(2014) 02 P&H CK 0058

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 5358 of 2012

Reliance Digital Media Ltd. APPELLANT

Vs

Jawed Habib Hair Xpreso Ltd. RESPONDENT

Date of Decision : 20-02-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 5, 8, 9
Constitution of India, 1950 — Article 227
Transfer of Property Act, 1882 — Section 106

Citation : (2014) 2 RCR(Civil) 969 : (2014) 1 RCR(Rent) 466

Hon'ble Judges : Rajiv Narain Raina, J

Bench : Single Bench

Advocate : Aashish Chopra, Advocate for the Appellant; Rakesh Bhatia, Advocate for the Respondent

Judgement

Rajiv Narain Raina, J.—This petition under article 227 of the Constitution of India lays challenge to the order dated 3rd August, 2012 of the learned Civil Judge (Junior Division), Faridabad rejecting the application u/s 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 for closing the suit and referring the disputes to arbitration. The facts briefly are that the petitioner is owner of Reliance Mart, Crown Interior''s Mall, Sector 35, Faridabad and let out space to the respondent to operate its business through space measuring 150 square feet in the Mall. The commercial relationship between the petitioner and the respondent is governed by a written contract agreement. Clause 12 of the agreement gave Reliance absolute and exclusive control and possession over the store and any space therein, from which, it would allow the vendor to engage in business. The vendor shall not be or deemed to be in possession of any such area. The vendor shall not claim any right of tenancy, sub-tenancy, lease, license, easement or possession or any other right or interest of whatsoever nature in respect of the store or such space or any part thereof in terms of schedule 6 of the agreement. Reliance shall mean Reliance Digital Media Ltd., the petitioner before this Court. The vendor shall mean Jawed Habib Hair Xpreso, a partnership firm registered under the Partnership Act, 1932 to work out of Crown Interiorz, 1st Floor, Sector 35, Mathura Road, Faridabad, Haryana. The effective date stipulated in schedule 6 and found at page 37 of the paper book was 20th February, 2011 shown against serial No. 5 of the schedule. The ''contract validity period'' of the agreement or ''the term period'' was fixed at 12 months against serial No. 8. In this manner, the contract would have ended on 19th February, 2012 by efflux of time. The business was to be conducted through a Kiosk measuring 150 square feet on a rent of ''22,060/- per month payable from the effective date.

2. The respondent tenant, feeling threatened by the petitioner company of being forcibly evicted from the premises by unlawful means before the expiration of the contract period having been asked to vacate the kiosk on 4th February, 2012, approached the Station House Officer, Police Station Sarai Khawaja, Sector 37, Faridabad with a complaint on 5th February, 2012 for police intervention against unlawful eviction without due process of law at the hands of Gundas. Respondent tenant also approached the Civil Judge (Senior Division), Faridabad by filing a suit against the petitioner praying for grant of permanent injunction restraining the petitioner company from forced dispossession of the space without due authority of law and in accordance with it. On notice issued and summons received, the defendant company entered appearance and filed an application u/s 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 invoking clause 9 of the agreement which reads as follows:-

Disputes. If any dispute arising out of or relating to this Agreement is not resolved amicably by the parties within 10 days of such dispute arising, then either may refer such dispute to Arbitration by written notice by which it will nominate its arbitrator. The other party shall appoint its arbitrator within 45 days of receipt of such notice, and the 2 arbitrators shall appoint the third arbitrator. Arbitration shall be conducted in Mumbai, in English, under the Arbitration and Conciliation Act. The Arbitral Award shall be in writing and shall be final and binding. Each Party shall bear its costs of arbitration. This agreement shall be governed and interpreted in accordance with the laws of India.

3. They pleaded that the suit was not maintainable before the Civil Court and the dispute could be adjudicated only by the Arbitral Tribunal with two arbitrators appointing the third arbitrator. It was provided in clause 9 that the arbitration proceedings would be conducted at Mumbai in the State of Maharashtra. The petitioner company relied on the following decisions of the Supreme Court to block the suit and to leave the disputes and differences arising between the parties to be adjudicated through the arbitration process, to wit:- Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, ; P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, ; Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others, ; The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another, .

4. The application was resisted by filing reply. The learned Civil Judge (Junior

Division), Faridabad reasoned that the issue of arbitrability has to be decided by the Civil Court seized of the suit and cannot be left to the decision of the Arbitrator. It was reasoned that if the subject matter of the suit was capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal, the Civil Court can yet refuse an application u/s 8 of the Act even if the dispute is covered by the arbitration agreement. The trial court relied on the ruling in Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, , Ashoka Buildcon Pvt. Ltd. Vs. Vadilal Dairy International Ltd., , and Mr. Akshay Kapur and Others Vs. Mr. Rishav Kapur and Others, , to reach the conclusion. On the other hand, Reliance placed reliance on the decision of the Supreme Court in The Branch Manager, Magma Leasing and Finance Limited and Another Vs. Potluri Madhavilata and Another, , Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, , and P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, .

5. The learned trial court thought that the matter deserves to be examined from the prayer made in the plaint against forcible dispossession from the disputed property. The stand of the plaintiff respondent found favour and consequently the application was rejected. As a result, the ad interim injunction granted remained operative and continues to bind against the Mall owner.

6. Mr. Rakesh Bhatia, learned counsel appearing for the respondent supports the order in conclusion. However, he agrees that the order of the trial court is not articulate in its reasoning and of culling out the ratio of the judgments noticed in the order as the same support the end product of dismissal of the application u/s 8 of the Act.

7. Mr. Bhatia points out to paragraphs 35 to 37 of the Supreme Court decision in Booz Allen (supra) in support of his case that his client had claimed a right in rem as against the world at large in contrast to a right in personam which is an interest protected solely against a specific individual. He, therefore, submits that ad-interim injunction granted by the Civil Court has got nothing to do with the arbitration law and practice. It is a power and jurisdiction conferred on the civil court to pass orders before arbitration u/s 9 of the Act. The two principles would necessarily have to be separated; one, the right to arbitration under a arbitration clause contained in a contract agreement signed by the parties and two, the right to move the Court for ad-interim injunctions/interim measures to protect possession against unlawful invasion or use of force, threat and the kind. The agreement having come to an end by efflux of time will not expose tenant to automatic eviction without resort to legal remedies by the petitioner seeking to eject a tenant and the right to protect illegal dispossession. These he says are two sides of the coin. He cites para. 35 to 37 of Booz Allen (supra) which are reproduced for ready reference:-

35. The Arbitral Tribunals are private for a chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public for a constituted under the laws of the country. Every civil or

commercial dispute, either contractual or non contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/ dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, u/s 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody, (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself.

8. In Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., , the Supreme Court had occasion to examine the scope of arbitration and observed that only such disputes or matters, which an arbitrator is competent or empowered to decide, can be referred to arbitration. The Court dealt with the issue under the company law. An arbitrator notwithstanding any agreement between the parties would have no jurisdiction to order winding up of a company since such power is conferred on the Company Court. Resort to Section 8 application under the Arbitration and Conciliation Act, 1996 for referring a winding up petition to arbitration is untenable. By analysis, the argument culled out is that ejectment can be ordered only through Court process. The Arbitral Tribunal is not a court and thus has no power to evict a person from the disputed property where

possession is duly delivered to tenant in accordance with laws governing tenancy operated through the Rent Controller constituted under statutory tenancy laws.

9. In Natraj Studios (P) Ltd. Vs. Navrang Studios and another, , the Supreme Court dealt with the protective provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 with reference to the scheme of arbitration under the then Arbitration Act, 1940. The Supreme Court held that the arbitration agreement regulated by rent laws and the disputes arising as to possession of premises can be decided by Small Causes Courts alone and not in arbitration resolution since an arbitrator would have no jurisdiction in the matter. The Court observed in para. 17 and 21 of the report as under:-

17. The Bombay Rent Act is a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways. It is a matter of public policy. The scheme of the Act shows that the conferment of exclusive jurisdiction on certain Courts is pursuant to the social objective at which the legislation aims. Public policy requires that contracts to the contrary which nullify the rights conferred on tenants by the Act cannot be permitted. Therefore, public policy requires that parties cannot also be permitted to contract out of the legislative mandate which requires certain kind of disputes to be settled by special Courts constituted by the Act. It follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognised by a Court of law.

21. In Deccan Merchants Co-operative Bank Ltd. Vs. Dalichand Jugraj Jain and Others, , the conflict was between the jurisdiction of the Registrar of Co-operative Societies under the Maharashtra Co-operative Societies Act and the jurisdiction of the Court of Small Causes under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The Court held that whether or not the Registrar of Cooperative Societies was a ''Court'' whose jurisdiction was ousted under S. 28 of the Bombay Rents, Hotel and Lodging House Rates control Act, 1947, the jurisdiction of the Registrar was surely ousted on broader considerations of public policy. The Court pointed out that the Rent Act had a specific social objective in view and for the achievement of that objective it was necessary that the Court set up under the Rent Act alone should deal with a dispute between a landlord and a tenant and that in accordance with the provisions of the Rent Act. Necessarily, the jurisdiction of the Registrar was ousted. The Court said (at pp. 901, 902);

The scheme of the various Rent Acts and the public policy underlying them are clear; the policy is to give protection to the tenants. Various powers have been conferred on the authorities under the Rents Acts to grant protection to the tenants against ejectment and other reliefs claimed by the landlords..........If the matter is heard by the Registrar, none of these provisions would apply. We can hardly imagine that it was the intention of the legislature to deprive tenants in buildings owned by cooperative societies of the benefits given by the Rent Act. It seems to us that the Act was passed, in the main, to shorten litigation, lessen its costs and to provide a summary procedure for the determination of the disputes relating to the internal management of the societies. But under the Rent Act a different social objective is intended to be achieved and for achieving that social objective it is necessary that a dispute between the landlord and the tenant should be dealt with by the Courts set up under the Rent Act and in accordance with the special provisions of the Rent Act. This social objective does not impinge on the objective underlying the Act. It seems to us that the two acts can be harmonised best by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Act, should apply.

10. Mr. Bhatia would then rely on the decision of the learned Single Judge of the Madras High Court in Sathish Raj and V. Rajendran Vs. Atlanta Applied Dynamics (India) Pvt. Ltd. and Daily Life Retail and Trading (India) Pvt. Ltd., to contend that the parties can enter into any contract containing clause for arbitration to refer any dispute for arbitration. But when there is a special Act covering the field of a particular dispute, the provisions of that Act alone have to be invoked and the dispute cannot be referred to any other mode of adjudication. The Court was considering the provisions of the local rent law of the State. It may be kept in mind that the Civil Court had primary jurisdiction while Rent Controllers are statutory authorities set up for the purpose of adjudicating landlord-tenant disputes. The jurisdiction of these adjudicators cannot be by-passed by an arbitration intervention through the provisions of the Arbitration and Conciliation Act, 1996. When there are special or general authorities exercising jurisdiction over the relief claimed in subject matter jurisdiction, then the arbitration clauses can be invoked for arbitration purposes but not for rights exercised in rem by an oppressor of rights.

11. The contract signed between the parties in this case is no better than a rent note or a lease agreement subject to the local rent laws permitting actions to be brought before the Rent Controller or through the due process of law ignited in civil courts where rent laws are not applicable then remedies can be sought through notices served u/s 106 of the Transfer of Property Act determining tenancy, followed by a civil suit praying for eviction by grant of a permanent and mandatory injunction.

12. It is lastly argued that when the lease contained an arbitration agreement but there is no agreement or consent between the parties extending the term of lease, then although not provided for in the agreement, the occupation of the tenant over the demised premises after the expiry of the lease agreement is not under an agreement. The respondent becomes a tenant holding over the disputed premises/space under the general law, which protects his possession. In such a case, an application for referring the dispute to arbitration deserves to be dismissed. See M/s V.S. Enterprizes Vs. B.R. Sharma, , SB for this proposition.

13. For the foregoing reasons, I support the conclusion reached by the learned Civil Judge (Junior Division), Faridabad as correct in dismissing the application u/s 8 of the 1996 Act in the light of the case law articulately and forcefully cited by

the respondent''s counsel. The question is one really of jurisdiction, that is, the authority to decide.

14. Mr. Aashish Chopra appearing for the petitioner is unable to make any significant dent in the arguments advanced by the opposite side. In my considered view, this petition deserves to be dismissed and the impugned order, skeletal though it may be, is found justified in its conclusion. Ordered accordingly.

