

(2012) 12 DEL CK 0372

In the Delhi High Court

Case No : Arbitration Petition 63 of 2012

M/s. Rural Communication and Marketing Pvt. Ltd.

APPELLANT

Vs

M/s. Fytronics India Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 06-12-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 16

Registration Act, 1908 — Section 17, 17(1)(d), 49

Transfer of Property Act, 1882 — Section 107

Citation : (2013) 1 AD 1

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : S.M. Bhaskar and Mr. Shiv Gupta and Mr. Zia-ul-islam, for the Appellant; Kajal Chandra and Ms. Renu Kuhar, for the Respondent

Final Decision : Disposed Off

Judgement

Reva Khetrapal, J.—The Petitioner-M/s. Rural Communication and Marketing Pvt. Ltd., by way of the present petition u/s 11(6) of the Arbitration and Conciliation Act, 1996 seeks appointment of an independent Arbitrator for the adjudication of disputes which have arisen between the Petitioner and the Respondent No. 1-M/s. Fytronics India Pvt. Ltd. with regard to a Lease Agreement dated 04.07.2011 entered into between the parties. The Respondent No. 2 is the director of the Respondent No. 1 Company. Shorn of details, the case of the Petitioner is that the Respondents by misrepresentation and fraud entered into the aforesaid Lease Agreement with the Petitioner for renting out an industrial building situated at Plot No. A-27, Block B-1, Mohan Cooperative Industrial Estate, New Delhi-110044 measuring 660.83 sq. yards on a monthly rent of Rs. 5,88,000/- for a period of six years and two months effective from 01.07.2011. The Petitioner alleges that even before taking possession of the said premises, the Petitioner pointed out to the Respondents that their assurance that the premises could be used for commercial office was only meant to deceive the Petitioner to enter into the Agreement and that the said premises as ascertained by the

Petitioner, were not approved for commercial/office use as per the Municipal Laws and thus the Agreement became voidable. The Petitioner then terminated the Lease Deed dated 04.07.2011 and asked for refund of the security deposit amount of Rs. 17,64,000/- (Rupees Seventeen Lac Sixty Four Thousand Only) and also an amount of Rs. 1,23,000/- (Rupees One Lac Twenty Three Thousand Only) advanced to the Respondents for the purchase of stamp duty. However, the Respondents refused to refund the said amounts so advanced.

2. On 23.11.2011, the Petitioner addressed a letter to the Respondents for referring the dispute to arbitration in terms of the Lease Agreement dated 04.07.2011. The Respondents vide their letter dated 09.12.2011 denied the claim of the Petitioner and refused to the appointment of the Arbitrator. Hence, the present petition instituted by the Petitioner for appointment of an Arbitrator.

3. In the reply filed by the Respondents to the present petition, the essential facts have not been disputed, being that a Lease Deed dated 04.07.2011 was entered into between the parties and that Clause 8(f) of the said Lease Deed contained an arbitration clause, which is as under:-

f) Any dispute between the Lessor and the Lessee with regard to this lease agreement shall be mutually settled among the parties failing which such disputes shall be referred to arbitrator appointed jointly by the Lessor and the Lessee and paid to the extent of respective part by both the parties. The arbitration proceedings will be conducted in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendments or re-enactment thereto for the time being in force and as per the rules of the Indian Council of Arbitration. The arbitration shall be conducted in English language and the venue of arbitration shall be Delhi. The courts in Delhi alone shall have jurisdiction on any matter connected with this lease.

4. The Respondents have also not disputed receipt of the letter dated 26th August, 2011 whereby the Petitioner terminated the Lease Deed, though the Respondents contend that as per Clause 2 read with Clause 8-A of the Lease Agreement neither the Respondent No. 1 nor the Petitioner could have terminated the Lease Agreement during the lock-in period, i.e., in the period intervening 1st July, 2011 to 31st August, 2014 and further that even after the completion of three years of the lock-in period, if any party still intended to terminate the Lease Agreement, then in those circumstances three months' notice in writing was mandatory to be given to the opposite party. The Respondents also admit receipt of an undated letter received by Respondents on 23.11.2011 and that it replied to the said letter vide its reply dated 09.12.2011.

5. As regards the maintainability of the present petition, the sole contention of the Respondents is that the Lease Deed dated 04.07.2011 having not been registered, any Clause of the unregistered Lease Deed cannot be taken into consideration. It is contended that the Lease Deed is inadmissible for want of registration, and thus, all its terms are inadmissible including the one containing

the arbitration clause. Though the Respondents in their reply have also contended that the Lease Deed is not duly stamped and, therefore, it should be impounded and dealt with in the manner as specified in the Stamp Act, in the course of hearing of the present petition it was not denied that the Lease Deed is a duly stamped document.

6. Thus, the sole issue which arises for consideration in the present case is whether an Arbitration Agreement contained in an unregistered but compulsorily registrable instrument by virtue of the provisions of Section 17 of the Registration Act, 1908 is a valid and enforceable agreement.

7. On the aforesaid aspect, this Court has heard the respective contentions of Mr. S.M. Bhaskar, the learned counsel for the Petitioner and Ms. Kajal Chandra, the learned counsel for the Respondents. Mr. Bhaskar on behalf of the Petitioner contends that an unregistered document affecting immovable property may be received as evidence of a collateral transaction not required to be effected by registered instrument. Mr. Bhaskar further contends that if the Petitioner had brought a suit for enforcement of the tenancy on the basis of the Lease Deed, then it could very well be urged that this document was not admissible in evidence u/s 49 Indian Registration Act, as it did not confer any title on the plaintiff regarding the property mentioned in the Deed, because the Deed was not registered, but in this case the Petitioner seeks arbitration for recovery of his earnest money and insofar as the payment of the earnest money to the Respondents by the Petitioner is concerned, the Lease Deed would be admissible in evidence for this collateral purpose as it was not required by law to be mentioned only in a registered instrument.

8. Ms. Kajal Chandra, on behalf of the Respondents, though conceded that an arbitration agreement does not require registration under the Registration Act and is, for all intents and purposes, an independent agreement for reference of disputes to arbitration which is independent of the main contract or instrument, even if it is found as one of the clauses in a contract or instrument, submitted that where the document is compulsorily registrable, but is not registered, no doubt it can be acted upon and enforced for the purpose of dispute resolution by arbitration, but what is required to be borne in mind is that the Arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, i.e., (a) as evidence of contract in a claim for specific performance, and (b) as evidence of any collateral transaction which does not require registration. Reliance was placed by her in the aforesaid context upon the judgments rendered in the following cases:-

(i) Ratan Lal and Others Vs. Hari Shanker and Others, .

(ii) K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd., .

(iii) Bajaj Auto Limited Vs. Behari Lal Kohli, .

(iv) SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd., .

9. In the case of Ratan Lal (supra), it was held that the term "collateral purpose" referred to u/s 49 of the Registration Act has a limited scope and meaning and the term would not permit the party to establish that the Deed created or declared or assigned or limited or extinguished a right to immovable property.

10. In the case of K.B. Saha (supra), the Hon''ble Supreme Court has held that from the principles laid down in various decisions of the Supreme Court and the High Courts, 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.

11. In the case of Bajaj Auto Limited (supra), the Supreme Court observed that if a document is inadmissible in evidence for non-registration, all its terms are inadmissible including the one dealing with landlord's permission to his tenant to sub-let.

12. In SMS Tea Estates Pvt. Ltd. (supra), while dealing with the question as whether an Arbitration Agreement in an unregistered (but compulsorily registrable) instrument is valid and enforceable, the Hon''ble Supreme Court opined:-

7. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts-one in regard to the substantive terms of the main contract and the other relating to resolution of disputes-had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or transaction affecting the immovable property. It is as if two

documents-one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registrable-are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer. These principles have now found statutory recognition in subsection (1) of section 16 of the Arbitration and Conciliation Act 1996 (Act" for short) which is extracted below:

16. Competence of arbitral tribunal to rule on its jurisdiction.-(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

13. After considering the rival contentions of the parties, I am of the opinion that the dicta laid down by the Hon"ble Supreme Court in the case of SMS Tea Estates Pvt. Ltd (supra) must govern the decision of this case. In the said case, the appellant sought arbitration in regard to three distinct disputes: (a) for enforcement of an alleged Agreement of Sale of tea estates, (b) for enforcement of the lease for 30 years; and (c) for recovery of amounts spent by it on the tea estates on the assumption that it was entitled to purchase the tea estates or at least to enjoy a lease of 30 years. The Supreme Court held that the appellant could not seek arbitration with reference to the enforcement of the alleged Agreement of Sale as the same was entered into prior to the Lease Deed and there was no arbitration agreement in regard to such Agreement of Sale. As regards the reference of dispute for enforcement of the Lease Deed for 30 years and the claim for recovery of the amounts allegedly spent on the tea estates, it opined as follows:-

18. An Arbitrator can no doubt be appointed in regard to any disputes relating to the lease deed. But as noticed above, as the lease deed was not registered, the Arbitrator can not rely upon the lease deed or any term thereof and the lease deed cannot affect the immovable property which is the subject matter of the lease nor be received as evidence of any transaction affecting such property. Therefore, the Arbitrator will not be able to entertain any claim for enforcement of the lease.

19. Lastly we may consider the claim for recovery of the amounts allegedly spent towards the tea estates, as a consequence of Respondents not selling the estates or not permitting the Appellant to enjoy the lease for 30 years. If this claim is treated as a claim for damages for breach in not granting the lease for 30 years then it would be for enforcement of the terms of the lease deed which is

impermissible u/s 49 of the Registration Act. If it is treated as claim de hors the lease deed then the arbitrator may not have jurisdiction to decide the dispute as the arbitration agreement (clause 35) is available only to settle any dispute or difference arising between the parties in relation to or in any manner touching upon the lease deed and not in regard to disputes in general.

14. Applying the aforesaid guidelines laid down by the Hon'ble Supreme Court, indubitably an Arbitrator cannot be appointed to entertain any claim for enforcement of the Lease Deed, but it is not the enforcement of the Lease Deed which is sought for in the present case but the refund of the earnest money. The question which presents itself is whether the refund of the earnest money can be said to be a transaction in the nature of a collateral transaction. This, to my mind, is undoubtedly a question which needs to be referred to arbitration, for, it is for the Arbitrator to opine whether the Lease Deed in the instant case can be received as evidence of the deposit of the security amount and also whether the claim of the Petitioner for refund of the security deposit is maintainable de hors the lease deed.

15. It is trite that the law clearly provides that lease of immovable property from year to year, or for any term exceeding one year, can be made only by a registered instrument [Section 17(1)(d) of the Registration Act, 1908 and Section 107 of the Transfer of Property Act, 1882] and that Section 49 of the Registration Act sets out the effect of non-registration to be that if a document which is compulsorily registrable, if not registered, will not affect any immovable property comprised therein in any manner nor would be received as evidence of any transaction affecting such property except for two limited purposes, viz., as evidence of a contract in a suit for specific performance and as evidence of any collateral transaction not required to be effected by registered instrument [Proviso to Section 49 of the Registration Act]. In the present case, the first exception is clearly not applicable, this being a dispute premised on a Lease Deed. It is the second exception which is sought to be pressed into service by the counsel for the Petitioner by submitting that the Petitioner seeks recovery of the security deposit and not the enforcement of the Lease Deed dated 04.07.2011.

16. The refund of the security deposit is sought on the premise that the Lease Deed in question is void/voidable having been entered into by the Petitioner on account of the fraud or misrepresentation by the Respondents. Whether in such a case the invalidity that attaches itself to the Lease Agreement will also attach itself to the Arbitration Agreement will also arise for consideration and must be necessarily adjudicated upon by the Arbitrator.

17. In view of the aforesaid, this Court appoints Mr. Justice S.N. Aggarwal (Retired Judge of this Court) as Arbitrator to adjudicate upon the disputes between the parties. The learned Arbitrator after going into the nature of the disputes will decide whether the same can be entertained and disposed of in consonance with the law laid down by the Hon'ble Supreme Court. The fee of the

learned Arbitrator shall be in accordance with the rules framed by the Delhi High Court Arbitration Centre. Parties shall appear before the learned Arbitrator on 20th December, 2012. ARB. P. 63/2012 stands disposed of in the above terms.