IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.07.2019
DATE OF DECISION : 31.07.2019

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THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.Nos.9222, 9225 and 10361 of 2019
and
W.M.P.Nos.9764, 9765 and 10902 of 2019

Skyrams Outdoor Advertisings India Pvt. Limited,
represented by its Authorised Signatory,
Nos.15 & 17, Lalith Towers,
G.S.T. Road, Alandur,
Chennai-600 016. ..Petitioner in W.P.No.9222 of 2019

Shine Outdoor Advertising Private Limited,
represented by its Authorised Signatory,
S.F.No.62/2C, Padurmedu,
Poonamallee,
Chennai-607 102. .. Petitioner in W.P.No.9225 of 2019

Fine Arts Communications India Private Limited,
represented by its Authorised Signatory,
No.20, U.V.Saminatha Street,
Alandur,
Chennai-600 016. .. Petitioner in W.P.No.10361 of 2019

Vs.

1.Corporation of Chennai,
represented by its Commissioner,
Periyar E.V.R. High Road,
Chennai-600 003.

2.The Revenue Officer,
Corporation of Chennai,
Ripon Buildings,
Chennai-600 003. ..Respondents in all writ petitions

These writ petitions are filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari or any other appropriate writ, order or direction in the nature of a writ calling for the records of the respondents ending with the order of the 2nd respondent in R.D.R.C. No.G4/9139/2016 dated 05.03.2019 and quash the same and pass such further or other orders as it may deem fit and render justice.

For Petitioners: Mr.K.Doraisami, Senior counsel for Mr.N.Mathivanan

For Respondents: Mr.T.C.Gopalakrishnan, Standing counsel for Corporation

COMMON ORDER

This common order will govern instant three writ petitions. In other words, this common order will dispose of these three writ petitions.

2 Mr.K.Doraisami, learned Senior Counsel instructed by Mr.N.Mathivanan (counsel on record for writ petitioners in all the three writ petitions) and Mr.T.C.Gopalakrishnan, Standing Counsel for Chennai Corporation on behalf of all respondents in all the three writ petitions were before this Court.

3 Pleadings are complete and with the consent of learned counsel on both sides, all three main writ petitions were taken up, heard out and are being disposed of by this common order.

4 This Court is informed without any disputation or disagreement that these writ petitions arise out of similar / common facts and that the central theme / core issue is the same in all these three writ petitions.

5 Notwithstanding various averments, grounds, contentions and averments in the nature of arguments raised in the affidavits filed in support of the writ petitions and counter affidavits, from the arguments that were projected at the hearing, it emerges clearly that writ petitions turn on a very narrow compass which is more in the nature of a preliminary objection to writ petitions.

6 Short facts shorn of details / particulars and elaboration or in other words, factual matrix that is imperative for appreciating this common order runs as follows :

(a) All three writ petitioners entered into contracts with 'Chennai Corporation' ('CC' for brevity) and these contracts are captioned 'Concession agreements'. These concession agreements shall hereinafter be referred to as 'said contracts'.

(b) In said contracts, CC is the concessioning authority and each of the writ petitioners are Concessionaires. To be noted, there are three separate contracts between CC and each of the writ petitioners, these contracts shall collectively be referred to as 'said contracts' in plural and 'said contract' in singular.

(c) Writ petitioners are inter-alia in the advertising industry, besides being in the field of erecting and maintaining bus shelters, installation of 'closed circuit television cameras' ('CCTV Cameras') at public places, erection of traffic signals, etc., This Court is informed that the line of activities of writ petitioners also includes maintenance of such installations.

(d) CC issued a tender notification calling for bids for construction and maintenance of modern stainless steel bus shelters in Chennai city on what is known as 'Build-Operate-Transfer' (BOT) basis. Suffice to say that this tender notification culminated in said contracts each of which are for 10 years period extendable by another five years.

(e) Under said contracts, writ petitioners were to dismantle the existing bus shelters, construct new modern stainless steel bus shelters and maintain the same.

(f) This court is informed that in these modern bus shelters, writ petitioners shall put up advertisements and earn revenue from such advertisements from various entities and companies which place such advertisements.

(g) Under said contracts, writ petitioners are inter-alia to pay concession fees to CC. To be noted, said contracts came to be executed on 31.12.2015 and said contracts are operating.

(h) Under the aforesaid circumstances, CC issued three separate orders / demands enhancing the concession fee which is also referred to as licence fee. The enhanced license fee was demanded and writ petitioners were put on notice that action under Section 326-D of 'Chennai City Municipal Corporation Act, 1919' ('CCMC Act' for brevity) would follow in the event of non payment.

(i) Instant writ petitions have been filed assailing aforesaid three communications (which shall hereinafter be collectively referred to as 'impugned orders / demands' in plural and 'impugned order / demand' in singular) inter-alia on grounds that this hike is steep and that it has been made contrary to covenants in said contracts, more particularly covenant in the form of Article No.17.

7 In the aforesaid backdrop, in response to writ petitions, CC raised one main preliminary objection to these writ petitions. That preliminary objection is predicated on Article 19 of said contracts. Article 19 of said contracts is ad verbatim the same in each of the three said contracts, Article 19 is captioned 'DISPUTE RESOLUTION' and the same reads as follows :

> "19.ARTICLE 19 - DISPUTE RESOLUTION
>
> 19.1 Amicable Resolution
>
> (a) Save where expressly stated otherwise in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including non-completion of the Project between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably by the CoC and failing such resolution of the same, in accordance with the procedure set forth in sub-clause (b) below.
>
> (b) Either Party may require the Dispute to be referred to steering group for amicable settlement. Upon such reference, both the Parties and the steering group shall meet at the earliest mutual convenience and in any event within 15 days of such reference to discuss and attempt to amicably resolve the Dispute. If the Dispute is not amicably settled within 15 (fifteen) days of such meeting, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 19.2 below.
>
> 19.2 Arbitration
>
> a) Arbitrators
>
> Any Dispute which is not resolved amicably as provided in Clause 19.1(a) shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a committee of three arbitrators chosen from a panel of five arbitrators on the list of arbitrators available with CoC. One arbitrator is to be chosen by each Party and the third to be appointed by the two

arbitrators chosen by the Parties. If either Party fails to choose its arbitrator, the other Party shall take steps in accordance with Arbitration and Conciliation Act, 1996.

b) Place of Arbitration

The place of arbitration shall be Chennai, Tamil Nadu.

c) Language

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and rulings shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings.

d) Procedure

The procedure to be followed within the arbitration, / arbitral tribunal and the rules of evidence which are to apply shall be in accordance with the Arbitration and Conciliation Act, 1996.

e) Enforcement of Award

Any decision or award resulting from arbitration shall be final and binding upon the Parties. The Parties hereto hereby waive, to the extent permitted by law, any rights to appeal or to review of such award by any court or tribunal. The Parties hereto agree that the arbitral award may be enforced against the Parties the Parties to the arbitration proceedings or their assets wherever they may be found and that a judgment upon the arbitral award may be entered in any court having jurisdiction thereof.

f) Fees and Expenses

The fees and expenses of the arbitrators and all other expenses of the arbitration shall be initially borne and paid by respective Parties subject to determination by the arbitrators. The arbitrators may provide in the arbiral award for the reimbursement to the prevailing party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by the said Party.

g) Performance during Arbitration

Pending the submission of and/or decision on a Dispute, difference or claim or until the arbitral award is published, the Parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award."

8 It was submitted by learned Standing Counsel for CC that when there is an arbitration clause, writ petitioners

cannot bypass the same and file instant writ petitions without resorting to arbitration. It was also argued by learned Standing counsel for CC that the arbitration clause being Article 19 of said contracts is in the nature of / has the trappings of a tiered arbitration clause. In other words, it is the specific say of learned standing counsel that arbitration clause is very comprehensive, it provides for an attempt towards amicable resolution at the first instance, thereafter a reference to a Steering Group and then to an Arbitral Tribunal.

9 To be noted, Article 19 of said contracts is an arbitration agreement within the meaning of section 7 of the 'Arbitration and Conciliation Act, 1996' ('A and C Act' for brevity). Though obvious, for the purpose of clarity, it is set out that arbitration agreement between parties, i.e., each of writ petitioners on one side and CC on the other in the instant cases on hand is by way of a covenant in the said contracts. Though obvious, for the purpose of enhanced clarity and specificity, it is made clear that arbitration agreement between parties being arbitration agreement within the meaning of section 7 of A and C Act can either be by way of a separate agreement or by way of a covenant in the contract. In this case, it is the latter.

10 In support of his aforementioned preliminary objection, learned standing counsel for CC pressed into service a judgment of Hon'ble Supreme Court in Rajasthan State Industrial Development and Investment Corporation and another Vs. Diamond & Gem Development Corporation Limited and another reported in (2013) 5 SCC 470. This case law was pressed into service for the principle that writ petitioners ought to have resorted to arbitration and filing of a writ petition without resorting to arbitration is impermissible when there is a subsisting arbitration agreement between the parties. In other words, based on this Diamond & Gem Corporation principle, writ petitioners ought to have resorted to the aforesaid arbitration clause provided in said contracts, more so in the manner adumbrated therein and these writ petitions filed without taking recourse to Article 19, i.e., arbitration agreement ought not to have been entertained and that the same are liable to be dismissed on this preliminary ground is learned standing counsel's emphatic say.

11 To examine this submission, which is in the nature of threshold barrier argument or what can otherwise be described as fire walling argument, this court thought it fit to take a panoramic birds eye view of broad grounds of attack by writ petitioners for culling out the core dispute/s. To be noted, submissions made on behalf of writ petitioners have been captured and set out supra elsewhere in this order. As can be

culled out from the submissions made by learned senior counsel for writ petitioners, the broad grounds of attack are that there is a covenant in said contracts, namely Article 17 captioned 'CHANGE IN LAW' which prohibits any claim on account of change in law and therefore, impugned orders / demands are contrary to Article 17. The other argument is that bus shelters will not qualify as Hoardings and therefore, amendment to Rule 13 of 'The Chennai City Municipal Corporation Licensing of Hoardings and Levy and Collection of Advertisement Tax Rules, 2003' ('Hoardings Rules' for brevity) cannot be the basis for making the impugned orders / demands. To buttress this, it was also pointed out that there was no license under Rule 3 of Hoardings Rules and therefore, CC not having insisted on license under Rule 3 at any point of time cannot now take umbrage under amendment to Rule 13 of Hoardings Rules, more so amendment to which was brought in, pursuant to Goods and Service Tax Act being brought in and make the impugned orders / demands. A bare perusal of these grounds reveal that this turns on covenants in said contracts.

12 It is necessary to set out that this court has made an adumbration of the grounds raised by writ petitioners and this court has now taken a birds eye view of the same for the limited purpose of ascertaining that dispute/s that are being raised are not in the nature of those which are not arbitrable.

13 Hon'ble Supreme Court in a series of judgments starting from Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others reported in (2011) 5 SCC 532 enlisted disputes which are not arbitrable.

14 I also had an occasion to pen a judgment for a Division Bench of this Court and the same is Lifestyle Equities CV Vs. QDSeatoman Designs Pvt. Ltd., reported in 2017-5-L.W. 500 : (2017) 8 MLJ 385, wherein Booz Allen and the line of authorities pertaining to disputes which are not arbitrable were referred to. What emerges clearly from these judgments is, following disputes are not arbitrable:

> (i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
>
> (ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
>
> (iii) Guardianship matters;
>
> (iv) Insolvency and winding-up matters;
>
> (v) Testamentary matters (grant of probate, letters of administration and succession certificate);

(vi) Eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes;

(vii) Patent, trade marks and copyright;

(viii) Anti-trust / competition laws;

(ix) Fraud

To be noted, the above list / enumeration of disputes that are not arbitrable may not be construed as exhaustive, but enumeration that is necessary for the limited purpose of disposal of instant case. In the considered view of this Court, disputes that are now being raised are clearly not in the nature of disputes which are not arbitrable.

15 This takes us to the arbitration agreement itself in the instant cases on hand. A perusal of the arbitration agreement, i.e., Article 19 of said contracts reveals that it is extremely comprehensive and it provides for dispute resolution by arbitration with regard to 'any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to' said agreements. In other words, arbitration agreement operating between the parties is comprehensive and expansive. As already alluded to supra, disputes are not in the nature of disputes which are not arbitrable.

16 An attempt was made to distinguish Diamond & Gem Development case by saying that dispute therein pertains to an approach road. Considering the facts and circumstances of the instant case, this court is unable to accept the submission on behalf of writ petitioners that Diamond & Gem Development case is distinguishable on facts. Diamond & Gem Development case is one where certain lands were allotted by 'Rajasthan State Industrial Development and Investment Corporation' ('RIICO' for brevity), the same ran into rough weather, as certain covenants pertaining to development of land so allotted became a contentious issue. Besides this, an arbitration clause and statutory remedies under the applicable rules thereunder were also available. To be noted, in Diamond & Gem Development case, there was also cancellation of allotment by RIICO. Most relevant paragraph in Diamond & Gem Development case is paragraph 39 and the same reads as follows :

> "39.The cancellation of allotment was made by appellant RIICO in exercise of its power under Rule 24 of the 1979 Rules read with the terms of the lease agreement. Such an order of cancellation could have been challenged by filing a review application before the competent authority under

Rule 24(aa) and, in the alternative, the respondent Company could have preferred an appeal under Rule 24(bb)(ii) before the Infrastructure Development Committee of the Board. The respondent Company ought to have resorted to the arbitration clause provided in the lease deed in the event of a dispute, and the District Collector, Jaipur would have then decided the case. However, the respondent Company did not resort to either of the statutory remedy, rather preferred a writ petition which could not have been entertained by the High Court. It is a settled law that writ does not lie merely because it is lawful to do so. A person may be asked to exhaust the statutory/alternative remedy available to him in law."

(Underlining made by this Court to supply emphasis and highlight)

17 What is significant in the instant case is, writ petitioners have not chosen to assail the amendment to Rule 13 of Hoardings Rules, but are only saying that the covenant in said contracts are such that the Hoardings rules cannot be pressed into service for enhancing concession / license fee. In other words, no provision of law or amendment has been assailed. What has been assailed is a simple enhancement of concession / licence fee and a demand of the same and such challenge is clearly predicated on covenants in said contracts. The grounds on which such enhancement of concession / licence fee under said contracts are assailed are such that they do not fall in the category of disputes which are not arbitrable. It therefore follows as an indisputable and inevitable sequitur that writ petitioners ought to take recourse to arbitration agreement which is in the form of covenant in the contract between parties, i.e., Article 19 in said contracts.

18 One last submission that was made on the part of writ petitioners is that the arbitration clause pertains to disputes which Steering Group can go into. Steering Group, its constitution and functions are set out in Article 7 owing to which, arbitration cannot be resorted to was writ petitioners counsel's say. Therefore, this court deems it appropriate to extract Article 7 which reads as follows :

"7 ARTICLE 7 – STEERING GROUP

7.1. Constitution

CoC shall through an office order, constitute a Steering Group comprising of a representative each of the CoC, Chennai City Traffic Police, State Transport Authority and the Concessionaire, within 30 days of this Agreement.

7.2 Functions

The Steering Group shall hold meetings at least once every fortnight to review the progress during the Implementation Period and once every two months during the Operations Period. The Steering Group shall carry out such functions and exercise such powers as are prescribed / conferred by CoC at the time of the agreement.”

19 It is not a case where Steering Group is the be all and end all of dispute resolution. As already alluded to supra, the arbitration agreement, i.e., arbitration clause between parties is a tiered arbitration, as it provides for an attempt to resolve the dispute/s amicably at the first instance, take it to Steering Group if the attempt to resolve amicably does not fructify and thereafter, if it still cannot be resolved, the matter will be referred to a three member Arbitral Tribunal in accordance with A and C Act. On an extreme demurrer, even if the argument of writ petitioners' counsel that disputes are outside the ambit of Steering Group is to be accepted, it makes no difference to the arbitration clause, as Steering Group after initial attempt to resolve amicably the dispute which has to be decided within 15 days, is going to say that it is beyond its purview and it will bring it to a three member arbitral tribunal.

20 Owing to the narrative thus far, this court sustains the threshold barrier submission which is in the nature of a firewall submission, i.e., that writ petitioners have to resort to arbitration and not file these writ petitions. This court refrains from expressing any opinion on the merits of the submissions made by writ petitioners. As already alluded to supra, the broad grounds of attack projected by writ petitioners or in other words, grounds on which writ petitions are predicated have been referred to for the limited purpose of this court satisfying itself that disputes are not in the nature of disputes which are not arbitrable. If any opinion or view is expressed by this court on the merits of the grounds of attack, that will impact the arbitration proceedings before the arbitral tribunal and therefore, this court deems it appropriate to not to express any opinion or view on the merits of the arguments advanced by writ petitioners' counsel and obviously also on counter to the same made by the CC as all these questions are left open to be decided by arbitral tribunal if amicable resolution of the same does not happen within the meaning of clauses (a) and (b) of Article 19.1 of said contracts.

21 These writ petitions are dismissed, albeit preserving the rights of writ petitioners to take recourse to Article 19 of said contracts, which provides for dispute resolution by arbitration under A and C Act. Consequently, connected miscellaneous petitions are closed. No costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Commissioner,
   Corporation of Chennai,
   Periyar E.V.R. High Road,
   Chennai-600 003.

2. The Revenue Officer,
   Corporation of Chennai,
   Ripon Buildings,
   Chennai-600 003.

+3 CCS to Mr.Muthumani Doraisamy, Advocate sr 65219.
+1 CC to Mr.T.C. Gopalakrishnan, Advocate sr 65422.

W.P.Nos.9222, 9225 and 10361 of 2019

SVI(CO)
SP(13/08/2019)