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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on January 28, 2015
Judgment Delivered on February 05, 2015

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ARB.P. 364/2012

M/S AISHWARYA FINANCIAL SERVICES PVT LTD & ANR

..... Petitioners

Through: Mr.Ajay Kumar Gupta, Adv.

versus

FUTURE VALUE RETAIL LTD

..... Respondent

Through: Mr.Sudhir K. Makkar, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

This petition is filed by the petitioner under Section 11 of the Arbitration & Conciliation Act ('Act' for short) for appointment of arbitrator, wherein the facts are, a lease agreement dated December 18, 2007 was executed between M/s Pantaloon Retail (India) Ltd. (now Future Value Retail Ltd., the respondent herein) and M/s Majestic Properties Pvt. Ltd. (erstwhile owner) for a period of 9 years with a 5 year lock-in period where neither party could terminate the lease agreement. The premises are the Lower Ground & Ground Floor in a Mall named "Melange, The Mall" bearing No.C-8/9/14, Pocket T, Pallavpuram, Phase-II, Meerut. Clause 11 of the lease agreement is the arbitration clause.

2. It is the case of the petitioners herein that they purchased the premises from the erstwhile owner. On December 07, 2009, a tripartite agreement was executed between the erstwhile owner, petitioners and the respondent through which the respondent agreed to pay rent with effect from December 01, 2009, as per the lease agreement.

3. It is the case of the petitioners that the arrangement as per the lease agreement required the respondent to pay the sum calculated @ 4.5% of sales of each month subject to payment of minimum guarantee of Rs.23 per sq. feet on the chargeable area that shall escalate by 10% every 3 years and also required to provide a monthly statement of sales with effect from December 01, 2009. It is the case of the petitioners that the respondent did not provide monthly sales statements and also did not pay 10% escalated guarantee amount.

4. On June 07, 2012, the respondent through a notice terminated the lease agreement and in the said notice taken a stand that the interest free refundable security deposit amounting to Rs.10 lacs shall be adjusted towards the minimum guarantee payable by the company during the notice period and the remainder shall be refundable by the petitioners to it. In reply to the termination notice, the petitioners vide their response dated June 11, 2012 stated that as per clause 2.3 the lock-in period had not expired and as per clause 7.1, a 6 months' notice was required which could only be given after the expiry of the lock-in period and, therefore, the termination is invalid. The petitioners inter-alia demanded unpaid

escalated guarantee and service tax payable along with additional interest @ 18% p.a. Suffice to state, disputes arose between the parties. The petitioners filed the present petition seeking appointment of arbitrator.

5. The respondent on the other hand had raised certain preliminary objections, which inter-alia includes that the petitioners were not parties to the lease agreement and, therefore, there exist no arbitration agreement between the petitioners and the respondent; the property is situated in Meerut and the lease agreement was also signed at Meerut and no cause of action has arisen in the territorial jurisdiction of this Court and simply having seat of arbitration in Delhi, in terms of clause 11.4 of the arbitration clause is insufficient to confer jurisdiction upon this Court; the lease agreement is unregistered; the petitioners have directly approached this Court with this petition without expressing their intention to appoint Sole Arbitrator; disputes have already been settled and the petitioners had issued a no objection certificate dated December 07, 2012. Suffice to state certain objections with regard to the merits of the disputes have also been taken.

6. Learned counsel for the petitioners on the preliminary objection raised by the learned counsel for the respondent about the territorial jurisdiction of this Court to entertain this petition would submit that in terms of clause 11.4 of the agreement, the arbitration proceedings are to be held at New Delhi and the cause of action has arisen in favour of the petitioners in New Delhi. He would also state

that the petitioners are also based in Delhi and certain payments were made in Delhi. He would rely upon the judgment of the Supreme Court in the case of *M/s Swastik Gases Pvt. Ltd. vs. Indian Oil Corporation Ltd.* 2013 (8) Scale 433; *Centre for Development Communication vs. JITF Urban Management (Bhatinda) Ltd.*, ARB.P. 380/2012, decided on February 04, 2013 along with ARB P. 381/2012 between the same parties; *Kartar Singh vs. M/s Mirkana Engineering Pvt. Ltd.*, ARB. P.98/2012 decided on April 02, 2013.

7. On the other hand, learned counsel for the respondent would vehemently oppose the maintainability of the petition in this Court, as according to him the agreement was signed at Meerut and the premises in question is also situated in Meerut. He would state that the respondent herein is based in Mumbai and no cause of action has arisen in Delhi. He would further state that merely because the arbitration clause stipulate proceedings to be held in New Delhi would not give a cause of action to the petitioner to file the petition here. He would rely upon the following judgments in support of his contention:-

(a) *Gulati Construction Co., Jhansi vs. Betwa River Board & Anr.* AIR 1984 Delhi 299

(b) *GE Countrywide Consumer Financial Services Ltd. vs. Surjit Singh Bhatia* 129 (2006) DLT 393

8. Having heard the learned counsel for the parties, insofar as the aspect that the petitioners were not party to the lease agreement and, therefore, no arbitration

agreement exist between the petitioners and the respondent is concerned, suffice to state that the respondent by its own action in addressing the termination notice to the petitioners has accepted the relationship with the petitioners. The respondent has also accepted in reply to para 7.5 that an assignment agreement was executed between the respondent, the petitioners and the erstwhile owners on December 07, 2009 and the contents of the said agreement are matter of record. In view of the aforesaid position, I need not go into the issue of privity of contract or whether the arbitration clause has been rightly invoked or not.

9. On the issue of territorial jurisdiction of this Court, I note that the property in question is situated in Meerut and the lease agreement is signed in Meerut. The petitioners have filed this petition with a stand in para 7.21 that this Court has territorial jurisdiction to entertain the present petition as the parties had entered into agreement and as per clause 11.4 of the agreement, the same shall be held at New Delhi. It is a settled position of law that parties are at liberty to choose a place where the arbitration proceedings shall be held. It is also a settled position of law that the parties by mutual consent cannot confer jurisdiction on the Court which otherwise does not have jurisdiction. Clause 11 of the agreement deals with the arbitration and the same is reproduced as under:-

“11. ARBITRATION

11.1 The Parties agree that they shall attempt to resolve through good faith consultation, any dispute or difference

between any of the Parties in respect of or concerning or connected with the interpretation or implementation of this Agreement or arising out of this Agreement, and such consultation shall begin promptly after a Party has delivered to another Party a written request for such consultation.

11.2 In the event that the Parties have been unable to resolve a dispute within a period of Forty-Five (45) days in accordance with the mechanism provided in Section 11.1, such dispute shall be finally settled according to the procedures set forth in Section 11.3.

11.3 In the event of any dispute or difference between any of the Parties in respect of or concerning or connected with the interpretation or implementation of this Agreement or arising out of this Agreement, such dispute or difference shall be referred to arbitration by a sole Arbitrator to be appointed mutually by the parties. In case the parties fail to arrive at a consensus than any of the parties may approach a Court of Competent jurisdiction for appointment of Arbitrator.

11.4 The arbitration proceedings shall be held in New Delhi.

11.5 The decision of such arbitration shall be binding and conclusive upon the Parties and may be enforced in any court of competent jurisdiction.

11.6 The Parties to the arbitration shall equally share the costs and expenses of any such arbitration.

11.7 The existence of any dispute(s) or difference(s) or initiation or continuance of the arbitration proceedings shall

not permit the Parties to postpone or delay the performance by the Parties to the arbitration of their respective obligations pursuant to this Agreement. If court proceedings to stay litigation or compel arbitration are necessary, the Party who unsuccessfully opposes such proceedings shall pay all associated costs, expenses and attorney's fees, which are reasonably incurred by the other party to the arbitration.

11.8 The provisions contained in this Article 11 shall survive any termination of this Agreement.”

10. From the above, it is clear that the arbitration proceedings shall be held at New Delhi. The question is no more *res integra*. The Supreme Court in ***Bharat Aluminium Co. vs. Kaiser Aluminium Technical Service (2012) 9 SCC 552*** has explained the meaning of the term “Court”, as has been provided for in Section 2(1)(e) of the Act and the same is reproduced as under:-

"Para 96 2. Definitions

(1) In this Part, unless the context otherwise requires -
.....

(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory

jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

97. The definition of Section 2(1)(e) includes "subject matter of the arbitration" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist.... "

11. From the above, it is clear that the Supreme Court while explaining the meaning of the term "Court" has held that the subject matter on the basis of which the jurisdiction of a Court can be decided has to be construed keeping in view the provisions of Section 20 by giving a wider meaning.

12. In the present case, undisputedly the venue of the arbitration under clause 11 is agreed to be New Delhi by mutual consent. No doubt, the seat of arbitration i.e. New Delhi is a neutral place i.e. neither Meerut nor Mumbai. This Court would fall within the meaning of "Court" in Section 2(1)(e). This Court has territorial jurisdiction to entertain the present petition. I rely upon the judgment of learned Single Judge of this Court in the case of ***Rohit Bhasin vs. Nandini Hotels***, ARB.P. 70/2012 decided on July 01, 2013, wherein the learned Single

Judge has on identical facts held that the place of arbitration would confer jurisdiction to a Court where the arbitration proceedings to be held. In the said case, the learned Single Judge relied upon the judgment of the Supreme Court in the case of ***Bharat Aluminium Co.*** case (supra), which has been already reproduced above. The relevant observation of the learned Single Judge is as under:-

“14. From the above, it is clear that the Supreme Court while explaining the meaning of the term "court" as defined in Section 2(1)(e) has held that the subject matter on the basis of which the jurisdiction of a court can be decided is not confined within the barriers of Section 20 CPC but has a wider meaning thereby also concurring jurisdiction upon the Court where the seat of arbitration will be located. It is pertinent to mention here that the meaning of Section 2(1)(e) of the Act was not in dispute before the Supreme Court in the above said judgment and the Supreme Court has not overruled any previous law in relation to the same but has clarified the intent of the legislature in ascribing such broad meaning to the term "court" in Section 2(1)(e).

15. In the present case, undisputedly the venue under Clause 15(3) is agreed to be in New Delhi by mutual consent even

the matter also covered within the meaning of Section 2(1)(e) of the Act as part of cause of action has arisen in Delhi.

16. Thus, this court has got the territorial jurisdiction to entertain the present petition.”

In view of the position of law in ***Bharat Aluminium Co.*** case (supra), the objection of the respondent insofar as the territorial jurisdiction is concerned need to be rejected. The judgments as relied upon by the learned counsel for the parties would have no application on the facts of this case and keeping in view the position of law in ***Bharat Aluminium Co.*** case (supra).

13. What is important in this case is that the petitioners at no point of time had shown their intent suggesting the name of a Sole Arbitrator, who could be agreed upon by the respondent. The arbitration clause refers to the appointment of Sole Arbitrator jointly. It is not in dispute that the only notice was given by the petitioners, dated June 11, 2012, wherein they have called upon the respondent, in terms of Clause 11.2 of the agreement, to settle the dispute within a period of 45 days as prescribed under the agreement, failing which they would be compelled to take legal action against the respondents. No where did they suggest the name of the Sole Arbitrator. The said notice was replied to by the respondent through its Advocate vide letter dated July 09, 2012. There was no invocation of clause 11.4 of the agreement. In the absence of invocation of clause 11.4 the respondent could

not agree on the name of the Arbitrator. When the procedure for the appointment of the Arbitrator is agreed between the parties, the appointment is to be made as per the said procedure. A perusal of Sub-Section (6) of Section 11, requests to the Chief Justice or his designate can be made if the condition laid down in (a), (b), (c) in that Sub-Section are fulfilled. What follows, is only on failure of one party to act as required under that procedure, an application under Section 11(6) for appointment of Arbitrator would lie.

14. In the case at hand there was no occasion for the Respondent to agree to the name of the Arbitrator, as no name was proposed by the Petitioner. Since, the pre-requisites for invoking the jurisdiction of the Chief Justice have not been fulfilled, the Chief Justice or his designate, i.e. this Court would refuse to accede to the request of the Petitioner for appointment of the Arbitrator. In this regard, the judgment of the Supreme Court in the case of ***Iron and Steel Company Limited vs. Tiwari Road Lines (2007) 5 SCC 703***, becomes relevant wherein the Supreme Court held as under:

“9. The legislative scheme of Section 11 is very clear. If the parties have agreed on a procedure for appointing the arbitrator or arbitrators as contemplated by Sub-section (2) thereof, then the dispute between the parties has to be decided in accordance with the said procedure and recourse to the Chief Justice or his designate cannot be taken

straightaway. A party can approach the Chief Justice or his designate only if the parties have not agreed on a procedure for appointing the arbitrator as contemplated by Sub-section (2) of Section 11 of the Act or the various contingencies provided for in Sub-section (6) have arisen. Since the parties here had agreed on a procedure for appointing an arbitrator for settling the dispute by arbitration as contemplated by Sub-section (2) and there is no allegation that anyone of the contingencies enumerated in Clauses (a) or (b) or (c) of Sub-section (6) had arisen, the application moved by the respondent herein to the City Civil Court, Hyderabad, was clearly not maintainable and the said court had no jurisdiction to entertain such an application and pass any order. The order dated 27.12.2004, therefore, is not sustainable.

10. In the matter of settlement of dispute by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator. It is for this reason that in Clause (a) of Sub-

section (8) of Section 11 of the Act it is specifically provided that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties. ”

15. In view of my discussion above, the present petition filed by the Petitioner is not maintainable as, the agreed procedure has not been followed by the Petitioner before seeking an appointment of Arbitrator. The application is rejected. The Petitioner would be at liberty to follow the procedure as laid down in clause 11.4.

(V.KAMESWAR RAO)
JUDGE

FEBRUARY 05, 2015/km