
(2013) 07 KAR CK 0135
In the Karnataka High Court
Case No : C.M.P. No. 13 of 2013

Satyam Cineplexes Limited

APPELLANT

Vs

Patel Realty India Ltd. and Bellona Estate Developers Limited

RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 16(1)(a)

Citation : (2013) 4 AKR 432 : (2013) 4 ARBLR 252 : (2013) ILR (Kar) 5597 :
(2013) 5 KarLJ 304 : (2013) 4 KCCR 3092

Hon'ble Judges : H.N. Nagamohan Das, J

Bench : Single Bench

Advocate : Udaya Holla for Smt. K. Sumalatha and Tarun Dua, for the Appellant;
Naganand for M/s. Khaithan and Co., for the Respondent

Final Decision : Allowed

Judgement

H.N. Nagamohan Das, J.—Petitioner is a company incorporated under the provisions of the Companies Act and engaged in the business of managing, operating and running multiplex cinema halls under the name of style of "Satyam Cineplexes". Respondent No. 1 is also a company incorporated under the provisions of the Companies Act and engaged in the business of acquiring, developing and programme real estate assets. Respondent No. 2 is also a company engaged in the business of constructing and developing commercial complexes and malls. Petitioners contend that on 17.07.2010 they entered into a Memorandum of Understanding (for short "the MOU") with respondent No. 1 wherein respondent No. 1 agreed to develop property and to lease 52000 sq.ft. area in the II floor of a building called "Mall of Bangalore" subject to certain terms. Under the MOU the petitioners have paid a sum of Rs. 15.00 lakhs as interest free security deposit. In furtherance of MOU several meetings were held, E-mails were exchanged and there came to be a concluded agreement to lease on 03.08.2012 and addendum to agreement to lease. This agreement to lease and addendum are accompanied by annexures. Respondent No. 1 instead of

discharging their obligation under the agreement to lease and addendum got issued a notice on 07.09.2012 refunding the security deposit of Rs. 15.00 lakhs on the ground that the terms of lease which was to be executed under the agreement to lease could not be finalized.

2. Petitioners contend that clause 29 of the MOU and clause 16 of agreement to lease and clause 79 and 80 of the addendum provides for an arbitration clause for settlement of the disputes. In view of the stand taken by the respondents the petitioners invoked the arbitration clause and got issued a lawyer's notice on 19.11.2012 nominating an arbitrator on their side and requesting respondent No. 1 to nominate the arbitrator on their behalf. The respondents instead of complying the demand made in the petitioners' lawyer's notice got issued a reply through their lawyers on 18.12.2012 inter alia contending that there is no enforceable agreement and as such the question of referring the dispute to an arbitrator will not arise. Having no other alternative the petitioners have filed this petition u/s 11(6) of the Arbitration and Conciliation Act seeking appointment of an arbitrator.

3. Respondent No. 1 entered appearance and filed statement of objections inter alia contending that the MOU dated 17.07.2010 was only an initial term sheet laying down the broad guidelines for negotiations and the same is not a concluded contract. The alleged agreement to lease and the addendum are not concluded contracts, unsigned, undated, unregistered and unstamped and as such they are not enforceable under law. Respondent No. 2 filed separate statement of objections inter alia contending that they are not parties to the MOU and as such there is no binding contract on them. On these grounds the respondents opposed the claim of the petitioners.

4. Heard arguments on both the side and perused the entire petition papers.

5. The MOU dated 17.07.2010 is not in dispute. In furtherance of the MOU there came to be several meetings between the parties and exchange of E-mails and the same is not in dispute. According to the petitioners meetings held on various dates and-exchange of E-mails resulted in finalization of the agreement to lease and addendum to agreement to lease on 03.08.2012. According to the petitioners the agreement to lease and addendum to agreement to lease are signed by the representatives of the respondents and the terms and conditions contained therein are binding on them. The subsequent attempt made by the respondents to alter Annexure 6 to the addendum is nothing but breach of agreement to lease and addendum to agreement to lease. When the agreement to lease and addendum to agreement to lease including the annexures are concluded the same cannot be altered unilaterally by any one of the parties. The concluded agreement to lease and addendum to agreement to lease are binding on the parties. Clause 16 in the agreement to lease and clauses 79 and 80 in the addendum to agreement to lease provides for arbitration clause to resolve the disputes between the parties arising out of this transaction.

6. The respondents contend that the agreement to lease and addendum to the agreement to lease including the annexures were at the stage of negotiations and they are not finalized. Subsequent to the MOU dated 17.07.2010 there came to be several meetings between the parties and exchange of E-mails on the terms and conditions of agreement to lease are not in dispute. Annexure H is the agreement to lease and Annexure G is the addendum to agreement to lease. A perusal of these two documents specifies that they are generated through E-mail and they are the outcome of MOU dated 17.07.2010. Further it is seen that the representatives of respondents have affixed the initials to the addendum to agreement to lease. At page 448 to 451 of the petition papers the synopsis of E-mail between the parties is filed and the same specifies exchange of E-mail between the parties on various dates. From this material on record it is manifest that there is agreement to lease and addendum to agreement to lease from which the arbitration clause can be ascertained.

7. Subsequent to the agreement to lease and addendum to lease an attempt is made by the respondents to incorporate certain major changes in Annexure 6 to the addendum and the same was refused by the petitioners. This subsequent attempt by the respondents will not take away the right of petitioners to invoke arbitration clause. In view of the stand taken by the respondents there is a dispute between the parties requiring adjudication by arbitrators as provided under the agreement to lease and addendum to the agreement to lease. As already pointed out clause 16 in the agreement to lease and clauses 79 and 80 in the addendum to agreement to lease provides for an arbitration clause. Therefore the petitioners have rightly invoked the arbitration clause by issuing a lawyer's notice on 19.11.2012.

8. Learned counsel for the respondents contend that the petitioners had only produced the Xerox copies of MOU dated 17.07.2010, agreement to lease and addendum to agreement to lease dated 03.08.2012 and the originals are not produced. Therefore the petition presented by the petitioners is contrary to Section 11 of the Arbitration and Conciliation Act and liable to be dismissed. The Supreme Court in the case of Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Limited, held "the photo copies of the lease agreements could be taken on record u/s 8 of the Arbitration Act for ascertaining the existence of arbitration clause." In the instant case there is no dispute between the parties with regard to the execution of MOU dated 17.07.2010. It is the case of petitioners that agreement to lease Annexure H and addendum to agreement to lease-Annexure G are the outcome of several meetings and exchange of E-mails. The meeting and exchange of E-mails are not in dispute. In the circumstances in view of the law declared by the Apex Court in the aforesaid decision, even in the absence of production of original deeds this Court can consider the photo copies of the MOU, the agreement to lease and the addendum to agreement to lease for the purpose of ascertaining the arbitration clause. Therefore I decline to accept the contention of the learned counsel for the respondents.

9. Learned counsel for the respondents contend that the petitioners specifically pleaded that the MOU dated 17.07.2010, the agreement to lease and the addendum to agreement to lease are concluded contracts and therefore the same requires registration u/s 17 of the Registration Act. In the instant case these documents are not registered and therefore on the basis of unregistered documents no relief can be extended to the petitioners. I decline to accept this contention of the learned counsel for the respondents.

10. The MOU dated 17.07.2010 is the first stage specifying that after negotiations the parties have to enter into an agreement to lease. The second stage is agreement to lease and addendum to lease dated 03.08.2012. It further specifies that at the third stage the parties have to enter into a regular lease deed on delivery of possession of leased premises. After the MOU the parties have entered into an agreement to lease and addendum to agreement to lease on 03.08.2012. Neither under the MOU nor under the agreement to lease nor under the addendum to agreement to lease the possession of the leased premises was delivered to the petitioners. In the absence of delivery of possession of the leased premises these documents do not require registration. In similar circumstances the Supreme Court in the case of V.B. Dharmyat (Deceased) through Lrs. Vs. Shree Jagadguru Tontadrya and Others, held as under:

10. Applying the aforesaid ratio to the present case we find that the document in question was not intended to, nor did it in fact result in a demise in present in favour of the appellant. This agreement was nothing more than a promise to do something in future, namely, to execute a lease deed and hand over possession of the plot in question to the appellant after the same was vacated by the municipality. The document, in other words, was a sort of undertaking or a promise given by Respondent 1 to the appellant that on the municipality vacating the plot, the same would be given on 99 years" lease to the appellant and the lease deed would be registered with the Sub-Registrar. Under no circumstances, in our opinion, did this document amount to a memorandum of a demise the present time.

Therefore I decline to accept the contention of the learned counsel for the respondents that for want of registration these documents cannot be relied on to ascertain the arbitration clause.

11. It is contended that the MOU, agreement to lease and addendum to agreement to lease are undated, unsigned and unstamped and as such no reliance can be placed on them. It is not in dispute that the MOU is signed by petitioner and respondent No. 1. Annexure G is the addendum to agreement to lease and the same is initialed by the respondents. As per the correspondence between the parties the agreement to lease and addendum to agreement to lease came to be finalized between the parties on 03.08.2012. In identical circumstances the Supreme Court in the case of Shakti Bhog Foods Limited Vs. Kola Shipping Limited, held that existence of an arbitration clause in an

agreement can be inferred from a document signed by the parties or an exchange of letter, telex, telegram, email or other means of telecommunication which provide a record of agreement.

Further, the Supreme Court in the case of Trimex International FZE Ltd. Dubai Vs. Vedanta Aluminium Ltd., India, held "It is clear that if the intention/of the parties was to arbitrate any dispute which arose in relation to the offer and acceptance, the dispute is to be settled through arbitration. Once the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect either the acceptance of the contract so entered into or implementation thereof, even if the formal contract has never been initialed.

In view of the law declared by the Apex Court in the above referred judgments, I find no substance in the contention of the learned counsel for the respondents.

12. It is contended that the agreement to lease and addendum to agreement to lease are unstamped and as such there is a bar u/s 35 of the Stamp Act to act on such a documents. The Supreme Court in the case of SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd., held as under:

12. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registrable) and which is not duly stamped:

i. The court should, before admitting any document into evidence or acting upon such document examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

ii. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document u/s 33 of the Stamp Act and follow the procedure u/s 35 and 38 of the Stamp Act.

iii. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in Section 35 or 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

iv. Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

v. If the document is not registered, but is compulsorily registrable, having regard to Section 16(1)(a) of the Act, the court can delink the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the

property or cannot be received as evidence of any transaction affecting such property. The only exception is whether the Respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 8 above. If the Respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

vi. Where the document is compulsorily registrable, but is not registered, but the arbitration agreement is valid and separable, 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, that is (a) as evidence of contract in a claim for specific performance and (b) as evidence of any collateral transaction which does not require registration.

(Underlining is mine)

13. Keeping the above principles in mind it is necessary to examine the fact situation in the instant case. Annexure H-the agreement to lease and Annexure G-the addendum to the agreement to lease dated 03.08.2012 are admittedly unstamped. If the deficit stamp duty and penalty is paid then the defect with reference to deficit stamp duty is cured and the Court may treat the document as duly stamped. In the instant case, learned counsel for the petitioners have filed a memo dated 18.01.2013 with a demand draft for Rs. 1100/- dated 17.01.2013 towards deficit stamp duty and penalty on the MOU dated 17.07.2010. Learned counsel for petitioners undertake to pay duty and penalty on the agreement to lease and addendum to lease. Thus the defect in relation to stamp duty and penalty is cured.

14. Respondent No. 2 contends that they are not parties to the MOU and as such they are not bound by the terms and conditions contained therein. Respondent No. 2 is a subsidiary of respondent No. 1. Both respondent Nos. 1 and 2 are under the control of Patel Engineering Limited. The Managing Director of Patel Engineering Limited-Mr. Rupen Patel is also the director of respondent Nos. 1 and 2. Respondent No. 1 intimated the petitioners stating that respondent No. 2 shall now step into the shoes of respondent No. 1 and they will lease the premises to the petitioners. This is evident from clause (I) and (J) in the agreement to lease. Further by E-mail dated 24.07.2012 the petitioners were informed that the name of respondent No. 2 was changed from Bellona Estate Developers Private Limited to Bellona Estate Developers Limited. The agreement to lease and addendum to agreement to lease were initialed by Mr. Rahul S. Mundada-Manager (Legal) of respondent No. 2. In similar circumstances the Supreme Court in the case of Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others, held as under:

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-

signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional case. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

Therefore respondent No. 2 is bound by the agreement to lease and addendum to agreement to lease.

15. Clause 16 of agreement to lease provides for arbitration clause. Clauses 79 and 80 of addendum to agreement to lease also provides for arbitration clause with certain changes and the same reads as under:

79 The first paragraph of Clause 16.4 of the Agreement shall stand substituted as follows: "if any Dispute, which has arisen under or in connection with the Agreement, cannot be settled by Parties through negotiations after a period of 30 (Thirty) days from the service of the Notice of Dispute or if any Party refuses in writing to amicable settle the Dispute prior to the expiry of a period of 30 (Thirty) days from the service of the Notice of Dispute (Appointed Day), the Dispute shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 and any amendments thereto and:"

80. Sub-clause (a) of Clause 16.4 of the Agreement shall stand substituted as follows: "The Parties shall appoint a sole arbitrator acceptable to both the Parties within 30 (Thirty) days the Appointed Day. In the event the Parties are unable to agree on a sole arbitrator within the time frame specified above, the Parties shall within the next 30 (Thirty) days appoint one arbitrator each and shall intimate the same to the other Party. For the purposes of clarity, the Parties agree that BEDL shall appoint one arbitrator and the Lessee shall appoint one arbitrator. Within 30 (Thirty) days of appointment of the second arbitrator, the arbitrators so appointed shall appoint the third arbitrator who shall be the chairman of the arbitral panel. In the event any Party fails to appoint an arbitrator within the time frames specified in this clause the other Party shall be entitled to make an application to the court of competent jurisdiction in accordance with the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator (at the

cost of the defaulting party) and the arbitrator so nominated shall be deemed to be the arbitrator nominated by the defaulting party. In the event of arbitrators nominated by the Parties fail to appoint the third arbitrator within the time frames specified in this clause, any Party shall be entitled to make an application to the court of competent jurisdiction in accordance, with the Arbitration and Conciliation Act, 1996, for appointment of the third arbitrator and the arbitrator so nominated shall be deemed to be the arbitrator nominated in accordance with this clause.

16. In terms of clauses 79 and, 80 to addendum to agreement to lease the petitioners have nominated an arbitrator on their side by name Mr. Justice R.C. Chopra (Retd.) and the same was intimated to the respondents as per lawyer's notice dated 19.11.2012. The respondents who have acknowledged the petitioners' lawyer's notice instead of nominating an arbitrator of their choice sent a reply through their lawyers on 18.12.2012 refusing to nominate the arbitrator of their choice. In the circumstances this Court is required to nominate an arbitrator who shall be the arbitrator of the respondents. For the reasons stated above, the following;

ORDER

- i. Petition is hereby allowed.
- ii. Hon''ble Mr. Justice A.J. Sadashiva (Retd.) is hereby appointed as Arbitrator on behalf of the respondents.
- iii. The arbitrators, Justice R.C. Chopra and Justice A.J. Sadashiva are requested to proceed with the matter in accordance with clauses 79 and 80 of the addendum to agreement to lease-Annexure G and the agreement to lease dated 03.08.2012 and adjudicate the dispute between the parties.
- iv. The learned arbitrators are requested to conduct the arbitral proceedings in the Arbitration Centre at Bangalore and as per the Rules framed by it.
- v. The petitioners to pay duty and penalty on the agreement to lease and addendum to agreement to lease within one week from today.
- vi. Registry is hereby directed to send a copy of this order to the learned arbitrators and also to the Arbitration Centre.