

(2022) 01 CAL CK 0005
In the Calcutta High Court

Case No : Arbitration Petition No. 1028 Of 2016

Woodburn Associates

APPELLANT

Vs

M/S. Marks And Spencer Reliance India Private Limited

RESPONDENT

Date of Decision : 05-01-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11, 12(1)
Indian Stamp Act, 1899 — Section 4

Citation : (2022) 01 CAL CK 0005

Hon'ble Judges : Prakash Shrivastava, CJ

Bench : Single Bench

Advocate : Surajit Nath Mitra, Soumabha Ghose, Rishav Dutt, Tiana Bhattacharyya, Vivek Singh, Soumyadeep Biswas

Judgement

Prakash Shrivastava, CJ

1. This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed for appointment of arbitrator.

2. The plea of the applicant is that it is a partnership firm having experience in real estate development whereas the respondent is a company

principally in the business of setting up and operating retail stores. Applicant is the owner of the land wherein he is developing basement plus ground

plus six storied commercial complex. The initial LOI dated 14th of February, 2014 was executed between the parties for leasing out the demised

premises to the respondent and thereafter terms were crystallized and five agreements i.e. master agreement, lease deed, vehicle parking agreement,

equipment agreement and signage agreement were signed on the same day i.e. 19th of September, 2014 for letting out the demised premises. Certain

disputes had arisen between the parties, therefore, applicant had given the

notice dated 24.09.2016 invoking the arbitration clause and nominating a senior advocate in terms of the arbitration clause contained in the master agreement. By the reply dated 04.10.2016, respondent had disputed the existence of the arbitration clause and had also disputed the claim on merit. Thereafter, the exchange of communications dated 25th of October, 2016 and 02.11.2016 took place between the parties and then this application has been filed.

3. Submission of the learned Counsel for the applicant is that the master agreement contains the arbitration clause and the parties are governed by the same. His further submission that the lease deed is duly stamped and registered, therefore, there is no requirement of payment of stamp duty and in this regard he has placed reliance upon Section 4 of the Stamp Act.

4. Opposing the prayer learned Counsel for the respondent has submitted that the master agreement is in the nature of lease deed and, therefore, it is required to be stamped and it being unregistered and unstamped, the arbitration clause contained therein cannot be invoked. He submits that master agreement is required to be read in isolation and it was superseded by other agreements and that the lease deed does not contain any arbitration clause.

5. I have heard learned Counsel for the parties and perused the record.

6. First objection is about non-existence of arbitration agreement. On the perusal of record, it is noticed that initially the LOI dated 14th of February, 2014 was entered into between the parties which provided for execution on master agreement, lease deed, equipment usage agreement and facility and maintenance agreement. Clause 6 of the LOI in clear terms provides that all agreements will be treated as part and parcel of the master agreement and no agreement shall be read or interpreted independently. Thereafter, on 19th of September, 2014, on the same day, master agreement, lease deed, equipment usage agreement, signage agreement and facility and maintenance agreement were executed. The master agreement clearly states that the demised premises is leased out on terms and conditions contained in that agreement and other definitive agreements to be executed between the parties. For convenience and accountability the other agreements were executed and it was clearly provided in the master agreement that:

â??E. For the aforesaid purposes, the Parties have herebyÂ agreed to execute the following definitive documents for the sake of convenience and

accountability of the Parities:

(i) this Agreement;

(ii) Lease Deed (which shall contain inter alia terms and conditions of the lease);

(iii) Equipment Usage Agreement (which shall contain terms and conditions for equipment usage);

(iv) Signage Agreement (which shall contain terms and conditions for signage);

(v) Vehicle Parking Agreement (which shall contain terms and conditions for use of vehicle parking spaces) (hereinafter collectively referred to as the

â??Definitive Agreementsâ?). For the avoidance of doubt it is hereby agreed that this Agreement captures the entire understanding between the

Parties and that the other Definitive Agreements are concurrent, co-extensive and co-terminus with each other and this Agreement. Upon termination

of any one of the Definitive Agreements, the other Definitive Agreements will also stand terminated.â??

7. The above clause of master agreement makes it clear that the master agreement captures the entire understanding between the parties and other

definitive agreements were concurrent, co-extensive and co-terminus. The master agreement also contains the details of grant of lease and clause

35.6 of the master agreement makes it clear that in the event of any inconsistency between the clauses of master agreement and other definitive

agreements, the clauses of master agreement will prevail.

8. The master agreement contains the following arbitration clause:

â??25. DISPUTE RESOLUTION AND JURISDICTION

25.1. The Parties agree that they shall attempt to resolve through good faith consultation, any dispute or difference between any of the Parties in

respect of or concerning or connected with the interpretation or implementation of this Agreement or arising out of this Agreement, and such

consultation shall begin promptly after a Party has delivered to another Party a written request for such consultation. In the event that the Parties have

been unable to resolve a dispute within a period of within 1 (one) month of a written request for such consultation, such dispute shall be finally settled

by arbitration under the provisions of the Arbitration and Conciliation Act, 1996.

25.2. The arbitration shall be conducted by a sole arbitrator to be mutually appointed by the Parties in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

25.3. The arbitration shall be conducted at Kolkata, India and shall be conducted in the English language. The arbitration award shall be final and binding on the Parties.

25.4. The courts in Kolkata shall have exclusive jurisdiction in relation to any proceedings arising out of arbitration including but not limited to, proceedings for inter relief.

25.5. When any dispute is under arbitration, except for the matters under dispute, the Parties shall continue to exercise their remaining respective rights and fulfill their respective obligations under this Agreement.

25.6. The validity, construction and performance of this Agreement shall be construed and the legal relations between the Parties hereto shall be determined and governed according to the laws of India.

25.7. The costs of the arbitration including the fees of the arbitrators shall be borne by both the Parties equally. It is however agreed and clarified that, each Party shall bear and pay its own costs, expenses, fees, disbursements and other charges of its lawyers, counsels, in connection with the arbitration proceedings.

25.8. The Lessee hereby unequivocally agrees that it shall not delay or withhold payment of any amounts payable under this Agreement and/or any other Definitive Agreements on the ground of any dispute having arisen under this Agreement and/or any Definitive Agreements or during the pendency of such dispute.â??

9. The execution of the master agreement and the arbitration clause contained therein is not in dispute.

10. Argument raised by the learned Counsel for the respondent that the master agreement has to be read in isolation as it was superseded by other definitive agreements, cannot be accepted having regard to the clauses of the master agreement which have been noted above. Since as per the terms of the agreements executed between the parties all definitive agreements are treated as part and parcel of the master agreement, therefore, in case if any dispute arises between the parties in respect of the definitive agreements

then the arbitration clause contained in the master agreement can validly be invoked by the aggrieved party.

11. Another objection of learned Counsel for the respondent that the master agreement is in the nature of lease deed and was required to be stamped,

is also not sustainable because a separate lease deed was executed on the same day which is duly registered and stamped. No dispute has been raised

by the Counsel for the respondent in respect of the stamp duty or registration of the lease deed. In terms of Section 4 of the Indian Stamp Act, 1899

and the local amendment in this regard, no deficiency in the stamp duty on the master agreement is found. Counsel for the applicant has rightly placed

reliance upon the judgment of N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited and Others reported in (2021) 4 SCC 379

wherein it is held that arbitration agreement is an independent agreement and is not chargeable to payment of stamp duty and non-payment of stamp

duty on the commercial contract would not invalidate the arbitration clause or render it unenforceable since it has an independent existence of its own.

12. Counsel for the applicant has placed reliance upon the judgment of Mendarian Enerprises Pvt. Ltd. & Ors. Vs. Inspector General of Registration,

Range-I & Ors. reported in 2003 SCC OnLine Cal 524 : (2004) 1 CHN 363 wherein in a case of agreement for sale, it is held that agreement for sale

as well as the conveyance should be deemed to be several instruments employed for completing the sale, therefore, in such cases duty is payable on

the principle instrument only at the applicable rate specified in Schedule 1A of the principal Act, but the factual position in the present case is different.

13. Learned Counsel for the respondent has also placed reliance in the judgment of Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar

Chattram & Other Charities and Others vs. Bhaskar Raju & Brothers and Others reported in 2020 SCC OnLine SC 183 but that was a case where

the instrument containing the arbitration clause was not properly stamped but that is not so in the present case. Counsel for the respondent has also

placed reliance upon the judgment of Prasanta Kumar Pahari vs. Sri Goutam Ghosh reported in (2014) 2 CHN 579 but that was case where

arbitration clause was contained in the agreement of sale which did not survive after the execution of deed of conveyance. Hence, it has no

applicability in the facts of the present case.

14. Having regard to the aforesaid, I am of the opinion that the objections raised by the learned Counsel for the respondent cannot be sustained and are hereby rejected. The arbitration agreement exists between the parties and the dispute has arisen in connection thereto, hence a case is made out for appointment of arbitrator to resolve the dispute between the parties. Accordingly, Retd. Justice Ashoke Kumar Dasadhikari, resident of 29B, Nanda Mullick Lane, (Near Girish Park) Kolkata - 700 006 (Mobile No. 9051024638) is appointed as arbitrator. His appointment is subject to obtaining his consent in terms of Section 12(1) in the form prescribed in Schedule VI of the Act.