
(2014) 02 CAL CK 0012
In the Calcutta High Court
Case No : A.P. No. 712 of 2011

Central Business Services Ltd.

APPELLANT

Vs

India Infoline Limited

RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 7, 9

Citation : (2014) 5 CHN 443 : (2014) 2 WBLR 530

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Abhrajit Mitra, Jishnu Chowdhury, Soumya Roy Chowdhury, Sudip Das Gupta and Arnab Sardar, Advocate for the Appellant; Anirban Ray, Samik Kanti Chakraborty and Soumabha Ghosh, for Proforma Respondent, Advocate for the Respondent

Final Decision : Allowed

Judgement

Indra Prasanna Mukerji, J.—This application u/s 11 of the Arbitration & Conciliation Act, 1996 is very interesting. It is made by Central Business Services Limited. The other parties are India Infoline Limited, the first respondent and Jain Industrial & Commercial Services Private Limited, described as the proforma respondent. The petitioner wants appointment of an arbitrator by this Court, to adjudicate upon the disputes between the above parties which are said to have arisen from the lease agreement dated 14th January, 2008. Now, this lease agreement was between Central Business Services Limited and India Infoline Limited only. The former was the lessor and whereas the latter, the lessee. The lease was of an office space on the 4th Floor of premises No. 1, Shakespeare Sarani, Kolkata-1. It contained a super built up area of 22350 sq. ft. The lease is for 9 years commencing from 1st January, 2008 till 31st December, 2016. A monthly rent of Rs. 9,38,700/- is payable.

2. Clause 6 of the lease is very important. It states as follows:

6. This Deed of Lease shall be co-extensive with the Service Agreement of even

date in respect of the said office whose terms and conditions are incorporated herein by this reference and breach of the said Service Agreement shall constitute and/or be deemed to constitute a breach hereof and vice versa.

3. Now, this lease also contains an Arbitration Clause which is Clause 25.1. It is set out hereunder:

25.1 All disputes and difference between the parties hereto at any time hereafter and of any nature whatsoever arising out of or in respect of or in relation to this Deed shall be referred to arbitration in accordance with the provisions of the Arbitration And Conciliation Act, 1996 or any statutory enactment or modification from time to time. However, it is expressly agreed between the parties herein that until adjudication of any dispute by the Arbitrator, the LESSEE shall be liable to make payment of all charges in conformity with the bills that may be raised by the LESSOR and in the event of any sums becoming payable to the LESSEE in terms of Arbitration Award, the same shall be refunded within 15 days from the date of receipt of such Award.

4. There was a second agreement between the proforma respondent, Jain Industrial & Commercial Services Private Limited and the lessee executed on the same day. In this agreement Jain industrial & Commercial Services Private Limited was described as the service provider. The proforma respondent was required to provide certain services to the lessee. These services are mentioned in the second schedule to this agreement. They are as follows:

1. Watch and ward only of the said office.

2. General maintenance only of the said office.

5. Now, in this agreement the petitioner lessor is not a party. Secondly, this agreement did not contain an arbitration clause.

6. This service agreement also contains the following clause making certain terms deemed to be incorporated in the lease deed. It is Clause 5 and reads as follows:

5. This Agreement shall be co-extensive and co-terminable with the Lease Deed of even date made between Central Business Services Ltd. and the User and a breach hereof shall be considered a breach thereof and vice versa. The terms of this Agreement are deemed to have been incorporated in the Lease Deed by their reference.

7. The first respondent has taken mainly two objections. The dispute arises out of this service agreement. This agreement was made on 14th January, 2008 between the proforma respondent described as the service provider and the first respondent. The agreement did not contain an arbitration clause. Even Clause 5 of the Service Agreement which stated that the agreement would be co-extensive and co-terminable with the lease deed and that the terms of that agreement would be incorporated in the lease deed, by reference, did not

incorporate the arbitration clause. Neither did Clause 6 of the lease agreement, set out above, which treated the terms and conditions of the service agreement, as incorporated in it.

8. Secondly, it was said on behalf of the first respondent that the petitioner had no locus to sue on the service agreement. The service agreement was between the proforma respondent and the petitioner. The proforma respondent was a legal entity being a private limited company. Only this company was a party to this agreement and not the petitioner. Therefore, the petitioner could not sue on this agreement.

9. Various authorities were cited on behalf of the parties. I will presently discuss the relevant ones.

10. The facts are most important. The lease agreement was made on 14th January, 2008. The service agreement was made the same day. The first respondent was a party to both the agreements. It was the lessee in the lease agreement and the recipient of service under the service agreement. In the lease deed the petitioner was the other party whereas in the service agreement the proforma respondent was the other party.

11. All four entities are body corporates. No body corporate can act on its own. It always acts through a human agency. The deed of lease was signed by a director of the petitioner and the Vice President of the first respondent. The Service agreement was signed by the same Vice President of the first respondent and by the director of the proforma respondent.

12. There is no dispute whatsoever that an arbitration clause was incorporated as Clause 25.1 in the Deed of Lease.

13. Now, these three gentlemen representing these three companies sat on the same day and signed the two agreements. No one can deny that the deed of lease was a substantive agreement. The second agreement was ancillary. If you take a look at the second schedule to the service agreement, you will find that it describes the services to be rendered under the agreement as "watch and ward" and "general maintenance" of the office. I consider these to be most minor and inconsequential terms of the bargain between the parties. Now, when these companies got together and executed the said two agreements, having Clause 6 in the first agreement and 5 in the second, in my opinion, each of the parties covenanted with the others that they were parties to both the agreements. These were to be taken and read together; each and every term of both the agreements was deemed to have been accepted by all the parties as binding between them. These clauses simply say that the terms and conditions of the service agreement are deemed to be incorporated in the Deed of Lease.

14. Now, the Deed of Lease contains an arbitration clause. If you consider the service agreement as woven into the lease deed, then you have a composite agreement with three parties with an arbitration clause.

15. The Section 7 of the Arbitration & Conciliation Act, 1996 amongst other things provides as follows:

7. Arbitration agreement.--

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

16. The Hon''ble Supreme Court has called this the doctrine of incorporation. A mere reference in an agreement to an arbitration clause in another agreement will not do. It has to be explicitly said that the arbitration clause in one contract or document is incorporated in another. The highest Court of the country had said the following in paragraph 16 of the case of M.R. Engineers and Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd., , cited by Mr. Mitra:

16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the Court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intension of adopting or borrowing specific portions of the said document for application to the contract.

17. In the case of The Indure Ltd. and Another Vs. Commercial Tax Officer and Others, , also cited by Mr. Mitra the highest Court explained how in certain circumstances two separate contracts or multiple contracts could be treated as a single contract and how breach of one could be deemed to constitute breach of the other.

18. The defence taken by the first respondent is difficult to understand. This is so because the first respondent had taken out an application u/s 9 of the Arbitration & Conciliation Act, 1996. (A.P. 456 of 2010) This application was made on the footing that there was an arbitration clause. The first respondent went to the extent of nominating an Arbitrator as stated by them in paragraph 18 of the petition. Recoiling from that position and saying that there is no arbitration agreement between the parties is a stand which is difficult to tolerate.

19. The other point regarding the locus of the petitioner is also worthless. In the Section 9 application the parties had proceeded all along on the premises that the proforma respondent was a beneficiary of the main contract between the petitioner and the first respondent. The conduct of the parties was also in this direction.

20. Therefore, all the points raised in defence by the first respondent fail.

21. This application succeeds.

22. I hold that there is a valid arbitration agreement covering both the lease and the service agreements dated 14th January, 2008. Disputes between the parties arising out of these two agreements, referred to in this application, are referred to arbitration. They are to be more particularly pleaded to in the statement of claim to be filed by the petitioner before the learned arbitrator. Mr. Dipak Kumar Shome, Bar-at-Law and Senior Advocate is appointed as an arbitrator to adjudicate the said dispute and to make and publish the award by 31st December, 2014. The arbitrator will be entitled to be paid fees @ Rs. 15,000/- per sitting to be shared equally by the parties. He is entitled to appoint a clerk and a recording Officer whose fees will be determined by him. The application is allowed to the above extent.

Later:

Mr. Ray for the respondent No. 1 prays for stay of this judgment and order. The prayer for stay is considered. The appointed Arbitrator is restrained from proceeding with the arbitration for a period of three weeks from date.