



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 229 OF 2023

M/s. Rock Realty Pvt. Ltd.

...Petitioner.

Versus

Royal Orchid Hotels Ltd.

...Respondent.

Mr. Rajesh Kachare i/b Mr. Amol P. Mhatre for the petitioner.

Mr. Rahul Narichania, Senior Advocate along with Mr. Bimal Rajasekhar for respondent.

Coram : Sharmila U. Deshmukh, J.

Reserved on : December 5, 2023.

Pronounced on : January 3, 2024.

ORDER :

1. By this petition filed under Articles 226 and 227 of the Constitution of India, exception is taken to the order dated 28th July 2022 passed by the District Judge, Pune in Miscellaneous Civil Application No.310 of 2022 allowing the application filed by the respondent below Exhibit-18 in Civil Suit No.99 of 2018, thereby quashing the order of trial Court dated 6th October 2021 and referring the dispute to arbitration under section 8 of the Arbitration and Conciliation Act, 1996 in accordance with the arbitration clause contained in the agreement dated 17th July 2006 which is attorned by the petitioner and respondent vide tripartite agreement dated 26th

October 2012.

2. Civil Suit No.99 of 2018 was instituted by the petitioner for possession and injunction. The suit property being premises situated on 4th to 9th floors in building known as "Marisoft Annexe", admeasuring about 71,420 sq. ft. along with parking space forming part of the lease deed. It is pleaded that by virtue of lease deed dated 17th July 2006, the predecessor in title of plaintiff and the defendant on the other hand had entered into a lease in respect of the suit property for a period of 10 years at the agreed monthly rent of Rs.28,05,927/- plus 25% share in the profits of the business.

3. By virtue of deed of conveyance dated 26th September 2011, the original lessor conveyed the suit property in favour of the present plaintiff and thereafter the plaintiff stepped into the shoes of lessor. Subsequently on 26th October 2012, a tripartite agreement was executed between the original lessor, the plaintiff and the defendant. It is pleaded that as per the said agreement, the defendant accepted his status as that of licensee and with effect from 15th January 2018, the licence has come to an end by efflux of time. It is pleaded that without prejudice to the above contention, if

it is held that the status of defendant is that of a lessee, the period of lease has expired on 15th January 2018 and as the paid up share capital of the defendant exceeds Rs.1 crore, the protection of Maharashtra Rent Control Act, 1999 is not applicable and the relationship between the parties is governed by the Transfer of Property Act, 1882. It is pleaded that by reason of expiry of lease by efflux of time, the lease-hold rights conferred upon the defendant, has come to an end. It is pleaded that on 20th February 2018, legal notice was addressed to the defendant pointing out that period of lease has expired and the lease was not renewed. It is further pleaded that defendant had carried out permanent illegal construction without the consent of plaintiff and damages were sought on that basis. In the jurisdictional clause, in paragraph 13 of plaint, it is pleaded that the suit is filed by plaintiff as licensor and alternatively in the capacity of lessor and as the status of defendant is of lessee and alternatively as the protection of Maharashtra Rent Control Act, 1999 is not available to the defendant, the defendant is bound to deliver possession of the property. That, in view of the specific provision contained in Section 26 of the Provisional Small Causes Act, 1887 (Maharashtra Amendment), the Court has jurisdiction.

4. The suit came to be resisted by the defendant and three applications were filed before the trial Court. The application below Exhibit-20 objected to the jurisdiction of trial Court on the ground that as per provisions of section 2(1)(c)(vii) of the Commercial Courts Act, 2015, the dispute is required to be referred to the Commercial Court and there is no jurisdiction with the Small Causes Court. The trial Court rejected the application as against which Civil Revision Application (Stamp) No. 15282 of 2019 was filed in this Court and this Court vide order dated 25th June 2019 observed that the suit was instituted contending that there is relationship of licensor and licensee and upon analysis of provisions of sections 16 and 26 of the Provisional Small Causes Court Act, 1887, this Court held that the Small Causes Court had jurisdiction.

5. The second application was filed by the defendant under section 10 of the Code of Civil Procedure, 1908 seeking stay of the suit for the reason that the subject matter of suit was also the subject matter of proceedings before the City Civil Court, Bangalore, being Arbitration Application No.58 of 2018, invoking the provisions of section 9 of the Arbitration and Conciliation Act, 1996 [for short "the Arbitration Act"], which came to be rejected by the trial Court

for the reason that issues before both the forums are not substantially the same, as the instant suit is for recovery of possession of the suit premises whereas the proceedings before the arbitrator is for specific performance of the agreement.

6. On 28th March 2018, the defendant moved an application below Exhibit-18 invoking section 8 of the Arbitration Act and seeking a direction to refer the matter to arbitration in accordance with the arbitration clause contained in the agreement dated 17th July 2006 between the plaintiff and the defendant. The application was resisted by the plaintiff contending that the application does not comply with the mandatory statutory provision of supply of certified copy of arbitration agreement, and that by previous application filed under section 10 as well as section 9A of CPC the defendant has invoked the jurisdiction of the Court. It was further contended that the dispute stated in the agreement is non arbitrable.

7. The trial Court vide order dated 6th October 2021 rejected the application. The trial Court considered the provisions of section 8 of the Arbitration Act and observed that arbitrator has been appointed in respect of the relief of specific performance. The trial Court considered that there was a tripartite agreement dated 26th

October 2012 and by way of said agreement, the parties adopted the terms and conditions of previous lease agreement dated 17th July 2016 and have also incorporated Clause 4.3 of the agreement dated 17th July 2016, which is in respect of execution of further lease-deed between the parties. The trial Court observed that for invocation of section 8 of the Arbitration Act, the applicant is required to produce on record, the original arbitration agreement or its certified copy and that the defendant has not placed on record the copy of tripartite agreement dated 26th October 2012 and as such held that there is non compliance of the statutory requirement of sub-section (2) of section 8 of the Arbitration Act and rejected the application.

8. As against the rejection, Arbitration Appeal No.310 of 2022 was preferred by the defendant under section 37 of the Arbitration Act. Vide judgment dated 28th June 2022, the appellate Court allowed the appeal and quashed the order of trial Court and referred the dispute to arbitration. The appellate Court observed that in the proceedings before the High Court of Karnataka arising out of the arbitration proceedings, contention of the plaintiff that the dispute is not arbitrable came to be rejected and an arbitral tribunal consisting of sole arbitrator has been constituted. The

appellate Court observed that before arbitral tribunal, the respondent has filed a counter claim which is identical to the claim filed in the instant case. The appellate Court further held that the existence of a valid arbitration agreement is entirely admitted by the plaintiff and that the tripartite agreement has already been produced by plaintiff. The appellate Court further held that the dispute between the landlord and tenant is an arbitrable issue in view of the law laid down by the Apex Court in the case of ***Vidya Drolia v. Durga Trading Corp. [(2021) 2 SCC 1]***. The appellate Court considered the reply of defendant which stated that in view of the ruling of the Apex Court, issue as regards the arbitrability of dispute has not been pressed by the defendant.

9. As regards the non compliance of sub-section (2) of section 8 of the Arbitration Act, the appellate Court held that the documents are not in dispute as also there is no dispute in respect of the arbitration agreement. Relying upon the decision of the Gujarat High Court in the case of ***Comed Pharmaceuticals Ltd v. Blue Star Limited [Civil Revision Application No. 142 of 2011, dated 5th August 2011]***, the Appellate Court held that the non production of tendered document admitted by both the parties shall not be a ground to

refuse an application to refer the matter to arbitration. The appellate Court rejected the contention of plaintiff that the application below Exhibit-18 was not filed on the first date of hearing and other applications were pressed by considering that the defendant appeared in the suit on 28th March 2018 and filed its appearance as well as two applications along with the present application below Exhibit-18 seeking direction to relegate the parties for arbitration. The Appellate Court allowed the appeal and referred the parties to arbitration.

10. Heard Mr. Rajesh Kachare, learned counsel appearing for the petitioner and Mr. Rahul Narichania, learned senior counsel appearing for the respondent.

11. At the outset, Mr. Narichania, learned senior counsel appearing for the respondent has raised a preliminary objection as regards the maintainability of petition. He submits that as regards the order passed by the appellate Court under section 37 of the Arbitration Act, the remedy is of revision and the present petition filed under Article 227 of the Constitution of India is not maintainable.

12. Mr. Kachare, learned counsel appearing for the petitioner submits that the settled position in law is that the dispute is non arbitrable as it is a dispute between the landlord and tenant. He submits that the specific case in the plaint is that the status of defendant is of a licensee and not a lessee, which was an alternate pleading. He submits that the decision of the Apex Court in the case of **Nataraj Studio (P) Ltd. v. Navrang Studios [(1981) 1 SCC 523]** had held that the exclusive jurisdiction is given to the Court of Small Causes to decide the proceedings between the landlord and tenant, between the licensor and lessee and to decide and deal with any claim arising out of the said Act. He relied upon the Full Bench decision of this Court in the case of **Central Warehousing Corp. v. F.A.P. Ltd [2010(1) Mh.L.J. 658]**, which held that section 41(1) of the Presidency Small Causes Courts Act, 1882 is special law which has constituted special Court for adjudicating the dispute specified therein between the licensor and licensee or landlord and tenant and that even if the licence agreement contains an arbitration clause, the exclusive jurisdiction of Small Causes Court under section 41 of the Presidency Small Causes Court Act, 1882 is not affected in any manner. He also relied upon the decision of this Court in the case of

Bafna Motors Private Ltd v. Amanulla Khan [in Arbitration Application No. 340 fo 2019 dated 5th May 2022] and submits that the settled position in law is that in case of a dispute between the landlord and tenant, the exclusive jurisdiction is vested in the Small Causes Court and the dispute is not arbitrable. He would further submit that before the arbitral tribunal, the defendant is seeking relief of specific performance of the agreement whereas the instant case is for recovery of possession for which the jurisdiction lies with the Small Causes Court. He further submits that this Court in a challenge to the rejection of application below Exhibit-20, has observed that the suit has been instituted contending that the relationship between the parties is of licensor and licensee and has held that the jurisdiction vests with the Small Causes Court. He submits that in view of the settled position in law, the dispute between the parties is non arbitrable and hence the invocation of section 8 of the Arbitration Act is clearly unsustainable.

13. *Per contra* Mr. Narichania, learned senior counsel appearing for the respondent places reliance on the decision of the Apex Court in ***ITI Ltd v. Siemens Public Communication Network Ltd [(2002) 5 SCC 510]***, which holds that the High Court has the jurisdiction to

entertain a revision petition against an order passed under section 37 of the Arbitration Act and although the provisions of section 37(3) of the Act only takes away the right of second appeal to the High Court, the remedy of revision is not taken away. He would further submit that considering the powers of revision under section 115 of the CPC, it is only in the case of inherent lack of jurisdiction that the Court would interfere with the order of appellate Court. Pointing out to the prayers in the counter claim filed by the plaintiff before arbitrator, he would submit that the reliefs which are sought in the instant suit are sought in the counter claim and the arbitrator has the power to rule on its own jurisdiction. He submits that the arbitration proceedings have commenced and already evidence has been led. Pointing to the averments in the plaint, he submits that it is the case of plaintiff that there was lessor-lessee relationship between the parties and the specific contention has been raised that the protection of Maharashtra Rent Control Act, 1999 is not available to the defendant and the relationship is governed by the Transfer of Property Act, 1882. He submits that despite having not pressed the objection of arbitrability in reply to the application at Exhibit-18, the present petition has been filed. He submits that the position is now clarified by the decision in ***Vidya Drolia (supra)*** where it is held that

the provisions of Transfer of Property Act, 1882 do not expressly or by necessary implication bar arbitration. He submits that the decision of this Court dated 25th June 2019 against the rejection of application at Exhibit-20 was prior to the decision of the Apex Court and was in the context of the jurisdiction vis-a-vis Commercial Courts Act, 2015.

14. In rejoinder, Mr. Kachare would submit that decision in the case of ***Vidya Drolia (supra)*** has held in paragraph no. 55 that when the arbitration cannot enforce and apply such rights which are conferred on the courts of public forum or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose the arbitration in preference to the courts or public forum is denied or could be curtailed. He further points out the findings of the Apex Court that it is necessary to examine if the statute creates special right or liability and if it is so, the dispute is non arbitrable. He further points out paragraph 58 of the decision which in the context of DRT Act, the Apex Court has held that the claims by DRT are non arbitrable as there is prohibition against waiver of jurisdiction of DRT by necessary implication.

15. In sur-rejoinder, Mr. Narichania would contend that there is already a counter-claim filed before the arbitrator and the issue as regards the specific performance of agreement and recovery of possession goes in hand in hand. He further submits that the issue whether there is a lease or licence, is an issue which can be decided by the arbitrator.

16. Considered the submissions and perused the record.

17. The instant suit was filed by the plaintiff seeking recovery of possession, contending the agreement dated 26th October 2012 executed between the original lessor, plaintiff and the defendant has expired by efflux of time. The admitted position is that by virtue of lease-deed dated 17th July 2006, the suit premises were let out to the defendant for a period of 10 years, and subsequently a tripartite agreement was entered into on 26th October 2012. The trial Court while rejecting the application below Exhibit-18 has observed that initially there was a lease agreement and by way of tripartite agreement dated 27th October 2012, the terms and conditions of previous lease agreement were adopted by the parties and in addition clause 4.3 was inserted in place of earlier clause in respect

of execution of further lease-deed. This observation of the trial Court has not been disputed by learned counsel appearing for the petitioner and as such by virtue of incorporation, the terms and conditions of earlier lease-deed have been incorporated in the subsequent tripartite agreement of 2012. The documents itself are not produced on record, however, considering the observations of trial Court *prima facie* it appears that by adoption of the terms and conditions of previous lease-deed, an agreement of lease was entered into between the parties.

18. Although it is pleaded in the plaint that the status of defendant is of licensee, it is pertinent to note the pleadings that the provisions of Maharashtra Rent Control Act, 1999 are not applicable to the relationship between the plaintiff and defendant and the relationship is governed by the Transfer of Property Act, 1882. A reading of various paragraphs of the plaint would indicate that the plaintiff has considered the document as lease-deed and has sought recovery of possession on the ground that the period of lease has expired. The trial Court while rejecting the application invoking section 8 of the Arbitration Act, has rejected the application only on the ground that there is non compliance of sub-section (2) of section

8 of the Arbitration Act as the original or certified copy of the tripartite agreement dated 26th October 2012 has not been produced on record. The appellate Court has rightly considered that neither there is any dispute as regards the existence of arbitration agreement nor the rejection on the ground of non production of copy of agreement dated 26th October 2012 can come in the way of referring the parties to arbitration inasmuch as the document was produced by the plaintiff itself. The appellate Court has rightly relied upon the decision in ***Comed Pharmaceuticals (supra)***.

19. Before this Court, the contention of learned counsel for the petitioner is that the dispute is non arbitrable by relying upon various decisions of this Court. Pertinently, in the reply to application at Exhibit-18, the petitioner had not pressed the said objection in view of the decision of the Apex Court in ***Vidya Drolia (supra)***.

20. Mr. Narichania, learned senior counsel appearing for the respondent is right in his submission that the issue is no longer *res-integra* inasmuch as the Apex Court in ***Vidya Drolia (supra)*** has held in paragraph 79 and 80 as under :

"79. Landlord-tenant disputes governed by the

[Transfer of Property Act](#) are arbitrable as they are not actions *in rem* but pertain to subordinate rights *in personam* that arise from rights *in rem*. Such actions normally would not affect third-party rights or have *erga omnes* effect or require centralized adjudication. An award passed deciding landlord-tenant disputes can be executed and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State. The provisions of the [Transfer of Property Act](#) do not expressly or by necessary implication bar arbitration. [Transfer of Property Act](#), like all other Acts, has a public purpose, that is, to regulate landlord-tenant relationships and the arbitrator would be bound by the provisions, including provisions which enure and protect the tenants.

80. In view of the aforesaid, we overrule the ratio laid down in *Himangni Enterprises* and hold that landlord-tenant disputes are arbitrable as the [Transfer of Property Act](#) does not forbid or foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration."

21. The Apex Court has held that the Transfer of Property Act does not forbid or foreclose the arbitration and it is only in case where the landlord-tenant dispute is governed by the rent control legislation, the same would not be arbitrable.

22. In the present case, the specific case of the plaintiff is that the protection of Maharashtra Rent Control Act, 1999 is not available and that the relationship between the parties is governed by the provisions of Transfer of Property Act, 1882. Enunciation of law in the case of ***Vidya Drolia (supra)*** squarely applies to the facts of present case. Considering the decision of the Apex Court in ***Vidya Drolia (supra)***, dispute in the present case is arbitrable as the same is governed by the Transfer of Property Act, 1882. The Apex Court in ***Vidya Drolia (supra)*** had also an occasion to consider the decision in the case of ***Natraj Studios (supra)*** relied upon by learned counsel for the petitioner while deciding the issue of arbitrability of landlord-tenant dispute. The Apex Court has held that only where the disputes are governed by the rent control legislation, the same would not be arbitrable as specific Court has been given exclusive jurisdiction. In view of the authoritative pronouncement of the Apex Court on the subject, which is binding on this Court, it is not necessary to refer to other decisions of this Court.

23. As regards the decision of this Court dated 25th June 2019 against the challenge to the rejection of application below Exhibit-20, in that proceedings, this Court was considering the jurisdiction of

the Small Causes Court *vis-a-vis* the Commercial Courts Act and in that context had held that the Small Causes Court had the jurisdiction in the matter. In the present case, the arbitral tribunal has already been constituted and it has proceeded with evidence in the matter. The admitted position is that the counter-claim is already filed by the respondent seeking the same relief of recovery of possession as sought in the present case. The issue as to whether there was a lease or licence can be considered by the arbitral tribunal.

24. Mr. Narichania, learned senior counsel for the respondent is also right in his contention that the relief of specific performance of the agreement as well as the recovery of possession are interlinked. In its reply to the arbitration application, petitioner has specifically contended that initially the case of petitioner was that the dispute between the lessor and lessee for possession was not arbitrable, however, in view of the decision of the Apex Court in ***Vidya Drolia (supra)*** the objection raised in the reply is not pressed. As such the contention of respondent was confined to the non compliance of mandatory requirements of section 8 of the Arbitration Act. As held by the appellate Court, objection as to non compliance of sub-section

(2) of section 8 of the Arbitration Act does not survive in view of the factual position that the document itself was produced by the plaintiff and that there is no dispute as regards the arbitration. Once having given up the objection as to the non arbitrability of dispute, it was not open to the the petitioner to raise a challenge on the same ground.

25. In the memo of petition, specific ground has been taken by the petitioner that the appellate Court has not taken into consideration the decision of the Apex Court in the case of ***Vidya Drolia v. Durga Trading Corp. [(2019) 20 SCC 406]***. The petitioner despite being aware of the subsequent decision of the year 2021 rendered by the Apex Court in ***Vidya Drolia (supra)*** has not approached this Court with clean hands and has deliberately suppressed the subsequent decision of the Apex Court.

26. I also find considerable force in the contention of Mr. Narichania that the petition itself is not maintainable as the remedy of revision was available in view of the decision in ***ITI Limited (supra)***. In the case of ***Deep Industries Ltd v. ONGC [(2020) 15 SCC 706]*** the Apex Court has held that if the petitions were to be filed under

Article 226 / 227 of the Constitution of India against the order passed in appeals under section 37 of the Arbitration Act, the entire arbitral process would be delayed. The Apex Court held that the High Court while exercising power under Article 227 of the Constitution of India would be extremely circumspect in interfering with the same taking into account the statutory policy as adumbrated by the Apex Court so that the interference is restricted to orders which are patently lacking in inherent jurisdiction. In the light of law laid down by the Apex Court if the submissions of petitioner is considered, it is not the case of petitioner that there was a lack of inherent jurisdiction.

27. Having regard to the above discussion, the petition is devoid of merits and stands dismissed.

[Sharmila U. Deshmukh, J.]