

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION APPLICATION NO. 225 OF 2015

Sunita Suresh Kabra

..Applicant

Vs.

Sterling Holiday Resorts (India) Ltd.

.. Respondent

Mr.Chirag Mody a/w. Mr.Rishikesh Soni i/b Ashok Purohit and Co. for applicant.

Mr.Shashank C. Thatte a/w. Mr.Rajit Agashe and Ms.Ketaki Asgaonkar for respondent.

CORAM : K.R.SHRIRAM, J.

DATE : 24TH JULY 2017

P.C.

1 This application is filed by applicant under Section 11 of the Arbitration and Conciliation Act, 1996. Applicant is relying upon Clauses 28 and 29 of the Vacation Time Share Agreement dated 6th April 1995 which read as under :

28 ARBITRATION

Any dispute, difference or question which may arise at anytime hereafter between the COMPANY and the TIMESHARE HOLDER touching the construction of this agreement or arising out of or in respect of or in connection with this agreement regarding the rights and liabilities of the parties hereto or otherwise, shall be referred to two arbitrators, each party having the right to nominate one arbitrator, which arbitrators shall, before entering upon reference, appoint an Umpire. This submission shall be deemed to be a submission to arbitration within the meaning of Arbitration Act, 1940, and the arbitration proceedings shall be subject to the provisions of the said Act or any statutory modification or re-enactment thereof for the time being in force. The award of the arbitrators or of the Umpire, in case of disagreement between the arbitrators, shall be final and

binding on both the parties. The venue of arbitration shall be Madras City/Bombay City.

29. *JURISDICTION*

In respect of the arbitration proceedings initiated pursuant to this agreement and in respect of all matters pertaining to this Agreement only the Civil Courts in Madras City/Bombay City shall have jurisdiction to the exclusion of other Courts.

2 Applicant had entered into a Vacation Time Share Agreement with respondent dated 6th April 1995 (The Agreement). As per Agreement, respondent was to get certain free period of stay over a year at the complex of respondent with or without hotel complex at Mahabaleshwar. Thereafter, applicant did enjoy the agreement with respondent. It is not disputed that applicant was enjoying the Time Share arrangement with respondent. By a letter dated 19th July 2012, respondent terminated the Agreement unilaterally and sent a refund cheque to applicant. Mr.Mody states that they had not encashed the cheque yet.

3 Applicant, by her Advocates' letter dated 6th September 2012, gave notice to respondent for arbitration. Respondent replied denying that they have not actually backed out from the Agreement but they have actually offered alternate accommodation to applicant and also stated that the Agreement only provides Chennai Court has exclusive jurisdiction. They also did not agree for appointment of the Arbitrator nominated by applicant

to be appointed as Sole Arbitrator. Hence this application came to be filed.

4 Respondent has filed a very short affidavit in reply of one Sanket Lade affirmed on 12th February 2016. The three points raised therein are : (i) that the Time Share Agreement dated 6th April 1995 has been terminated and refund of Rs.1,50,388/- has been given to applicant and therefore, there is no arbitrable dispute; (ii) copy of the Time Share Agreement annexed to the application has various interpolation in hand without authorization and respondent did not agree to the authenticity and genuineness of the purported Agreement and therefore the Agreement is fabricated and the Court should not look into such an agreement; (iii) Non-joinder of all necessary parties because the Agreement has entered into with three individuals, viz., applicant herein, one Suresh Kabra and one Ms.Shalini Kabra.

5 So far as the first defence is concerned, in my view it is arbitrable. So far as the second defence of interpolation is concerned, which was the main argument of respondent, applicant has filed an affidavit in rejoinder dated 22nd July 2016 stating that the original Agreement has been sent to respondent way-back in 1995. Respondent should have produced the original of the Agreement but they have failed to produce. Mr.Thatte for

respondent submitted that in every case, the party would send the original Agreement signed back to respondent but in this case, applicant did not. At the same time, there is not a shred of evidence from respondent that they have even written to applicant calling upon applicant to send the original Agreement back. In fact, in response to a letter dated 22nd February 2016, from respondent's Advocate asking for inspection, applicant's Advocate have, by their letter dated 2nd February 2016, informed respondent's Advocate that the original agreement was sent to respondent after the signature and making necessary corrections in Agreement and no duplicate copy of the Agreement has been given to applicant. There is no response to the letter nor has any response filed to the rejoinder. Moreover, it should be noted that since 1995, respondent has been acting upon the Agreement. Had, applicant not sent the original agreement to respondent, certainly respondent would have called upon applicant to provide the original Agreement. As regards, non-joinder, it should be noted that the Agreement has been signed only by applicant. Even the termination letter from respondent is addressed only to applicant. Therefore, non-joinder is a non-issue.

6 Therefore, in my view, this is nothing but an after thought and an attempt to derail the arbitration proceedings from commencing. In my view,

the arbitration agreement is valid. Mr.Naushad Engineer, an Advocate having office at Lentin Chambers, 1st Floor, 1-D, Dalal Street, Fort,Mumbai 400 023, Tel. 91-22-2265 1159, 91-22-6631 1102, Mobile No.9821047087 and Mr.Jehangir J. Jejeebhoy, Advocate having office at 29/29A, Ali Chambers, Nagindas Master Road, Fort, Mumbai 400 023 (Mobile No.9820395211), both, practicing in this Court are appointed as Arbitrators. Since clauses 28 and 29 prove for an option of Bombay City also, the arbitration to be held in Bombay. The two Arbitrators to appoint Presiding Arbitrator within two weeks from today. The Arbitral Tribunal to complete arbitration proceeding by 31st January 2018.

7 The application disposed. No order as to costs.

(K.R. SHRIRAM, J.)