, such proceedings have been initiated and the petitioner is a party to that proceedings, in which they have raised a preliminary objection as to the maintainability of such petition, as also moved an application under Section 8 of the said Act. His submission is, such

application could not be maintainable after having dealt with the property, as the advisory jurisdiction of the Court under

Section 7 of the said Act is really available prior to entering into the transaction.

11. In the conspectus of the aforesaid submissions, I am of the view that both objections raised by the respondent, are not sustainable.

12. In so far as the first aspect is concerned, no doubt, the earlier Archbishop has given an undertaking before the Hon'ble Supreme Court. The undertaking was in the form of not dealing with the properties unless permission was obtained under Section 7 of the Trusts Act. As to what is the consequence of having entered into the lease deed and appropriating the amount are matters which would have to be examined in the arbitration proceedings. This Court is not being called upon to decide the merits of the controversy and if it may be said, there are various options of reliefs available to the arbitrator, if he finds specific performance is not possible, but finds merit in the case of the petitioner.

13. It is also not a case where Section 23 of the Contract Act would come into play because, in my view, the alleged infraction on the part of the respondent does not make the lease deed opposed to public policy or forbidden by law. What was a pre-requisite for the respondent was that they had to obtain permission under Section 7 of the Trusts Act, which they failed to comply with and now they seek to take an advantage of their own default and trying to defeat the contractual rights of the petitioner. Thus, the judgment referred to by the learned

Senior Counsel for the respondent in the case of ***Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010***, reported in ***AIR 2014 SC 3723 : (2014) 6 SCC 677*** would not support the respondent and it cannot be said that the contract is void *per se*.

14. In so far as the plea based on Section 7 of the Trusts Act is concerned, as already stated aforesaid, it is really in the nature of an advisory opinion. The opinion is sought by the Court on any question affecting the management or administration of the trust property. The respondent did not think it fit to obtain such an opinion prior to entering into the lease deed with the petitioner. One may say, the respondent was fully conscious of its responsibility arising from the undertaking given before the Hon'ble Supreme Court and yet choose to ignore that. As to under what circumstances the Archbishop of Madras-Mylapore did so, apparently through his power of attorney, would have to be tested in the arbitration proceedings, though the said Archbishop is no more holding the office of Archbishop of Madras-Mylapore.

15. There appears to be force in the contention of the petitioner that post filing of the present petition, the endeavour to invoke the jurisdiction of this Court under Section 7 of the Trusts Act appears to be an endeavour to avoid the consequences of breach of undertaking given before the Hon'ble Supreme Court as well as to defeat the rights of a contracting party like the petitioner.

16. I am of the considered view that there is no impediment in appointing an arbitrator in terms of the arbitration clause under Section 11(5) of the said Act.

17. I, therefore, appoint Justice K.P. Sivasubramaniam, a retired Judge of this Court as the sole Arbitrator to enter upon the reference and after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible.

18. The learned counsel for parties agree that arbitration may be done under the aegis of the Arbitration Centre, Madras High Court Campus and the rules of the Arbitration Centre would govern the proceedings.

19. The original petition is accordingly allowed, leaving the parties to bear their own costs.

Sd/ (S.K.K., CJ.)

23.04.2015

//Certified to be a true copy//
Dated this the day of 2015.

R.s/04.05.2015 COURT OFFICER
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