
(2010) 02 KL CK 0066
In the High Court Of Kerala
Case No : A.R. No. 43 of 2009

Joseph Vilangadan and Nisha Johny

APPELLANT

Vs

P.N. Writer and Co. Pvt. Ltd.

RESPONDENT

Date of Decision : 08-02-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 7, 7(2), 7(3)

Registration Act, 1908 — Section 17, 49

Transfer of Property Act, 1882 — Section 106, 107, 53A

Citation : (2010) 02 KL CK 0066

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : V.J. Joseph, for the Appellant; Alex Varghese, for the Respondent

Final Decision : Dismissed

Judgement

Antony Dominic, J.—The applicants have approached this Court invoking its jurisdiction u/s 11 of the Arbitration and Conciliation Act (hereinafter referred to as "Act" for short) for the appointment of an Arbitrator to resolve the disputes between themselves and the respondent herein.

2. Bereft of unnecessary details, the case of the applicants is that by Annexures A1, A2 and A4 unregistered lease deeds, the applicants leased out the premises mentioned therein to the respondent. By and large, the terms of the lease deeds are similar, and in so far as it is relevant, the lease deeds provided for payment of monthly lease rent and an initial period of three years with two successive renewal options for three years each at the discretion of the lessee. The lease rent payable for the three spells of periods is contained in Clause 3 of the agreements. Clause 26 of Annexures A1, A2 and A4 provided that in case of any dispute with respect to lease agreement, the same shall be referred to an Arbitrator appointed by the lesser/lessee in consonance with the provisions of the Act and that the decision of the Arbitrator shall be binding on the parties.

3. On the strength of Annexures A1, A2 and A4 lease deeds, the respondent

occupied the premises. During the currency of the lease, landlords demanded revised rent which the tenant was unwilling to pay. The tenant thereafter vacated the premises, which according to the tenant was on 31/10/2008, with only a portion of the building alone retained in their possession, while the landlord contends that the tenant vacated only on 21/3/2009. Be that as it may, finally by Annexure A7 notice, the landlords claimed a total amount of Rs. 27,30,000/- and future rental. On receipt of the said notice, the respondent replied by Annexures A8, A9 and A10 notices admitting the lease agreements, their status as tenant, but however, disputing the claim of the landlord and demanding refund of the amounts specified in the replies. It is stated that thereafter the applicants appointed an Arbitrator, the validity of which was disputed by the tenant and thereupon the Arbitrator withdrew from the reference.

4. In the aforesaid circumstances, on behalf of the applicants, Annexure A18 notice intimating the appointment of an Arbitrator was served on the respondent. On receipt of the said notice, Annexure A19 reply was given stating that the appointment of the Arbitrator made by Annexure A18 was ill advised and they disagree with the same for the following reasons:

- a) All the three Lease Agreements dated October 1, 2004 (2 Nos.) & December 15, 2006 are ab initio void. There exists no valid Agreements for arbitration.
- b) There exists no arbitrable dispute.
- c) There is no adjudicatory role for a judicial or quassi judicial authority. It was thereupon that the applicants filed this arbitration request seeking appointment of an Arbitrator.

5. Counsel for the applicants contended that since the execution of the lease agreements, and the existence of arbitration clause are admitted, they are entitled to have an Arbitrator appointed to resolve the disputes, the existence of which is evident from Annexures A7 to A10 notices and its replies. The contention raised by the respondent is more a reiteration of the grounds urged by them in Annexure A19 notice referred to above. According to them, the lease deeds were for a total period of 9 years, and therefore, are compulsorily registrable documents in terms of Section 17 of the Registration Act and Section 107 of the Transfer of Property Act. Admittedly, the documents are not registered, and therefore, Section 49 of the Registration Act applies. According to them, the existence of a valid agreement between the parties is a condition precedent for entertaining an arbitration request. Reliance was placed on the Apex Court judgment in *SBP & Co. v. Patel Engineering Ltd.* (2005) 8 SCC 618, which was followed by this Court in *Vijaya Narayanan Vs. Prabhakaran*, and in *Prakash v. Sriram Transport Finance Co. Ltd.* 2008 (3) KLT 97. It is stated that as the agreement between the parties is void ab initio, there arise no question of appointing an Arbitrator. Yet another plea that was raised by the counsel was that the stamp duty having not been paid on Annexures A1, A2 and A4, to borrow the expression used by the counsel, the document is void and useless.

6. In reply, the contentions raised by the counsel for the respondent were contradicted by the learned Counsel for the applicants relying heavily on the provisions of the Act and the judgments of the Apex Court in *Anthony v. K.C. Ittoop and Sons* 2006 (6) SCC 394 and *Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited*, . It was also contended that even if it is assumed that the lease agreement is invalid for non registration, that does not prevent the Court from referring to the said document for deciding on the existence of the Arbitration Agreement, it being a collateral purpose, which according to the learned Counsel is permissible in view of the proviso to Section 49 of the Registration Act. Counsel also contended that even if the agreement is invalid or void as canvassed by the respondent, the Arbitration Clause is severable and is a separate agreement between the parties, and therefore, will survive the invalidity and will remain binding and operational between the parties. On this basis, he sought the appointment of an Arbitrator.

7. I have considered the submissions made.

8. At the outset, it should be noticed that on facts, there is no dispute about the execution of Annexures A1, A2 and A4 lease deeds, that on the strength of the aforesaid agreements, the respondent occupied the premises and that subsequently the respondent surrendered the premises. It is also not in dispute that rent was paid during the period of occupancy. After admitting all this, the contention raised by the respondent is that since the lease deed is a compulsorily registrable document and as it has not been registered, the document in its entirety, being void and useless, the arbitration clause cannot be enforced. The question is whether this contention raised by the learned Counsel for the respondent deserves acceptance.

9. As already seen, Annexures A1, A2 and A4 lease agreements provide for arbitration of disputes. Arbitration agreement has been defined in Section 7 of the Act as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not". Sub-section 2 provides that "an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement", which as per Sub-section 3 shall be in writing. Sub-section 4 provides that "an arbitration agreement is in writing if it is contained in - a document signed by the parties; or an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Therefore, it is evident that there is no prescribed format or the manner in which the arbitration agreement is to be executed between the parties. In the context of the Indian Arbitration Act, 1940, this precise question was considered by the Apex Court in *Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others*, , and it was held that an arbitration agreement is not required to be in any particular form and that what is required to be ascertained

is whether the parties have agreed that if disputes arise between them in respect of the subject matter of contract, such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement. Relevant provisions of the 1940 Act and the 1996 Act not being different, the law laid down in the aforesaid judgment still holds good. In this case, evidently Clause 26 of Annexures A1, A2 and A4 reflects the existence of an arbitration agreement where the parties have agreed to submit themselves to the jurisdiction of an arbitrator appointed in the manner as provided therein.

10. It was contended by the learned Counsel for the respondent that existence of a valid arbitration agreement and arbitrable disputes are the condition precedent for reference to arbitration and the appointment of an arbitrator. This is too well settled a principle and I do not think it necessary to labour on this issue except to refer to few judgments which were cited by the respondent. The Apex Court in *SBP & Co. v. Patel Engineering Ltd.* (2005) 8 SCC 618 where in para 47, it has been held that:

The Chief Justice or the designated Judge will have the right to decide his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. Following this judgment, in *Vijaya Narayanan Vs. Prabhakaran*, , a Division Bench of this Court held that while exercising the power of appointment, the Court has to decide whether there exists a valid arbitration agreement and whether the dispute that is sought to be raised before it is covered by the arbitration clause. To the same effect is the judgment in *Prakash v. Sriram Transport Finance Co. Ltd.* 2008 (3) KLT 97, where it has been held that while considering an application for the appointment of an Arbitrator, Court cannot act mechanically, instead it has a duty to decide whether there is a valid agreement between the parties and that agreement contains an arbitration clause. It was further held that only if it is found that there is a valid agreement and that the agreement contains an arbitration clause, can the parties be referred for arbitration as provided under the Act. In view of the above judgments, the contention raised by the learned Counsel for the respondent deserves to be accepted and I do so.

11. The major controversy between the parties is regarding the consequences of non registration of Annexure-A1, A2 and A4, the lease deeds relied on by the applicant. The statutory provisions which are relied on in this context are Section 107 of the Transfer of Property Act providing for the manner in which leases are made, and Sections 17 and 49 of the Registration Act, 1908, which provide for documents, the registration of which is compulsory and the effect of non registration of documents which are required to be registered u/s 17 the Registration Act, or by any provisions of the Transfer of Property Act. Section 49 of the Registration Act being relevant in the context of this case, is extracted below for reference. Effect of non registration of documents required to be

registered:- No document required by Section 17 [or by any provision of the Transfer of property Act, 1882] to be registered shall-

- (a). affect any immovable property comprised therein, or
- (b). confer any power to adopt, or
- (c). to be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument.

12. From a mere reading of this provision, it is evident that a document which is required to be registered u/s 17 of the Registration Act or under the Transfer of Property Act, cannot affect any immovable property or confer any power to adopt or to be received as evidence of any transaction affecting such property or conferring such power unless it has been registered. However, in view of the proviso to the Section, an unregistered document affecting immovable property and required to be registered, may be received in evidence of any collateral transaction which is not required to be effected by registration.

13. The contention raised by the applicant is that in view of the provisions contained in 105 defining lease, a lease can be created otherwise than by a registered document. In support of this contention, the learned Counsel for the applicants relied on the Apex Court judgment *Anthony Vs. K.C. Ittoop and Sons and Others*, and also *Neelakantan Sreedharan v. Subba Bhakthan Narayana Bhakthan* 1975 KLT 128. As far as the Apex Court judgment in Anthony's case is concerned, that was a case where lease was created for a period of five years by an unregistered document. Taking advantage of the fact that the lease deed was not registered, the landlord attempted to terminate the lease by a notice u/s 106 of the Transfer of Property Act. In its judgment, considering the reality that a lease was created, possession was handed over and rent was paid, it was held that the fact situation constituted creation of a lease as provided in the second part of Section 107 which provide that all leases of the movable property other than those covered by the main part may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession. On this basis, the Supreme Court held that the lessee in that case being a tenant was entitled to the protection of the Rent Control Act. In so far as the decision in *Neelakantan Sreedharan v. Subba Bhakthan Narayana Bhakthan* 1975 KLT 128 relied on by the learned Counsel for the applicants is concerned, it has been held that irrespective of the fact that the lease deed is unregistered, that document can be referred to for ascertaining the nature of possession by the tenant and the jural relationship between the parties.

14. However, it is to be noticed that in both these judgments, Courts have not diluted or dispensed with the requirements of registration as provided u/s 107 and Section 17 of the Registration Act or the consequences of non registration as provided in Section 49 of the Registration Act. For this reason, I do not think that these judgments are of any assistance to the applicants. If that be the position, in view of the provisions contained in Section 49 of the Registration Act, documents cannot be received in evidence and the Apex Court has consistently held that such a document is void. In this context, the judgment in *Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others*, was relied on by the counsel for the respondents, where it has been held that "if the lease is void for want of registration neither party to the indenture can take advantage of any of the terms of the lease. At best the provision contained in Section 53A of the Transfer of Property Act which incorporated the English equitable doctrine of part performance can, if the terms thereof are satisfied, be relied upon to protect possession for the period reserved under such a void lease. But no other terms of such an indenture inadmissible for want of registration can be the basis for a relief."

15. The further question is whether even if the lease deeds in question are inadmissible in evidence in view of Section 49 of the Registration Act, these documents can be received in evidence for proving its terms enabling the landlords to claim revised rent, treating it as a collateral transaction. In other words, what is to be examined is whether the applicants can claim the benefit of the proviso to Section 49. I shall first refer to the precedents cited before me.

16. The effectiveness of an unregistered lease deed was considered by this Court in *Chandrakala Vs. Soman*, where it has been held thus:

5. The Rent Control Court and Appellate Authority have rejected the prayer of the landlady for revision of rent on different grounds. The lease deed is admittedly an unregistered one. This Court has laid down the law in *Paul's case* (supra) that an unregistered lease deed cannot be pressed into service to create, declare, assign, limit or extinguish any right, title or interest in or to the property comprised in the document. Reference may also be made to the decision of the Apex Court in *Anthony v. K.C. Itoop* AIR 2000 SC 3523. u/s 49 of the Registration Act no document requiring registration u/s 17 or by any provision of the Transfer of Property Act is to affect any immovable property comprised therein or to be received as evidence of any transaction affecting such property unless it is registered. An unregistered document cannot be admissible in evidence to prove its terms, though it can be put in evidence for collateral purpose. The term of lease, claim for enhanced rent are not collateral purpose. Rate of rent is an important ingredient of the rental agreement. If the landlady wanted to create any right in her favour for revision of rent after a period of two years the same could be done only through a registered document. Unregistered lease deed cannot be pressed into service to create any right for revision of rent. Consequence of non-registration of a document has been dealt with in Section 49

of the Registration Act. Section 49 bars reception in evidence of document or proceeding which is required to be registered u/s 17 of the Registration Act but not registered. Unregistered lease deed could at best be looked into for ascertaining the commencement of possession, rate of rent or similar other provisions which are collateral to the principal transaction. Since the document is unregistered one, in our view, if the landlady wanted a revision of rent, the remedy available to the landlady is to approach the Rent Control Court for fixation of fair rent. Therefore we are in agreement with the finding of the Rent Control Court and Appellate Authority that the landlady is entitled to get rent only at the rate of Rs. 450/- per month or otherwise fixed by the Rent Control Court by way of fixation of fair rent.

17. The expression "collateral purpose" occurring in the proviso to Section 49 of the Registration Act has come up for consideration before various High Courts as also the Apex Court. In *Jnanchandra Dutta Vs. Mahim Chandra Das*, , the Calcutta High Court held that to use an unregistered instrument for the purpose of proving its terms would not be using it for a collateral purpose and that the question as to who is the tenant and on what terms tenancy has been created are not collateral facts but are important terms of the contract of tenancy, which cannot be proved by admission of an unregistered lease deed into evidence.

18. Again in *Ratan Lal and Others Vs. Hari Shanker and Others*, , the Allahabad High Court held that since the appellant therein wanted to extinguish the right of the respondent relying on the unregistered tenancy, the same was not a collateral purpose. Proceeding further, the court held that collateral purpose has a limited scope and meaning and that the document cannot be used for the purpose of saying that the deed created or declared or assigned or limited or extinguished a right to immovable property and that the term "collateral purpose" would not permit the party to establish any of these acts from the deed.

19. In *Bajaj Auto Limited Vs. Behari Lal Kohli*, the Apex Court held that the document if inadmissible for non-registration, all its terms are inadmissible and that if a decree purporting to create a lease is inadmissible in evidence for want of registration, none of the terms of the lease can be admitted in evidence and that to use a document for the purpose of proving an important clause in the lease is not using it as a collateral purpose. Referring these judgments and also to *Rai Chand Jain Vs. Miss Chandra Kanta Khosla*, and *Rana Vidya Bhushan Singh Vs. Ratiram*, , the Apex Court rendered its judgment in *K.B. Saha and Sons (P) Ltd. v. Development Consultant Ltd.* 2008 (8) SCC 564. That was a case where by an unregistered lease deed, a flat was let out to the respondent. According to the landlord, in view of Clause 9 of the lease deed, the lease was for the specific purpose of occupation by a particular officer of the respondent and that thereafter the premises ought to have been surrendered. However, the lessee insisted on inducting another officer into the premises and thereupon the suit was filed for eviction of the respondent. Trial Court and the High Court held that the lease deed was inadmissible and unenforceable for the reason that it was not

a registered document. Against this judgment, the landlord filed Appeal before the Apex Court, which was also dismissed. In its judgment, after making reference to the aforesaid judgments of the High Courts and of itself, the Apex Court arrived at its conclusion in para. 34, which is extracted below for reference:

34. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that:

1. A document required to be registered, if unregistered is not admissible into evidence u/s 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

20. Unless there is an enforceable provision enabling the landlord to claim revised rent, which claim was disputed by the tenant, there can be no arbitrable dispute between the parties, the existence of which is a condition precedent for the appointment of an Arbitrator. It was contended by the applicants that even if the agreement is unenforceable for its non registration, the arbitration agreement between the parties, is a separate agreement and therefore, will survive even if the agreement is invalidated for any reason. Reference was made to text books on Arbitration and also the Apex Court judgment in *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.* 2006 (2) SCC 628. As I have already held, when an application for the appointment for an Arbitrator is made, it is the duty of the court to ascertain the existence of a valid arbitration agreement between the parties and an arbitrable dispute. Therefore, even if it is accepted that inspite of the invalidity of the lease deeds, the arbitration agreement will survive, unless there also exists an arbitrable dispute, this Court will not be justified in appointing an arbitrator.

21. From the judgments referred to above, it is clear that the terms of the lease is an important clause in the agreement, the proof of which is not a collateral purpose, to claim the benefit of the proviso to Section 49 of the Registration Act. Further, an agreement for payment of revised rent is not one which can be effected without a registered instrument to attract the proviso to Section 49 of the Registration Act. If that be the situation, about which there cannot be any doubt, the result would be that there is no enforceable provision for the landlord to claim revised rent, in which event, there exists no arbitrable dispute between

the parties. Consequently, this Court will not pass an order u/s 11(6) of the Arbitration and Conciliation Act 1996 appointing an Arbitrator as sought for in this application.

Result is that, the petition has to fail, and is accordingly dismissed. Parties are left to bear their respective costs.