

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 20.03.2018

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

O.P. No.672 of 2017

P.Shabeer Ahamed

.. Petitioner

Versus

1.M/s.Tower Vision India Ltd,
C 56, Neethi Bagh, New Delhi-49
Now at Plot No.356, Udyog Vihar,
PH-4, Gurgaon, Haryana -122 015.
Rep by its General Manager

2. R.Thanakodi

3. T.Velmurugan

..Respondents

Prayer: Original Petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 to appoint an arbitrator to decide the dispute/claim between the petitioner and the respondents in accordance with clause 25 of the lease deed dated 05.02.2009 with the 2nd and 3rd respondents and clause 23 of license deed date 29.01.2009 with the 1st respondent .

For petitioner : Mr.T.Gowthaman for
Mr.R.S.Sivaram

For Respondent 1 : No appearance

For Respondent 2 & 3 : Mr.S.Shyam Kumar

ORDER

This petition seeks the appointment of an Arbitrator to decide upon disputes that have arisen between the petitioner and the respondents. The prayer is made in the light of clause 25 of lease deed dated 05.02.2009 between the petitioner, R2 and R3 and Clause 23 of the license deed dated 29.01.2009 between the R1 and R2.

2. Heard Mr.T.Gowthaman, learned counsel for Mr.R.S.Sivaram learned counsel for the petitioner and Mr.S.Shyam Kumar learned counsel for R2 and R3. None appears for R1.

3. R1 and R2, represented by the petitioner entered into a Memorandum of Understanding (MOU) dated 29.01.2009 whereunder the parties reduce to writing the terms and conditions for licence of the property at Srirengam, Tiruchirappalli District belonging to R2. Thereafter, the petitioner entered into a lease agreement with R2 and R3 dated 05.02.2009 for the lease of the aforesaid property. The lease was for the purpose of enabling the setting up of a cellular site consisting of equipments, towers, poles, antennas, generators and other connected accessories. The lease was for a period of 15 years and expires on 23.12.2023. The document specifically permitted the lessee to sub-lease the property to other tele-communication service providers at clause 4.8, reading as follows:

'Clause 4.8: The Lessor(s) here by agreeing and also providing the rights to the Lessee that the Lessee has full rights to sub lease/share/sub-rent the said space with other Business/Telecommunication Service Provider/ User(s)/

Operators, where the other Business / Telecommunication Service Provider/ User(s)/ Operators will rent out the same for their clients/multiple clients on their business needs on all times. The Lessor(s) will/shall not raise any objection whatsoever or will/shall not clam any extra Lease/Rent fee for the same. The Lessor(s) has no lawful or any rights to contact/speak out /write / escalate to the Lessee's clients of its Business / Telecommunication Service Provider/ User(s)/ Operators, for /in the leased Land property.'

4. The lease deed also contains a clause providing for resolution of disputes by arbitration at Article 25 reading as follows:

'Clause 25: The Licensee shall have an option to transfer or assign this License Deed to any subsidiary or affiliated company or any third party without any prior notice or consent of the Licensor. Notwithstanding anything contained herein this agreement, the Licensor(s) hereby agrees that the Licensee has the right to assign its rights and obligations under this Agreement to any bank and/or financial institutions for subsisting and/or future arrangements, as long as the rights of the Licensor(s) under this agreement shall opt be derogated. The Licensor(s) further expressly agrees that the Licensee may, without recourse effect such assignment without any further act or any form of consent or reservations from the Licensor.'

5. Simultaneous therewith, a license agreement dated 05.02.2009 was entered into between R1 and R2, whereunder the schedule property was sub-leased by R2 to R1. The license agreement provided for a monthly licence fee of Rs.12,000/- enhanced 10% every three years. The tenure of the licence agreement was 15 years. Possession of the property had been handed over on 29.01.2009 to R1, who has installed mobile towers and all connected equipments therein and is currently carrying on business in the premises.

6. It is the case of the petitioner that a licence agreement dated 10.2.2009 has been entered into between himself and R1 for sub-lease of the

property for a monthly licence fee of Rs.12,000/-. The term of the agreement is 15 years and the licence fee was to be enhanced by 10% every 3 years. Defaults arose in the payment of license fee by R1 to the petitioner and no payments have been forthcoming from the month of March 2009 after payment of the first instalment. This document has however, not been produced before me.

7. The learned counsel for the petitioner would allege that R1 has, in fact, been remitting the license fee direct to R2 and R3, by passing the petitioner.

8. A legal notice was issued by the petitioner to R1 on 17.08.2016 calling upon R1 to pay the arrears of Rs.11,56,560/- computed as on 17.08.2016. There has been no response thereto and the entire amount is outstanding as of now along with interest till date of payment.

9. In view of the suspected collusion between the first, second and third respondents, the petitioner filed a suit in O.S. No.880 of 2011 before the District Munsif, Tiruchirappalli arraying all three respondents as defendants therein. An interim application under section 8 of the Act was filed by defendants 1 and 2 therein being R2 and R3 in the present Original Petition, praying that the District Munsif refer the parties to Arbitration in the light of the arbitration agreement between the parties. The suit thus came to be closed and the Interim Application allowed directing the parties to work out their remedies in Arbitration. It is relevant to note that there is complete identity of

parties in the suit with the present petition and the reference to Arbitration on 19.08.2014 is in the presence of all learned counsel who appeared for the plaintiff and three defendants.

10. Notice issued to R1 has been duly served and the name of the respondent printed in the cause list. There is however no appearance. I thus, proceed to set R1 *ex parte* since sufficient opportunity has been granted for his presence.

11. R2 and R3 have filed a counter objecting to the appointment of Arbitrator and denying that the petitioner was entitled to sub-lease the property. R2 and R3 also dispute the statement of the petitioner that they are not entitled to receive the lease rent directly from R1. They however admit that they were aware of R1 having taken possession of the property and installing the mobile tower and equipment therein.

12. On an overall appreciation of the averments of the petitioner and of R2 and R3, it seems, *prima facie*, possible to me that R1 is effecting payment of rentals directly to R2 and R3 and the petitioner has been kept out of the ambit of the transaction by the concerted effects of the three respondents together.

13. Be that as it may, I am, in this petition, concerned with the prayer for appointment of an Arbitrator alone, for consideration of which, I have to, as the Supreme Court has stated, examine and verify the existence of an arbitration agreement alone, nothing more, nothing less.

14. The respondents rely on the Judgement of the Supreme Court in the case of *Duro Felguera, S.A Vs. M/s.Gangavaram Port Limited* (Arbitration Petition No.30 of 2016 dated 10.10.2017) to the effect there cannot be a single reference to Arbitration in the case of multiple independent contracts and the petitioner relies on a Judgement of the Full Bench of the Supreme Court in *Chloro Controls India Private Limited Vs. Severn Trent Water Purification INC and others* reported in (2013) 1 SCC 641 to the effect that a composite transaction, though under different agreements, may be referred to a single Arbitration proceeding.

15. Learned counsel for the petitioner has also relied on the judgment of the Apex Court in *Sundaram Finance Ltd Vs. NEPC India Ltd* (AIR 1999 Supreme Court 565) and the learned counsel for R2 and R3 on (i) *Alupro Building Systems Pvt Ltd. vs. Ozone Overseas Pvt Ltd* in Arbitration Case No.56 of 2016 dated 11.1.2018 and (ii) *Uttarkhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited* in O.M.P.No.3 of 2015 dated 28.2.2017.

16. Having heard learned counsel and perused the documents and case law cited, I am of the view that the disputes as between the parties are liable to be referred to arbitration in the light of the arbitration agreements in documents dated 29.01.2009 and 05.02.2009 between R1 and R2 and R2 and R3 with the petitioner, respectively.

17. The transaction before me is, evidently, a composite transaction.

18. The Memorandum of Understanding entered into between R1 and R2 represented by the petitioner as his power of attorney, dated 29.01.2009 is to record the undertaking arrived at by the parties for lease of the subject property. On the same day, R2, represented by the petitioner, enters into a Licence Deed with R1. On 05.02.2009, a lease deed is entered into between the petitioner and R2 and R3. Much has been made of the fact that the Lease Deed between the petitioner and R2 & R3 is dated subsequent to the Lease and Licence Deeds between respondents 1, 2 and 3 as well as the fact that the General Power of Attorney given to the petitioner by R2 has itself been cancelled on 31.03.2009. However, these averments pale in comparison to the stand taken by R2 & R3 in the civil proceedings that the dispute between the parties is an arbitrable one.

19. On a combined reading of all relevant documents, it seems clear to me that the transaction between the parties is one composite transaction. The respondents have clearly been engaging in the transaction to the exclusion of the petitioner. The objection of the learned counsel for R2 and R3 to the effect that there is no arbitrable dispute is thus rejected. Paragraphs 6 and 7 of the affidavit filed by R2 and R3 in the suit filed by the petitioner are relevant;

'6. We further submit that suppressing all these facts, the plaintiff herein has come forward with the present vexatious and mis-conceived suit and obtained an order of interim injunction also in I.A. No.301 of 2011 from this Hon'ble Court. We submit that the suit as well as the Injunction Petition itself is not maintainable in view of the legal bar contained under the Arbitration Act.

7. We submit that the plaintiff is not entitled to file the present suit at all in as much as the fact that there is an arbitration Agreement

between ourselves and the plaintiff for sorting out our disputes and differences in terms of the Arbitration Conciliation Act, which has been clearly stated in the Lease Deed Dated 05.02.2009'

20. Accepting the above request, the District Munsif has closed the Suit referring the matter to arbitration. A Civil Revision Petition has been filed by the petitioner against the aforesaid order which has been dismissed by a learned single Judge of this Court by order dated 24.11.2016. This order has become final.

21. The decision of the Supreme Court in the case of *Duro Felguera* (supra) deals with independent contracts involving both domestic as well as international Arbitration. It is in this context that the Supreme Court concludes at paragraph 14 as follows:

'14. In the case at hand, there are six arbitrable agreements (five agreements for works and one Corporate Guarnatee) and each agreement contains a provision for arbitration. Hence, there has to be an Arbitral Tribunal for the disputes pertaining to each agreement. While the arbitrators can be the same, there has to be six Tribunals- two for international commercial arbitration involving the Spanish Company-M/s.Duro Felguera,S.A and four for the domestic'

22.The facts in this case are different and distinguishable, since all agreements in question relate to the same domestic transaction.

23. The judgment of the Full Bench in the case *Chloro Controls* (supra) while examining the impleadment of a third party to an arbitration concludes that a third party may well be impleaded to participate in proceedings for arbitration, if sufficient reasons can be shown of his/its nexus and connection to the dispute. In the present case, none of the parties can be said to be third

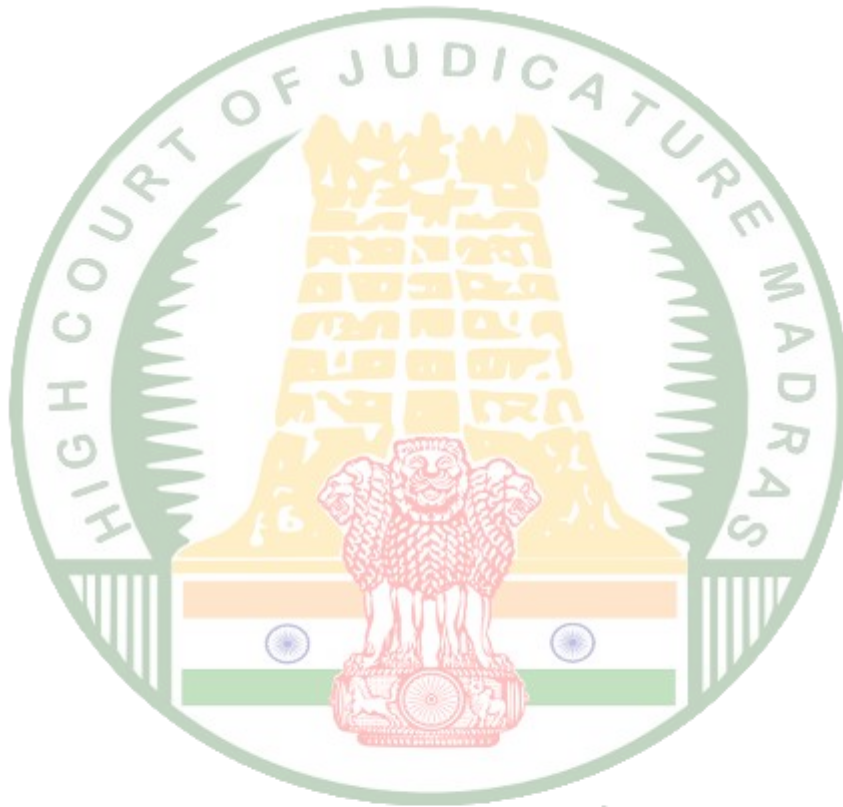
parties as the transaction is a single one that intrinsically connects them all. The affidavit of R2 and R3 before the District Munsif establishes this beyond doubt. In the above circumstances, I have no hesitation in holding that the transaction before me is a composite transaction in which the petitioner, R1, R2 and R3 are equal stakeholders and in this view of the matter the dispute inter se is an arbitrable one.

24. In the above circumstance and in the light of the Arbitration Agreements in Deeds of Licence and Lease dated 29.01.2009 and 05.02.2009 read with the statement of R2 and R3 in affidavit dated 02.11.2011 filed in I.A.No.339 of 2013 in O.S.No.880 of 2011, I allow this petition and appoint an Arbitrator as prayed for.

25. I thus appoint Mr.P.J.Rishikesh, Advocate as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. He may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses.

20.03.2018

Rkp/sl



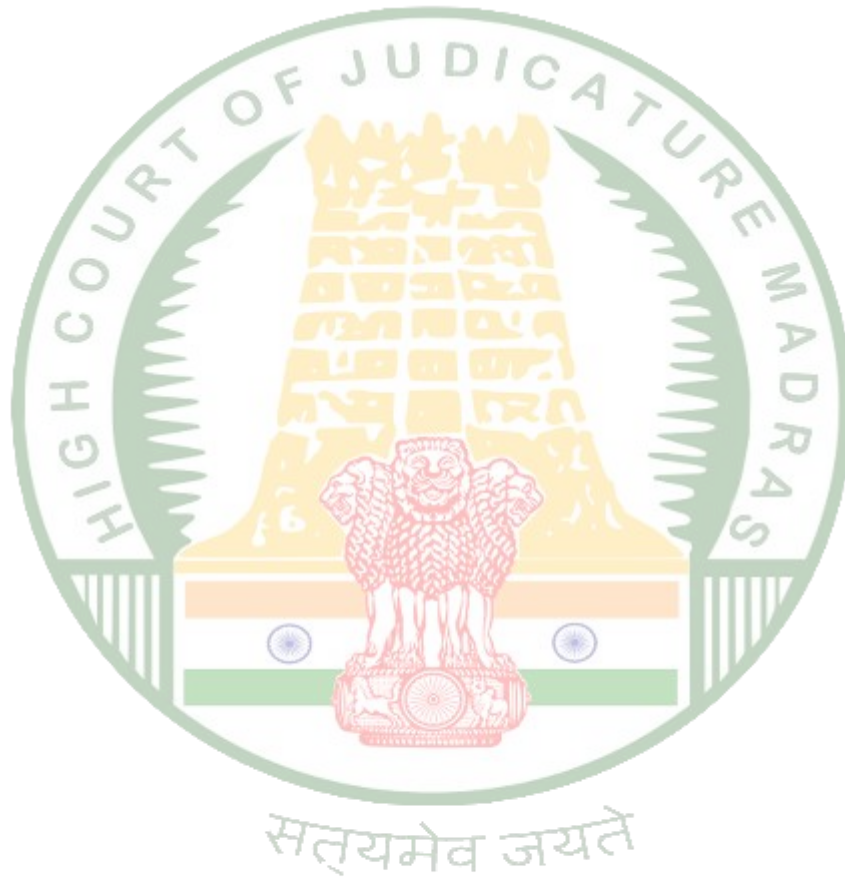
सत्यमेव जयते

Dr.ANITA SUMANTH,J.

WEB COPY

RKP/SL

O.P. No.672 of 2017



20.03.2018

WEB COPY