

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Civil Revision Petition No.4947 of 2016

ORDER: *(Per Hon'ble Sri Justice U.Durga Prasad Rao)*

This Civil Revision Petition is filed by the plaintiff under Article 227 of the Constitution of India aggrieved by the order dated 14.03.2016 in I.A.No.1007 of 2015 in O.S.No.338 of 2015 passed by the learned XI Additional Chief Judge, City Civil Court, Hyderabad, whereby the learned Judge allowed the petition filed by the defendant under Sec.8 of Arbitration and Conciliation Act, 1996 (for short "Arbitration Act") and referred the suit—O.S.No.338 of 2015 to the Arbitration.

2) The parties in this revision are referred as they were arrayed before the lower Court.

3) The brief facts of the case are thus:

a) The plaintiff filed O.S.No.338 of 2015 against defendant on the pleas that the defendant took on lease the commercial complex belonging to the plaintiff's partnership firm for running Big Bazar showroom under a lease deed dated 21.12.2006; the said lease was terminated w.e.f. 30.09.2012 and the defendant vacated the premises; thereafter, the defendant executed an indemnity deed dated 31.12.2012 and as per Clause No.3 thereof he agreed to reimburse the Service Tax;

accordingly, the plaintiff paid a sum of Rs.88,35,358/- towards Service tax till 31.01.2014 from time to time as detailed in the plaint and the defendant had reimbursed only Rs.62,62,047/- leaving a balance of Rs.25,73,311/-; the plaintiff issued notice dated 17.02.2014 to the defendant demanding the aforesaid amount but the defendant failed to pay the amount and on the other hand issued a reply dated 24.04.2014 with all false and frivolous allegations and hence the plaintiff was constrained to file the suit for recovery of suit amount.

b) The defendant contested the suit.

c) While-so, the defendant filed I.A.No.1007 of 2015 under Sec.8 of Arbitration Act pleading that the suit claim arises out of lease deed dated 21.12.2006 which contained an Arbitration clause to resolve the disputes arising in respect of the lease deed through Arbitration and therefore, in terms of Clause No.13 of lease deed, the Court may refer the suit claim to the Arbitration.

d) The plaintiff opposed the said petition *inter alia* contending, firstly, that the lease deed which contained the Arbitration clause was terminated and the indemnity deed dated 31.12.2012 was an independent agreement to that of the lease deed and therefore, the Arbitration clause in the lease deed cannot be applied to the suit claim sprouted from the indemnity deed. Secondly, he contended that since the lease deed was an unregistered document, the Arbitration clause contained in the said document cannot be enforced in view of the bar under Sec.17 of Indian Registration Act. Nextly, he contended that

since the petitioner/defendant failed to produce the original Arbitration agreement or certified copy thereof, his petition under Sec.8 of Arbitration Act was not maintainable.

e) The trial Court in its impugned order negated the contentions raised by the plaintiff on the finding that the Service Tax liability had arisen during the lease period and therefore, the dispute relating to the Service Tax liability can be referred to Arbitration and accordingly, allowed the petition and referred the suit to the Arbitration.

Hence, the instant C.R.P.

4) Heard arguments of Sri Zeeshan Adnan Mahmood, learned counsel for petitioner and Sri A.Venkatesh, learned counsel for respondent.

5 a) Fulminating the order of the trial Court, learned counsel for petitioner/plaintiff would firstly argue that the suit filed by the plaintiff was solely based on the indemnity deed dt.31.12.2012 whereunder the defendant agreed to reimburse the Service Tax to the plaintiff basing on which assurance, the plaintiff paid Rs.88,35,358/- towards Service Tax till 31.01.2014 and the defendant also reimbursed to an extent of Rs.62,62,047/- but failed to pay balance of Rs.25,75,311/- for recovery of which along with interest, the suit was laid. Learned counsel emphasized that the indemnity deed dt.31.12.2012 does not contain any Arbitration clause therein to refer the parties to the Arbitration. He would stress that one of the main conditions for referring parties to the

Arbitration under Sec.8 of the Arbitration Act is, there must be an Arbitration agreement existing between the parties with reference to the point in dispute. In the instant case, there was no such Arbitration clause or agreement in the indemnity deed and the respondent/defendant has also not produced either the original or certified copy of the Arbitration agreement/clause in compliance of Sec.8(2) of the Arbitration Act showing the existence of Arbitration clause and hence the trial Court ought to have dismissed the petition. He relied upon the following decisions to claim the necessity to file Arbitration agreement:

- i) *Atul Singh and others vs. Sunil Kumar Singh and others*¹
- ii) *N. Radhakrishnan vs. Maestro Engineers and others*².

b) Nextly, he would argue that the original lease deed which was in force between 21.12.2006 and 30.09.2012, no doubt, did contain an Arbitration clause under Clause No.13 to the effect that any disputes arising in respect of the lease deed should be referred to Arbitration. However, the aforesaid Arbitration Clause was intended to operate only in respect of disputes arising out of the terms of the lease deed but none others. The present suit claim, he sought to clarify, relates altogether to a different agreement but not in respect of any of the terms of the lease deed and therefore, the Arbitration clause contained in the lease deed has nothing to do with it. Further, since the lease period was over and lease deed was terminated, the Arbitration clause contained in it ceased to exist and Sec.8 cannot be invoked on the strength of such an extinct

¹ (2008) 2 SCC 602

² (2010) 4 SCC 72

Arbitration clause. On this ground also, the trial Court ought to have dismissed the petition. He placed reliance on the decision reported in *Master Pieces Furniture Pvt. Ltd. vs. Konda Lakshma Reddy and another*³ to buttress his claim that Arbitration clause in the prior lease deed which was terminated cannot be made applicable to the disputes between parties arising long after expiry of the lease deed.

c) Thirdly, and alternatively, he argued that even assuming that the Arbitration Clause in the previous lease deed covers present dispute also, still the said Arbitration clause cannot be pressed into service for the reason that the lease deed dated 21.12.2006 was an unregistered and unstamped document.

6) Per contra, while supporting the impugned order, learned counsel for respondent/defendant would argue that though the indemnity deed was executed after the termination of the lease agreement, still the Service tax covered by the indemnity deed relates to the lease period and in that view, the trial Court rightly held that the dispute relating to the Service Tax can be referred to the Arbitration and for this purpose there was no need that the indemnity deed should contain a separate Arbitration clause. So far as the argument relating to non-filing of Arbitration agreement is concerned, learned counsel fairly admitted that the indemnity deed does not contain Arbitration clause and the lease deed dated 21.12.2006 only contained the Arbitration clause and as the original lease deed was held up with the plaintiff, he could not produce

³ 2014 (1) ALD 375

the original/certified copy of the lease deed along with I.A.No.1007 of 2015. He would further argue that though the lease deed was an unregistered document, which was compulsory registerable, still the same could be used for collateral purpose of showing the existence of Arbitration clause therein. He placed reliance on *SMS Tea Estates Pvt. Ltd. vs. Chandmari Tea Company Pvt. Ltd*⁴.

7) In the light of above rival arguments, the point for determination is:

“Whether there are merits in this C.R.P to allow?”

8) **POINT**: The first and foremost aspect that falls for consideration is whether the dispute relating to the recovery of Service tax is one of the terms of the lease deed dated 21.12.2006 or an independent term covered by indemnity deed dated 31.12.2012. We have given anxious consideration to the terms of the lease deed dated 21.12.2006, a copy of which is filed along with material papers. The lease deed was executed between the plaintiff who is lessor and the defendant who is the lessee in respect of leasing of commercial premises in Prakruthi Plaza, Chikkadpally, Hyderabad. Various terms of the lease have been incorporated therein. Suffice for our purpose to say that there is no specific term with regard to the payment of Service Tax to the Government. However it must be noted, under Clause No.13, the parties agreed that in case of any dispute arising in respect of the lease deed, the matter should be referred to Arbitration of two Arbitrators

⁴ (2011) 14 SCC Pg.66

appointed by each party. Thus, it is clear that the aspect of payment of Service Tax was not one of the terms of the lease agreement. It is an admitted fact that the lease period was terminated by 30.09.2012 and it is a further admitted fact that three months thereafter i.e, on 31.12.2012, the defendant executed an indemnity deed, clause No.3 of which was extracted in the plaint is thus:

“3. That as per the understanding, in the event of any claim being made by the service tax department and on the basis of the said demand, service tax is being paid by the defendant to the concerned Government Authorities, the entire liability of the same till 30th January, 2013 including interest and penalties shall be borne by us and shall be paid within a week of the payment affected by the defendant on producing the valid receipts of payments made by the defendant to the concerned authorities”.

It is the case of plaintiff that basing on the said undertaking, he paid Rs.88,35,358/- to the Government towards Service Tax upto 31.01.2014 and though the defendant reimbursed Rs.62,62,047/-, still a sum of Rs.25,75,311/- was due. Be that as it may, as rightly contended by the plaintiff, the indemnity deed does not contain Arbitration clause. Further, the lease deed which was expired long prior to the indemnity deed, does not contain any specific term relating to the payment of Service tax so that the parties could be referred to Arbitration basing on Clause 13 therein. As already stated, indemnity deed which was executed long after the termination of lease also does not contain Arbitration clause. The indemnity deed, it must be said, is independent undertaking given by the defendant to bear the liability of Service Tax.

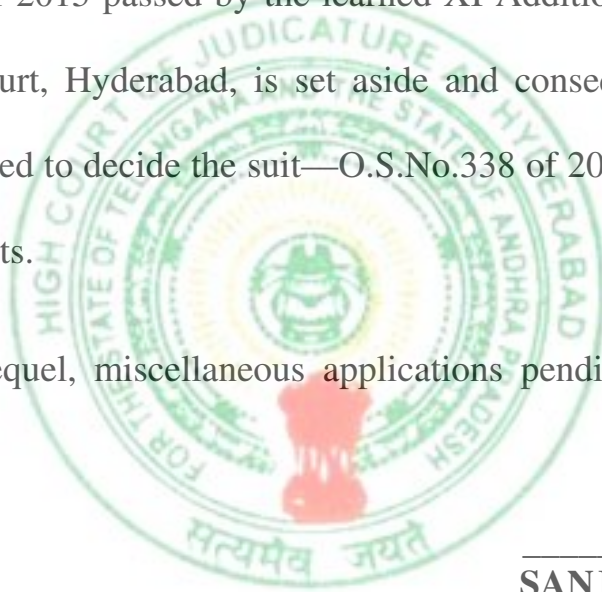
Merely because Service Tax agreed to be paid was for the lease period, that by itself, the said undertaking does not become part of the terms of the lease deed. It is an independent undertaking by itself. Therefore, the Arbitration clause in the lease deed cannot be made applicable to an independent agreement. In similar circumstances, in *Master Pieces Furniture Pvt. Ltd's* case (3 supra), a learned Single Judge of this Court opined that the Arbitration clause contained in a lease deed that was expired cannot be held to operate as a bar to the subject matter in a subsequent suit. Therefore, we hold that the trial Court was not correct in applying the Arbitration clause of an expired lease deed to the subject matter, that too an independent subject matter of a subsequent suit.

9) Then the argument relating to non-filing of original/certified copy of Arbitration agreement is concerned, it has no much relevance because admittedly the indemnity deed does not contain an Arbitration clause. Hence, question of filing the Arbitration agreement does not arise. Whereas, the lease deed dated 21.12.2016 which contained Arbitration clause was admittedly not filed by the defendant along with I.A.No.1007 of 2015. However, he pleaded in the said petition that the original lease deed was in the custody of the plaintiff and therefore, he could not produce the same. The said plea was not refuted by the plaintiff in his counter. In view of the aforesaid facts of this case, defendant cannot be found fault for non-filing of the lease deed containing the Arbitration agreement though it is mandatory under

Sec.8(2) of the Arbitration Act. The aspect whether the lease deed dated 21.12.2006 containing Arbitration clause was compulsory registrable and exigible to stamp duty and whether those requirements were not met with, is wholly irrelevant in this case in view of our earlier finding that the suit claim was based on an agreement independent to the terms of the lease deed.

10) In the result, this Civil Revision Petition is allowed and the impugned order dated 14.03.2016 in I.A.No.1007 of 2015 in O.S.No.338 of 2015 passed by the learned XI Additional Chief Judge, City Civil Court, Hyderabad, is set aside and consequently, the trial Court is directed to decide the suit—O.S.No.338 of 2015 on merits. No order as to costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.



SANJAY KUMAR, J

U. DURGA PRASAD RAO, J

Date: 27.01.2017

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