

(2014) 04 CAL CK 0008
In the Calcutta High Court
Case No : C.A. No. 1353 of 2014

Shyam Retails (India) Pvt. Limited

APPELLANT

Vs

Bajaj Infracon Private Limited

RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 5, 8
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 2(12)
Transfer of Property Act, 1882 — Section 106, 111, 114, 114A
West Bengal Premises Tenancy Act, 1997 — Section 6(4)

Citation : (2015) 1 ARBLR 71 : (2014) 4 CHN 73

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Probal Kumar Mukherjee and Shebatee Datta, Advocates for the Appellant; Saptanshu Basu, Subhabrata Das, Anuradha Poddar and Kuldip Mallick, Advocates for the Respondent

Judgement

Harish Tandon, J.—This revisional application is directed against Order No. 19 dated 12th March 2014, passed by the learned Civil Judge (Senior Division), 2nd Court, Barasat, in Title Suit No. 128 of 2012, by which an application under sections 5 and 8 of the Arbitration and Conciliation Act, 1996, is rejected. The plaintiff/opposite party filed a suit for recovery of possession on the ground of expiration of the period indicated in the notice under section 106 of the Transfer of Property Act.

2. The premises in question was given to the petitioner on the basis of an agreement styled as "Licence Agreement". The terms and conditions embodied in the said agreement would evince, which is also manifest from the conduct of the plaintiff/opposite party, that the parties indicated to demise the said premises for a definite period. Precisely for such reason, the plaintiff/opposite party terminated the said agreement upon issuing a notice under section 106 of the Transfer of Property Act.

3. Essentially, it is a suit for recovery of possession on one of the grounds enshrined under section 111 of the Transfer of Property Act.

4. The defendant/petitioner filed an application under sections 5 and 8 of the Arbitration and Conciliation Act, 1996 for an order to refer the parties to arbitration because of existence of an arbitration clause in the said agreement.

5. It is sought to be contended by the defendant/petitioner that any matter arising from or relating to the said agreement is capable of being adjudicated through private fora and not by public fora.

6. The sole point evolved from the respective stand of the parties is whether a suit for recovery of possession, on any of the grounds enumerated under section 111 of the Transfer of Property Act, is capable of being adjudicated by an arbitrator.

7. Both the parties have relied upon a judgment of the Apex Court rendered in the case of *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, . The Apex Court, in express terms, held that certain disputes, which are under the Special Act, are not capable of being decided through arbitration. The aforesaid observation can be aptly quoted as under:

"36. The well-recognised examples of non-arbitral 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, juridical 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."

8. According to Mr. Mukherjee, the learned advocate appearing for the defendant/petitioner, matter pertaining to eviction of a monthly tenant, who is otherwise protected under the welfare legislation of the Kent Act, has been kept outside the purview of arbitration agreement but a matter which pertains to recovery of possession, on the ground of revocation of licence under the general law, cannot be said to be beyond the arbitration clause.

9. The terms "licence", "lease" or "tenancy" are some nomenclature used in different context. In order to ascertain the meaning of the expressions used in an agreement, the conduct of the parties, as well as the nature of the terms and conditions, are the relevant factors.

10. Where an agreement is entered between the parties by way of a licence or a lease, conduct of the party is one of the primary factors. It can be evinced with certainty that in the instant case recovery is sought on the basis of the notice issued under section 106 of the Transfer of Property Act.

11. The aforesaid observation is only illustrative and tentative for the purpose of determining the instant application and shall not have any bearing at the time when the suit is to be finally heard after the defence is disclosed by the defendant/petitioner.

12. Prima facie reading of the plaint would show that it is essentially a suit for recovery of the demised premises under section 111 of the Transfer of Property Act.

13. Mr. Mukherjee is very much vocal in saying that since relief of mesne profit and/or damages are also sought for in the plaint, the same is capable of being determined and/or adjudicated by an arbitrator as the said matter squarely comes within the ambit of the arbitration agreement.

14. The aforesaid submission is made upon drawing inspiration from a judgment of the Apex Court rendered in the case of Madan Lal Vs. Bhai Anand Singh and Others, .

15. Reliance is also placed on an unreported judgment of a Co-ordinate Bench of this Court, delivered in the case of Smt. Ananya Chowdhury & Another vs. Ranjit Kumar Mitra (A.P. 182 of 2008 decided on 15th May 2008), in support of the contention that even after the issuance of a statutory notice under section 6(4) of the West Bengal Premises Tenancy Act, 1997, since a relief for arrear rent is made in the suit, the same is capable of being determined by an arbitrator under the arbitration clause and the entire matter should be relegated to the arbitrator.

16. Let me first take the unreported judgment rendered by a Co-ordinate Bench of this Court in the case of Smt. Ananya Chowdhury (supra). It appears from the facts narrated therein that a statutory notice under section 6(4) of the West Bengal Premises Tenancy Act was issued by the landlord against the tenant seeking his eviction on one of the grounds incorporated under the said Act. By way of ancillary relief a further decree for arrear rent was also claimed in the said suit.

17. The Co-ordinate Bench, as it appears, not only disputed the arrear rent but the entire eviction suit was relegated to the arbitrator for determination.

18. The aforesaid unreported judgment is contrary to the decision rendered by the Supreme Court in the case of Booz Allen and Hamilton Inc. (supra) where the Supreme Court, in clear and express terms, indicates that certain disputes covered under any of the Special Acts cannot be brought under the arbitration clause.

19. So far as the judgment, rendered in the case of Madan Lal -vs- Bhai Anand Singh & Others, (supra) is concerned, this Court finds that a proceedings for recovery of possession was initiated before the Land Controller. The agreement entered into by and between the parties requires the lessee to have the market value of the building constructed on the land of the landlord on or before surrender and/or delivery of possession. The Rent Controller was found to have

no authority to ascertain the market value of the property under the relevant statute. The Apex Court did not stay the suit for eviction but since the Rent Controller was found to be not capable of determining the market value of the property under the relevant provisions of the statute, the said issue was relegated to arbitration since the parties had expressly indicated the dispute to be referred to arbitration.

20. I am afraid, whether the said decision has any manner of applicability in the present context. It is essentially a suit for recovery of possession under the Transfer of Property Act. The tenant petitioner shall have a right to claim relief against the forfeiture either under section 114 or under section 114A of the Transfer of Property Act. The aforesaid reliefs can only be granted by a Court.

21. In the aforesaid context reliance can conveniently be placed upon the judgment of a Co-ordinate Bench of this Court, rendered in the case of Eastern Coils Private Limited vs. Deb Prasad Ghosh, reported in 1999 Volume-II CLJ 349. In the said report the deed of lease contained an arbitration clause. A suit for recovery of possession on the ground of expiration of the lease was filed by the lessor before the Civil Court. The lessee filed an application under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 challenging the Civil Court's jurisdiction and prayed that the parties should be relegated to the arbitral proceedings. The Court, noticing various provisions of the Transfer of Property Act, including the provisions relating to section 114 of the said Act, held that such a suit is competent to be decided by the Court; despite the parties having agreed to resolve the dispute through arbitration.

22. The facts of the said decision are identical and similar to the facts of the present case. This Court, therefore, has no hesitation to hold that the legal disputes, involved in the present case, can very conveniently be decided by the Civil Court.

23. This Court in the case of M/s. Fingertips Solutions Private Limited -vs- Dhanashree Electronics Limited (C.O. 3084 of 2009 decided on 7.9.2011) held that the dispute covered under the Transfer of Property Act is to be decided by the Civil Courts; despite existence of the arbitration clause in these words:

"21. The issue of eviction is essentially an issue which could be adjudicated and/or decided by the Court as it involved various question relating to the granting of the relief under the different provisions of the Transfer of Property Act. The cumulative effect of the judgment of this Court in case of Eastern Coils (P) Ltd. (supra) and the Supreme Court in case of Booz Allen and Hamilton Inc. (supra) that the eviction or a recovery proceeding under the special statute or where the express power is conferred upon the Court which necessarily implies the exclusion of the private Fora.

22. The second contention that the dispute whether the opposite party is obliged to renew the lease after an option is exercised by the petitioner which is pending adjudication before the Arbitral Tribunal if decided in favour of the petitioner

would non-suit the opposite party, is also not tenable. The point of renewal is also intrigue questions before the Court while adjudicating whether the notice under section 106 of the Transfer of Property Act is valid or not which would be determined by the public Fora and not by the private Fora. Some overlapping disputes cannot be segregated from the larger dispute which is only capable of being adjudicated and decided by the Court as has been held by the Apex Court in case of Sukanya Holdings (P) Ltd. (supra) the same principle has been reiterated by the Supreme Court in case of Booz Allen and Hamilton Inc. in these words:

51. If the three issues referred by the appellants are the only disputes, it may be possible to refer them to arbitration. But a mortgage suit is not only about determination of the existence of the mortgage or determination of the amount due. It is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons (referred to in para 48.2 above), who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-a-vis the mortgagor and mortgagee. Even if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitral or could be decided by a private forum, the issues in a mortgage suit cannot be divided."

16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under section 8 of the Act. In our view, it would be difficult to given an interpretation to section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between the parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed."

24. Let me now consider the other submission of Mr. Mukherjee that one of the reliefs, claimed in the plaint, can very well be adjudicated by the arbitrator.

25. According to Mr. Mukherjee, determination of mesne profit and/or damages can be determined by an arbitrator as the said dispute is covered under the arbitration agreement.

26. Before going into the above aspect, it would be relevant to understand the meaning of the words "mesne profit" and/or "damages" defined under section 2(12) of the Code of Civil Procedure which reads thus:

"2(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful

possession."

27. A meaningful reading of the aforesaid definition suggests that mesne profit is a profit in relation to a property, which the person derived and/or actually received or might with ordinary diligence have received from his wrongful possession. The word "wrongful possession" has significance in the context of a suit for recovery of possession. A person is in legal possession so long the possession becomes wrongful either by the Act of the parties or by statutory interdict.

28. Wrongful possession can be attributed in the present case from the expiration of the date given in the notice under section 106 of the Transfer of Property Act. Since expiration of the period of statutory notice is one of the grounds relating to determination of the lease, possession of the lessee would be wrongful on the date of expiration thereof.

29. The relief, which cannot stand independently and depend upon the primary and/or paramount relief, is required to be claimed otherwise and the parties would be precluded from claiming the same under Order 2 Rule 2 of the Code of Civil Procedure. Whether the possession is wrongful or the termination is valid or not, which may attract eviction of the lessee, is a matter to be decided in the suit and, therefore, the ancillary and/or consequential relief claimed by way of mesne profit is depending thereupon.

30. Furthermore, the Court should not segregate the reliefs when such relief is of composite nature; even if the same is found to be covered under the arbitration agreement.

31. Support on the above aspect can be had from the judgment of the Supreme Court, in the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, , where it is held in paragraph 16 of the judgment:

"16. Lastly he contends that if some of the disputes which are covered under the arbitration agreement whereas others are not, the Court should not split up the disputes but the entire disputes should be adjudicated by the Court by placing reliance upon the judgment of the Supreme Court in the case of Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, ."

32. This Court, therefore, does not find any merit in the submissions made by Mr. Mukherjeo as the points taken are already decided by the Apex Court.

33. The revisional application is thus devoid of merit. The same is hereby dismissed. There shall, however, be no order as to costs.