

(2013) 05 P&H CK 0070

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 6552 of 2010 with C.R. No. 3031 of 2011

Hughes Communications India Limited and Others

APPELLANT

Vs

East West Traders and Another

RESPONDENT

Date of Decision : 28-05-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 8
Partnership Act, 1932 — Section 69
Presidency Small Cause Courts Act, 1882 — Section 41
Registration Act, 1908 — Section 17(1)(d), 49
Specific Relief Act, 1963 — Section 34

Citation : (2013) 3 ARBLR 283 : (2013) 171 PLR 258

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : Amit Rawal, with Mr. Divanshu Jain in C.R. No. 3031 of 2011 and Mr. Arun Jain, with Mr. Aashish Chopra and Mr. Dharmesh Misra in C.R. No. 6552 of 2010, for the Appellant; Amit Rawal with Mr. Divanshu Jain for Respondent No. 1 in C.R. No. 6552 of 2010 and Mr. Ashwani Kumar Chopra with Mr. Aashish Chopra and Mr. Dharmesh Misra in C.R. No. 3031 of 2011, for the Respondent

Final Decision : Allowed

Judgement

K. Kannan, J.

I. The array of parties in the two civil revisions

1. Both the matters are connected and they are brought together for disposal through a common order. The revision petitioner in C.R. No. 6552 of 2010 namely Hughes Communications India Ltd. is the respondent in C.R. No. 3031 of 2011. The revision petition in C.R. No. 3031 of 2011 namely East West Traders is the respondent in C.R. No. 6552 of 2010. Since the impugned orders have arisen in rent control proceeding and suit where East West Trader is the petitioner-landlord, the reference to the parties as petitioner and respondent shall be shall be purpose of convenience East West Traders and Hughes Communications India Ltd. respectively. II. The origins of disputes in the two proceedings

The respondent (M/s. Hughes Communications India Ltd.) is addressed in two capacities, the company with its office at NIRLAC Centre, 2nd floor, B-25, Qutab Institutional Area is referred to as the tenant and the company having its office at Shivaji Marg, New Delhi is referred to as the sub-tenant. BSNL a public sector undertaking is also referred as sub-tenant in the petition before the Rent Controller. The proceedings setting out the disputes have commenced through an application filed by the respondent contending that the original lease agreement between the parties contains a reference to arbitration and consequently, the resort to action for eviction filed at the instance of the petitioner-landlord (M/s East West Traders) is not maintainable and the matter will have to be referred to the arbitrator. The application filed by the respondent was dismissed on several grounds, inter alia, that the 3rd respondent referred to ejection petition namely BSNL was itself not a party in the lease that contained a provision for an arbitral proceeding and therefore, the adjudication cannot be referred to the arbitrator. The further reasoning was adjudication which is the subject of a rent petition could not be referred to Arbitrator u/s 8 and the special forum created under the Rent Act alone has the exclusive jurisdiction. The first revision has been filed by the respondent in C.R. No. 6552 of 2010 against the dismissal of the application.

2. The petitioner had filed yet another suit for declaration and consequential relief of injunction against the respondent described as a sub-tenant in the rent petition and yet another person by name Vijay Dhar. The suit of injunction was founded on a plea that the industrial plot No. 2 situate at Sector 18, Gurgaon was allotted to the petitioner on free hold basis by HUDA on 02.02.1995. He had a site plan sanctioned for construction and the plaintiff had raised a structure in an area of 12960 sq. ft including 6480 sq. ft for basement, 2160 sq. ft for ground floor, 2160 sq. ft. for mezzanine and 2160 sq. ft. for first floor and rented out to the respondent having its office at NIRLAC Centre at Qutab Institutional Area on 30.09.2000 through an unregistered instrument stipulating a rent of Rs. 2,26,800/- per month. This amount excluded electricity and water charges which were payable by the lessee to the concerned authorities. Subsequently, an area measured 4320 sq. ft. of mezzanine floor was let out to the lessee in addition to 2160 sq. ft. of mezzanine floor already in possession of the tenant at a monthly rent of Rs. 75,600/- per month w.e.f. 01.03.2001. Yet another additional space of 4320 sq. ft. at the ground floor was also let out to subsequently in addition to 2160 sq. ft. of the ground floor w.e.f. 01.01.2002.

III. Eviction petition by petitioner against respondent; petition under s. 8 of Arbitration & Conciliation Act by respondent; A plea of change of character as being in possession under agreement of sale

3. The grievance of the petitioner was that the respondent had parted with the possession of 1200 sq. ft. of its basement portion by way of sub lease to BSNL without the written consent of the landlord. It had also allowed for yet another portion of the building namely the basement, ground floor, mezzanine floor and

first floor by way of sub lease to the company at Shivaji Marg. The plaintiff had contended that the petition for eviction had been before the Rent Controller initially on the violation of terms of lease and even when the petition was pending, the respondent had purported to invoke the arbitral clause in the unregistered lease and had an arbitrator, one Sh. Vijay Dhar appointed, which the petitioner would state as illegal since the lease deed itself was for a period of 11 years and being unregistered, a clause for arbitration could not have been enforced. The respondent was attempting to raise a dispute regarding its alleged right of obtaining a sale deed under the terms of the lease after certain number of years. The petitioner's own response was that the proceedings before the arbitrator were not valid. The suit itself, therefore, contained a prayer that the arbitrator, who was cited as a 2nd defendant shall not carry on with his further hearing. The contention is that the appointment of the 2nd defendant as arbitrator under the lease deed dated 30.09.2000 was illegal and void and that no arbitrator could be appointed when the disputes between the parties were governed under the Haryana Urban (Control of Rent and Eviction Act), 1973 and only a Rent Controller has jurisdiction to enter upon a dispute between the parties. It was also submitted that jurisdiction to grant specific performance itself vested only with the Civil Court and an arbitrator could not grant such a relief. In the said suit also, the respondent filed an application u/s 8 contending that any petition regarding the appointment of arbitrator ought to be taken before the Arbitrator himself and a civil suit cannot be pursued when one of the parties has already resorted to arbitration. The Civil Court, therefore, held that since the arbitral proceedings were already being initiated and the notice of entry into reference had already been issued by the arbitrator, the suit cannot be proceeded with in terms of Section 8 of the Arbitration and Conciliation Act, 1996. He, directed, therefore, the suit to be stayed. It is against this order that the petitioner has filed the civil revision in C.R. No. 3031 of 2011.

IV. Arbitral clause in unregistered document is enforceable

4. The petitioner has referred to several decisions to the effect that the unregistered document cannot be relied upon for giving effect to terms of the lease. He relies on K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd., for a contention that a clause in an unregistered document stipulating a manner of use is a clause stipulating the term of lease itself and it cannot be relied on. The Court was considering that a stipulation of a lease about the user was literally a term of the lease itself and found that it was not enforceable. In Bajaj Auto Limited Vs. Behari Lal Kohli, the Supreme Court was considering the fact of non-registration of the document of lease which is required to be registered and the effect of a particular clause allowing for a sub lease to be treated as a term of the lease itself. The Court held that a tenant cannot rely on such a clause to justify his own sub-lease. This would be applicable only in cases where a clause is sought to be enforced under a document which is the term of lease. In U.P. State Sugar Corporation Ltd. Vs. Jain Construction Co. and Another, , the Court was holding that arbitral proceedings would not be

maintainable at the instance of an unregistered firm having regard to the mandatory provisions contained in Section 69 of the Partnership Act. All these decisions have a common under-current. A term of lease, such as a right to sub-lease or manner of user of the demised property or the competency of a person as a lessor or lessee are all terms of lease and enforcement of any of the rights under such status shall not be possible through an unregistered document. A term for reference to arbitration could be seen on a standalone basis without being reckoned as a term of lease. An arbitral agreement itself does not require to be registered. Indeed there is even a direct case law on the subject by the Supreme Court in SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd., , where the Supreme Court has held that an arbitral agreement itself does not require to be registered and consequently a clause for an arbitration in an unregistered document of lease which is required to be registered could be severed from the other clauses and given effect to. In the light of the said judgment, a reference to arbitration as sought by the party to secure an enforcement of the arbitration through an arbitral clause in an unregistered document is not any longer res Integra.

V. Prayer in civil suit

(a) Declaratory relief in order that requires adjudication must be contentious

5. The suit for declaration that has been filed before the Civil Judge (Senior Division), Gurgaon is to the effect that the lease deed dated 30.09.2000 executed between the parties namely between the petitioner and the respondent was illegal and not enforceable except for collateral purpose. The consequential relief of injunction that is been sought is that an adjudication of dispute between the parties through an arbitrator cannot proceed any further and the arbitrator will have no jurisdiction to adjudicate upon any dispute in respect of the suit property since an action for eviction has already filed. I am prima facie of the view that suit itself was a needless exercise. The suit is for a declaration of an obvious legal incident. The declaratory action which is contemplated u/s 34 of the Specific Relief Act itself is for enforcement of a legal right, which the defendant is interested in denying. Such a suit will also include a prayer for consequential relief if it was capable of being secured. In this case, a declaration that an unregistered document cannot be used otherwise than for a collateral purpose is stating the obvious that does not require an adjudication of any legal character. Under the provisions of the Transfer of Property Act u/s 107 and 17(1) (d) of the Registration Act, a document of lease would require to be registered and Section 49 admits of exceptions that includes a power to refer to the document for a collateral purpose. The suit for declaration that an unregistered lease deed is null and void and that it cannot be used other than for a collateral purpose is, therefore, a reproduction of what the statutes contain as referred to above. It requires no adjudication.

(b) Relief of specific performance is arbitrable

6. Even an issue that right to enforce a contract of sale of immovable property by specific performance is not anathema to the proceedings before the arbitrator. This has also been considered directly by a judgment of the Supreme Court in *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, where the Supreme Court has held that the claim to specific performance which creates but a personal obligation is arbitrable. The arbitrator will have a power to also deal with disputes that may result in grant of relief for specific performance. In *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others*, , the Supreme Court has held that a right to specific performance arises out of a contract and parties can agree to refer the issues relating to specific performance to shorten the litigation and the arbitrator can also grant such a relief.

(c) An arbitral clause in a document that is terminated is still enforceable

7. Even the contention of the landlord that he has put an end to tenancy and that he has resorted to action for eviction does not render invalid or irrelevant the arbitration clause. *Reva Electric Car Company P. Ltd. Vs. Green Mobil*, is an authority for the proposition that an arbitration clause which formed part of contract shall be treated as agreement independent of other terms of contract and hence arbitration clause continues even if the contract does not continue. I will not find any error in the order passed and the revision petition challenging the said order in C.R. No. 3031 of 2011 would require to be dismissed.

VI. Rent petition for eviction, whether required to be stayed/stalled by reference to arbitration

(a) Clause providing for a right to purchase by a tenant in the unregistered lease, whether it is enforceable shall be a matter for adjudication by arbitrator

8. The specific question that has caused the friction between the parties is on a subject whether in a petition where the landlord had complained that the tenant had committed breach of terms of lease and has created a sub-lease in favour of two persons namely an entity going by the same name as the respondent but a different address given and the BSNL as a sub tenant they will be liable for being evicted. The tenant was relying on a clause in the lease deed itself that had provided for a right empowering the tenant to purchase the property and lawfully used to put an end to the tenancy and seek for its enforcement before the Arbitrator. While a clause for arbitration itself is severable and the right could be enforced by having an arbitrator appointed for subjecting the dispute between the parties, it is still a moot point of whether a clause in the unregistered lease deed that allows for a right to purchase the property granted under the lease could be relied on or not. The learned senior counsel for the tenant relies on an observation in *Halsbury's Laws of England*, Fourth Edition, Vol. 27, 1981, para 109 relating to Leases and Underleases that an option to purchase in a lease agreement is collateral and independent of and not incidental to the relationship of landlord and tenant. I am not reproducing the terms of the lease that contains a reference to an agreement to purchase by the respondent from the petitioner

only by virtue of the fact that I am still keeping open the issue of enforceability of such a clause under the unregistered lease and will not find a need to reproduce the same for consideration. It may amount of pre-judging the issue of the petitioner's contention that such a clause is not enforceable.

(b) Plea by tenant that there is a change in character as purchaser is a plea that falls within arbitral domain; ground of eviction though not arbitrable, examination of rights of tenant to purchase is arbitrable.

9. The dispute between the parties that has arisen between the landlord and tenant has driven the landlord to an action for ejectment. The tenant disputes this right on a contention that he is not any longer a tenant and he has, after the completion of the stipulated number of years in the unregistered lease, a right to obtain a sale deed and consequently he is not any longer a tenant to be answerable for an action for ejectment before the Rent Controller. The crucial question is whether dispute is such that it is not arbitrable. If it is, the next question is, whether facts and circumstances are such that is not exigent to refer the kind of dispute to arbitration.

10. In *N. Radhakrishnan Vs. Maestro Engineers and Others*, the Supreme Court was considering the issue of arbitrability of a dispute and the applicability of an arbitration in situation where serious issues of fraud, forgery and coercion were raised. In such a situation, the Court found as a matter of discretion that it was not a fit case for a reference to arbitration. This judgment ought not to be understood that wherever expressions of fraud or in due influence are used by any party, the matter will automatically go out of the purview of arbitral exercise. The parties are corporate entities and the reference to fraud and deception that could be inferred from the pleadings refer to the legal effect to the instrument and not on any particular vitiating circumstances that prevail on one party at the instance of the another. The matter before the arbitrator has to simply conclude on the enforceability of a clause for sale contained in an unregistered instrument and the equities obtaining by the conduct of either of parties that would find a merit or otherwise for the enforceability of agreement. The pleadings in the rent petition do not pose any serious issues of fact relating to fraud and misrepresentation, coercion or forgery that would be improper to be left with an arbitrator adjudication. I do not, therefore, find any justification in this case for exclusion of jurisdiction for an arbitrator.

11. The learned counsel for the landlord also refers me to a judgment of a Full Bench of the Bombay High Court in *Central Warehousing Corporation Vs. Fortpoint Automotive Pvt. Ltd.*, wherein the point for reference to the Full Bench was the issue of jurisdiction of a Small Cause Court in a situation where an agreement between the licensor and a licensee contained an arbitral clause. The Court held that by virtue of a provision u/s 41 of the Presidency Small Causes Act, 1882 the jurisdiction of Small Cause Court will not be excluded. Section 41 of the Act dealt with Rules or procedures between licensor and licensee, which contained a non obstante clause viz., that the provision contained in the Act was

applicable notwithstanding any other law for the time being in force. The only exception provided under the Act was a proceeding under the Bombay Rent Control Act of 1995. I have already held that there is no doubt that in a concluded situation of status of parties as landlord and tenant and where the landlord was seeking for eviction on the ground that there had been any of the grounds available to him under the Rent Act for obtaining eviction, the eviction could be obtained only by resort to the Act before the Rent Controller and not by a suit or through arbitration. However, if the issue is that the tenant is no longer a tenant and he has obtained some other status and whether such a status is capable of being established in an independent forum when one of the parties has elected to press for consideration of such a right, the Rent Controller has to await the decision in such a case. This is so, particularly in view of the limited jurisdiction of the Rent Controller and the persona designata status that he has, viz., he carries out only mandate of the Act in an existing jural relationship of landlord and tenant. A fortiori, an issue of whether sale deed could be executed in favour of the tenant by any term which is legally enforceable cannot also be decided by the Rent Controller. Even as a matter of exigency, it should only be kept outside the purview of the Rent Controller's adjudication. The Senior counsel for the petitioner would rely on the judgment of this Court in Dr. Jasbir Singh Mann Vs. Mrs. Ana Cidaliza Columna Ohri and Others, as making possible an inference that Rent Controller's jurisdiction will be paramount and by parties cannot contract themselves out of it. The Court held that a dispute between a landlord and tenant relating to the tenancy arrangement itself cannot be a matter of reference to an Arbitrator. We have already observed that the issue is not whether any of the grounds for eviction exists or not. The issue in adjudication is again not an enforcement or otherwise of the terms of the lease deed as such relating to a landlord and tenant. The issue for adjudication by the arbitrator is a matter which the Rent Controller himself cannot decide. If the Rent Controller cannot decide whether the agreement of sale could be enforced or not, it is not possible to allow for a proceeding before the Rent Controller to be completed when yet another forum is to adjudicate whether the tenant has obtained any better right to remain in the property other than as a tenant. My own judgment in St. Joan's Education Society Vs. National Thermal Power Corporation Limited and others, is also cited by the learned senior counsel for the petitioner to say that the exceptional situations pointed out in the judgment as including grounds of eviction as to when the matter could not go to an arbitrator for adjudication. I have stated, inter alia, that eviction and tenancy matters governed by special statutes, where tenant has a statutory protection against eviction, cannot be a matter of adjudication before an arbitrator. This point also requires no further dilation since the issue before arbitrator is not an issue which the Rent Controller is capable of deciding. None of the decisions cited by the learned counsel for the petitioner referred to above applies to the facts and circumstances.

12. If we must start with the fundamental premise that an arbitral clause in an

unregistered lease could still be invoked and given effect to for adjudication of disputes that have arisen between the parties before an arbitrator, then the issue of whether the respondent continues with the status as a tenant or not will be verily a matter which the arbitrator himself will decide. Again the issue of whether a clause under the unregistered lease providing for a right of purchase by the respondent is enforceable is also a clause which will be considered by the arbitrator as falling within his jurisdiction to decide. Since I have already come to the conclusion that the reference to arbitration was justified and that a suit instituted by the petitioner that the lease deed was not valid and enforceable and that the arbitrator does not have the power to adjudicate cannot further be prosecuted and found a reason for a dismissal of the civil revision in C.R. No. 3031 of 2011, I have to only hold that such an arbitrator will render an adjudication regarding the status of parties and whether there existed a change in character for a tenant to have become a purchaser who has a valid and enforceable right against the petitioner. I have no difficulty in accepting the contention of the petitioner that a ground of ejectment or whether a tenant had committed a breach of terms that makes him liable for being ejected could be decided only by the Rent Controller under a special jurisdiction and the arbitrator will not have a power to decide. The rent control proceedings are initiated only in an admitted status of landlord and tenant. It must be a case of a tenant whose status is admitted to a tenant. Under normal circumstances, even a denial of status by tenant that he is not a tenant and therefore, the petition was not maintainable could be adjudged by the Rent Controller himself. Such a power must be taken as eclipsed in view of a reference to arbitration that will decide the enforceability of the agreement which the tenant relies on against the petitioner. The Rent Controller shall not be permitted to continue the proceedings further when there is a clear dispute between the parties of respective status. The enforceability of an alleged right of an agreement to purchase the property shall be decided first before the ground for ejectment is brought for an adjudication before the Rent Controller. A petition filed u/s 8 under the Arbitration and Conciliation Act was, therefore, perfectly tenable. The Rent Controller was in error in assuming that his own powers were being trenched upon by the respondent's effort to remove the ejectment proceedings from out of his jurisdictional ambit.

13. Two situations are possible. If the arbitrator comes to the conclusion that right as a tenant has been put an end to and the tenant has obtained a right to purchase the property, there is nothing further that remains for adjudication before the Rent Controller. The learned senior counsel for the tenant places judgments from foreign jurisdictions, such as U.S.A. and Australia that a right to purchase property from the landlord puts an end to jural relationship of tenancy. I am not extracting the verbatim reproduction but take them as first principles of law to call for. I am not also reproducing cases cited relating to enforceability of terms of purchase in a rent agreement as unnecessary before this court, but which will fall for consideration before the arbitrator himself. The Rent

Controller's jurisdiction ceases if there exist no subsisting relationship of landlord and tenant (see: R. Kanthimathi and Another Vs. Beatrice Xavier (Mrs), Sri B. Paramashivaiah and Sri B. Chandrashekar Vs. Sri M.K. Shankar Prasad Chetty and Sri M.K. Srinivas Murthy (since deceased by his Lrs Smt. Anita S. Murthy and Kum. Snigdha rep. by her mother and Guardian Smt. Anita S. Murthy),). If the arbitrator comes to the conclusion that there exists no valid clause to obtain specific enforcement or that the conduct of the parties has been such that the tenant has forfeited the right to purchase, landlord could obtain a favourable decision to secure the relief of possession before the arbitrator through an award and put it in execution for his own benefit.

At the option of the landlord, he may stop short of securing eviction, defeat the tenant's claim to obtain specific performance and resume rent proceedings and secure an order of ejectment on proof of what he contends in the rent petition. The Rent Controller has to, therefore, take a hands off approach till the arbitration before the named arbitrator comes to a close. In Joseph Kantharaj and Another Vs. Attharunnisa Begum S., , the Supreme Court approved of stay of proceedings before the Rent Controller when a suit was filed by the tenant for specific performance of agreement of sale.

VII. Impartiality of arbitrator cannot be decided otherwise than through resort under the Arbitration Act itself.

14. Learned counsel for the petitioner has filed documents to show that appointment of named arbitrator was itself a subject of challenge in some other proceedings and the matter had gone up to Supreme Court where the arbitrator's impartiality was in challenge and he was ordered to be removed. After hearing the arguments, I had asked the counsel to deliberate on choice of arbitrators mutually agreeable to the parties. When the tenant prepared some choices that could be considered, the landlord would want nothing of it and invited me render a judgment on merits as argued before me. I cannot now allow that objection regarding the impartiality of arbitrator to be taken before me. It will be a matter left to the petitioner to approach the arbitrator, who has assumed jurisdiction to challenge his right u/s 16 of the Arbitration and Conciliation Act, 1996 and seek for appropriate redressal, if he is aggrieved by the decision in higher forums in the manner provided under the Arbitration and Conciliation Act. It must be remembered that the 1996 Act is a complete Code and if an arbitral process has started, the interference by a Civil Court would still be circumscribed by the width of jurisdiction that is provided under the Act itself. No Civil Court will exercise jurisdiction without reference to the provisions of the Arbitration and Conciliation Act itself (See Kverner Cemeration India Ltd. v. Bajranglal Agarwal and another, (2012) 5 S.C.C. 214). An objection such as that the arbitrator cannot be impartial and that he is himself Director of the company is not an objection that can be brought by one of the parties to the arbitration through an independent suit or a petition before a Civil Court. On the other hand, it must be done before the arbitrator himself and an award that may be passed

by the arbitrator will also be subject to judicial review in the manner contemplated under the Arbitrator and Conciliation Act. The proceedings before the Rent Controller will, therefore, stand stayed till the arbitrator concludes his proceedings. VIII. Disposition

The order dismissing the application before the Rent Controller is erroneous and it is set aside. The civil revision in C.R. No. 6552 of 2010 is allowed. I have already held that transfer of proceedings of civil suit for continuation before the arbitrator is justified in paragraphs 6 to 8 above. C.R. No. 3031 of 2011 is dismissed.