

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.06.2017

Pronounced on : 17 .08.2017

CORAM

THE HON'BLE DR. JUSTICE ANITA SUMANTH

O.P.No.834 of 2016

R. Ramaswamy Charitable Trust

...

Petitioner

Vs

Koki'o Spaces Private Ltd.,
represented by its Managing Director,
Mr. M. Shyam Lumar,
registered office at
A3, Darshan Apartments,
No.2, II Main Road,
Gandhi Nagar, Adyar,
Chennai 600 021

सत्यमेव जयते

.. Respondent.

Prayer: Petition filed under section 11 of the Arbitration and Conciliation ACT, 1996 praying to appoint the Sole Arbitrator to adjudicate upon the disputes that have arisen between the petitioner and respondent.

For Petitioner : Mr.M.S.Krishnan, Senior Counsel
for M/s.Sarvabhauman Associates

For Respondents : Mr. Karthik, Senior Counsel
for Mr.S.Ravichandran

ORDER

This is an application filed in terms of Section 11 of the Arbitration and Conciliation Act 1996 (in short 'Act'), praying for the appointment of an arbitrator to settle disputes that have arisen inter se the parties. The petitioner is a public charitable trust established by Smt Sushila and Sri R. Ramaswami for extending medical relief, support for education, relief for the poor and other charitable activities.

2. The Trust was a legatee under the will of Sri.Ramaswami, receiving a property belonging to him located on Chamiers Road, Chennai to further the philanthropic intentions of the couple.

3. The Trust thereafter entered into a Memorandum of Agreement (in short MOA) dated 12.7.2013 with the respondent for sale of the property to augment its income. The MOA sets out the detailed terms and conditions that govern the proposed transaction of sale and purchase and includes inter alia clause 6.6 that provides for the resolution of disputes or differences that may arise inter se the parties, by arbitration. The clause reads thus:

'6.6. Any dispute or differences which may arise between the parties either as to the construction, meaning or effect of any of the clauses of these presents or as to any act, matter or thing or obligations of the parties hereto shall be referred to the arbitration of sole arbitrator who shall be appointed by mutual consent of both the parties and whose decision shall be final and binding on both the parties. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply to such proceedings and the seat of arbitration shall be at Chennai.'

4. According to the petitioner, there were delays on the part of the respondent to fulfil their obligations under the MOA leading to an exchange of communication between the parties in this regard. Initially the respondent was concillliatory in approach, requesting for time to fulfil ts obligations and complete the sale. However, letter dated 11.6.2016 indicated otherwise with the respondent making various allegations against, and raising demands of the petitioner.

5. Vide letter dated 18.6.2016, the petitioner called upon the respondent to complete the transaction setting a dead line of 30.6.2016 or latest 15.7.2016 as sought for by the respondent in e-mail dated 4.4.2016. The trust also communicated that in the alterntive, the MOA would be treated as cancelled. In reply dated 22.7.16, no clear commitment was expressed by the respondent.

6. The trust thereafter cancelled the MOA on 23.7.2016 returning the advance of Rs. 1 lakh recieved by it under the MOA. This was, however, not accepted by the respondent, who, under cover of letter dated 1.8.2016 returned the cheque expressing their non-acceptance of the cancellation of the MOA.

7. Simultaneously, the respondent also approached the City Civil Court in O.S.No.4052 of 2016 seeking to declare the termination of the MOA as illegal I.A.No.10046 of 2016 was filed seeking to restrain the trust from entering into any transaction with regard to the property at Chamiers road with

a third party. Inter alia, the petitioner has filed a petiiton u/s 8 of the Act

seeking reference of the matter to an Arbitrator for resolution.

8. In the background of these facts, Mr.M.S.Krishnan, learned senior counsel appearing for Mr.S.Sivasankar, learned counsel for the petitioner would submit that a dispute has clearly arisen between the parties that is liable to be referred to arbitration as agreed to under the MOA.

9. Mr.Karthick, learned senior counsel appearing for Mr.S.Ravichandran, learned counsel for the respondent would object to the maintainability of this petition on three grounds. Firstly, that the Civil Court was already seized of the matter, secondly, that the unilateral dissolution of the MOA by the petitioner nullifies the arbitration clause and thirdly, that a right in rem or prayer for specific performance is not liable to be decided in proceedings for arbitration. He would point out that the relief of declaration sought as a remedy against the illegal cancellation of the MOA cannot, be decided by arbitration and that it was the City Civil Court at Chennai, which is the appropriate forum to decide the matter.

10. Mr. Krishnan, on the other hand, would argue that the cancellation of the MOA had been rejected by the respondent in which circumstance, the arbitration clause in the MOA would stand revived and applicable to the transaction.

11. Both learned Senior Counsel cite case law that I refer to in brief.

(i) *Olympus Superstructures Pvt Ltd V. Meena Vijay Khetan (1995) 5*

grant specific performance of contract.

'34. In our opinion, the view taken by the Punjab, Bombay and Calcutta High Courts is the correct one and the view taken by the Delhi High Court is not correct. We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree – with a view to shorten litigation in regular courts – to refer the issues relating to specific performance to arbitration. There is no prohibition in the [Specific Relief Act, 1963](#) that issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and [Conciliation Act, 1996](#) as contrasted with Section 15 of the English Arbitration Act, 1950 or section 48(5)(b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning immoveable property.

.....
36. Further, as pointed in the Calcutta case, merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms. Ruma Pal, J. Observed:

".....merely because the sections of the [Specific Relief Act](#) confer discretion on courts to grant specific performance of a contract does not mean that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. The grant of interest or costs, parties should be precluded from referring the dispute to arbitration."

We agree with this reasoning. We hold on Point 3 that disputes relating to specific performance of a contract can be referred to arbitration and [Section 34\(2\)\(b\)\(i\)](#) is not attracted. We overrule the view of the Delhi High Court. Point 3 is decided in favour of respondents.'

(ii) *National Agricultural Coop. Marketing Federation India Ltd Vs.*

Gains trading Ltd (2007) 5 SCC 692 for the proposition that as arbitration

clause is severable and would survive even in the event, the main agreement, of which it forms part, is declared null and void.

'6. Respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. [Vide : Heymen vs. Darwins Ltd – 1942 (1) All ER 337, Union of India vs. Kishori Lal Gupta & Bros. - AIR 1959 SC 1362 and The Naihati Jute Mills Ltd. vs. Khyaliram Jagannath - AIR 1968 SC 522]. This position is now statutorily recognized. Sub-section (1) of section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and

a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected. '

(iii) This is reiterated in *Reva Electric Car Company Private Limited Vs. Green Mobil* (2012) 2 Supreme Court Cases 93, wherein at paragraph 54, it is held as follows:

'54. Under [Section 16\(1\)](#), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, [Section 16\(1\)\(b\)](#) further provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. [Section 16\(1\)\(a\)](#) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of [Section 16\(1\)\(b\)](#), it continues to be enforceable notwithstanding a declaration of the contract being null and

void. In view of the provisions contained in [Section 16\(1\)](#) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Ms.Ahmadi that with the termination of the MOU on 31st December, 2007, the arbitration clause would also cease to exist.'

(iv) The proposition is reiterated yet again in *Today Homes and Infrastructure Private Limited Vs. Ludhiana Improvement Trust and another* (2014) 5 SCC 68 (see paras 13 and 14) and *Ashapura Mine-chem Limited Vs. Gujarat Mineral Development Corporation* (2015) 8 Supreme Court cases 193, (see paragraphs 20, 21 and 29).

12. Both learned counsel would rely on the judgment of the Supreme Court in the case of *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others* (2011) 5 SCC 532 for the proposition that a right in rem cannot be the subject of arbitration. While Mr.Krishnan would rely on the findings in paragraph 32, Mr. Karthick would rely on paragraphs 37 and 38, all extracted below:

'32. The nature and scope of issues arising for consideration in an application under [section 11](#) of the Act for appointment of arbitrators, are far narrower than those arising in an application under [section 8](#) of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under [section 11](#) of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under [section 34](#) of the Act, relying upon sub-[section 2\(b\)\(i\)](#) of that section.

37. It may be noticed that the cases referred to above relate

to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide : Black's Law Dictionary).

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

13. The Supreme Court, in *Arasmeta Captive Power Company Private Limited and another v. Lafarge India Private Limited* (AIR 2014 Supreme Court 525) refers in extenso to the powers to be exercised by the High Court under Section 11 of the Act as elaborated by the seven Judges Bench in *SBP and Company Vs Patel Engineering Ltd. & Anr* (AIR 2006 SC 450) and have carved out those issues which the Court, in exercise of jurisdiction under Section 11, would leave exclusively to the arbitral tribunal in the following terms:

'(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.'

14. In the light of the submissions advanced and documents filed, the first issue that arises for decision is the maintainability of the present petition under section 11 before this Court. In terms of the sequence of events, it is the respondent that has approached the Civil Court first and the petitioner has, in my opinion, rightly filed a petition under Section 8 seeking to refer the matter to arbitration. The present petition under section 11 is thus superfluous. Both parties would agree on the position that the petition under section 8 is itself at an advanced stage of hearing. Let the same be decided expeditiously and in any event, within a period of 4 weeks from the date of receipt of this order.

15. Mr. Krishnan would argue that in view of sub-section (3) of Section 8, proceedings before the civil court could run parallel with proceedings for arbitration. The provisions of section 8(1) and (3) of the Act read thus:

1. ***Power to refer parties to arbitration where there is an arbitration agreement.— 1*** [(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

.....

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending

before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.'

16. The Supreme Court in *Sukanya Holdings*, in the context of Section 8(3) of the Act categorically finds that the object of the Act would not be served if a consolidated cause of action, comprising issues that are both arbitrable and otherwise, is bifurcated. The Supreme Court in the aforesaid situation proceeded to refer the entire bundle of lis to the civil court without bifurcation.

17. In the present case, de hors reference to the provisions of section 8(3), the lis that has been made out, in my view, relates to the validity of the MOA and the issues arising thereunder. Both parties have, in fact, been blowing hot and cold with respect to the existence of the MOA. In essence, the dispute is a commercial dispute and there does not appear to be any aspect thereof that is not arbitrable. Even specific performance, sought for by both parties at different points of time, is a matter that the Arbitrator could well consider and grant.

18. The petition is disposed of directing the disposal of the application u/s 8 of the Act pending before the city civil court within a period of 4 weeks from the date of receipt of this order. No costs.

17.08.2017

msr/sl

<http://www.judisic.in> Index: Yes/No

Speaking order/non-speaking order

Dr.ANITA SUMANTH,J.

msr/sl



Pre-Delivery order in

O.P.No.834 of 2016

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