

OCD- 25

ORDER SHEET
AP/553/2022
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

BSPM PROJECTS AND ANR.
VS
FIITJEE LIMITED

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 18th November, 2024.

Appearance:

Mr. Tanoy Chakraborty, Adv.

Ms. Urmila Chakraborty, Adv.

Mr. Subham Dey, Adv.

Mr. T. Sett, Adv.

...for the petitioner

Mr. Somnath Gangopadhyay, Adv.

...for the respondent.

The Court: The petitioner no.1 entered into a lease agreement dated April 8, 2013 with the respondent through its authorized representative one Sri Manoj Daga. The said agreement contains an arbitration clause. It provides that if the parties failed to amicably settle the matter, the dispute would be referred to a sole Arbitrator. Further, a maintenance agreement was also entered into between the petitioner no.1 and the respondent. The said agreement at Clause 11 mentioned that the same was co-terminus with the lease agreement. The said maintenance agreement also contains an arbitration clause. According to the petitioner, who claims to be the lessor of the respondent, rents from February,

2017 were due and payable till date. It is contended that notice invoking arbitration was issued on April 21, 2022. The Annexure-C to the application enumerates the rents payable by the respondent as per the calculation of the petitioners from April, 2017 to July, 2022.

It appears that on March 8, 2017, FIITJEE informed the petitioner No.1 that the management had decided to hold the rents, till clearance was received from the State Bank of India in view of the SARFAESI proceedings. The petitioners, accordingly, were asked to settle the bank and provide a NOC for clearance of the dues so that the monthly lease rent could be processed by the respondent in favour of the petitioner no.1.

Thus, in March 2017, there was an acknowledgment of rent payable, but the respondent had raised certain issues with regard to non-compliance of the covenants in the lease deed, by the lessor. By another letter dated August, 17, 2017, the learned advocate for the respondent had called upon the petitioner No.1 to pay Rs.6,68,16,800/-. In all those letters, the respondent informed the petitioner no.1 that the State Bank of India had issued notice, threatening to take possession and had already taken symbolic possession. Such issues were reiterated by a letter dated April 13, 2022. The lease deed was valid for 29 years, from April 1, 2013 to March 31, 2042. Records reveal that the State Bank of India had taken symbolic possession, as per the communications of the respondent. The respondent, by a notice dated April 13, 2022, sought to terminate the lease deed and the maintenance agreement. The respondent claimed Rs.10 crores as damages. The petitioner No.1 was also informed that the dispute should be resolved by arbitration.

Mr. Gangopadhyay, learned advocate for the respondent submits that the claim is time barred. That the respondent was not in possession and that the notice under Section 21 was issued much later than three years from the date, the period of limitation started to run. He further contends that there was no live dispute between the parties, in view of the fact the State Bank of India had taken over possession.

The petitioners have relied on several documents to show that the possession of the property was not handed over by the respondent to the State Bank of India and as such, the petitioner no.1 continued to have a right to the rent. The questions whether the respondent had any claim for damages or whether the petitioner No.1 had a right to claim rent in terms of the agreement and whether the termination of the agreement allegedly by the respondent by its notice were justified and to what other relief the petitioner no.1 was entitled, are issues which have to be decided in the arbitration.

Even if the cause of action started with the claim for rent from February, 2017, the petitioner has enumerated the details of the rent payable upto July, 2022 and the notice invoking arbitration was issued on 21st April, 2022. Whether part of the claim was barred or not can also be decided by the learned Arbitrator. The letter of the respondent clearly indicates that KMC was informed by the respondent's representative that the said respondent was not liable to pay the property tax and the rent should not be attached. It was stated clearly that the rent was not being paid to the lessor. The respondent refused to hand over the keys to the property. None of these letters support the claim of Mr. Gangopadhyay that FIITJEE had surrendered possession of the property and were operating from elsewhere or that SBI had taken physical possession. With

regard to the issue whether an unregistered partnership firm and one of its partners could invoke arbitration or not, this Court is of the view that the question of arbitrability can also be decided by the learned Arbitrator, especially in view of the contention of the petitioner that Section 69 of the Indian Partnership Act, 1932, would not be a bar either to invoke arbitration, or in passing of an award. The respondent is at liberty to raise all such issues before the learned Arbitrator.

All that this Court is required to see in this case is whether there is an arbitration clause and whether the same is ex facie barred by limitation or not.

The decision cited by Mr. Gangopadhyay in *Bharat Sanchar Nigam Limited Vs. Nortel Networks India Pvt. Ltd.* reported in (2021) 5 SCC 738 clarifies such position. In paragraph 53.1 the Hon'ble Apex Court held that the period of limitation would begin to run from the date when there was a failure to appoint arbitrator. In rare and exceptional cases, where the claims were ex facie time barred or it was manifestly clear that there were no subsisting dispute, the Court could refuse to make the reference. Records in this case indicate that even in 2022, there was a subsisting dispute and the application was filed before this Court for reference to arbitration in July, 2022. In *Geo Millar & Co. Pvt. Ltd. Vs. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.* reported in (2020) 14 SCC 643, the Apex Court held that a dispute with regard to non-payment of invoices was raised after 14 years from submission of the invoices.

Under such circumstances, limitation would be a mixed question in this case and has to be decided in the light of the facts and evidence. Whether there is a recurring cause of action for non-payment of monthly lease rent and maintenance charges under the terms and conditions of the agreement, and

whether the termination was valid etc. can be urged before the learned Arbitrator.

Accordingly, this Court appoints Mr. Samrat Sen, learned senior Advocate, Bar Library Club, to arbitrate the disputes between the parties. This appointment is subject to compliance of Section 12 of the 1996 Act. The learned Arbitrator will be at liberty to fix his remuneration in the reference.

All points raised by the respondent before this Court and in the affidavit-in-opposition, including the applicability of Section 69 of the Indian Partnership Act, may be raised before the learned Arbitrator.

Accordingly, AP/553/2022 is disposed of.

All parties are to act on the basis of server copy of this order.

(SHAMPA SARKAR, J.)