

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 12.04.2022

+ **ARB.P. 14/2020**

PARSVNATH DEVELOPERS LTD.

..... Petitioner

versus

FUTURE RETAIL LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Rahul Malhotra and Mr Rishu Kant
Sharma, Advocates.

For the Respondent : Mr Sudhir K. Makkar, Senior Advocate
with Ms Saumya Gupta, Ms Veera Mathai,
Ms Yogita Rathore, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'PDL') has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') praying that an Arbitrator be appointed on behalf of the respondent (hereafter 'FRL'), in accordance with Clause 11.3 of the Sub-License Agreement. PDL had nominated its Arbitrator and further prays that the two Arbitrators (one nominated by PDL and the other as may be appointed by this Court on behalf of FRL), be directed to appoint the Presiding Arbitrator.

Factual Matrix

2. PDL is a public company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of developing land and constructing residential and commercial projects in India.

3. FRL is a company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of running large format stores like 'Big Bazaar', 'Food Bazaar', 'Fashion Bazaar', 'Central' in some of the major cities in India.

4. On 06.09.2004, PDL entered into an agreement with the Delhi Metro Rail Corporation Ltd (DMRC), whereby a specified area on the ground floor and first floor within the Station Box at Inderlok Metro Railway Station was allocated to PDL for constructing a shopping complex under the name and style of 'Parsvnath Mall'. Under the terms of the said agreement, PDL was given the right to sub-license the use of the facility for the period of the agreement and for the uses specified therein.

5. Thereafter, on 29.06.2005, PDL and FRL [formerly known as Pantaloon Retail (India) Limited] entered into a Sub-License Agreement (hereafter '**the Contract**'), wherein Unit no. G-29 and F-28, located at the Ground and First floors, admeasuring approximately 42,500 sq. ft. of super area of Parsvnath Mall, were agreed to be sub-licensed to FRL for running a departmental store under the name of 'Big Bazaar'.

6. During the subsistence of the Contract, in the year 2007, the Government of India enacted the Finance Act, 2007 by virtue of which the service of renting/licensing immovable properties for commercial use was included as a taxable service and brought under the nest of service tax with effect from 01.06.2007. Consequently, the licensing of the premises to FRL under the Contract was a taxable service. PDL claims that FRL was liable to bear the additional burden of service tax; however, FRL had failed to reimburse the service tax paid by PDL.

7. PDL states that from 10.07.2007 onwards, various letters were issued to FRL demanding payment of the service tax amount. However, FRL had failed to make the said payment.

8. By a notice dated 27.06.2018, PDL informed FRL that for the period 01.06.2007 to 31.12.2017, FRL was liable to pay an amount of ₹4,27,93,994/- towards service tax and GST. However, since the concession period of PDL with DMRC expired on 19.06.2017, and after adjusting the IFRSD amount of ₹54,51,184/-, FRL was liable to pay the balance amount of ₹3,73,42,810/-. Accordingly, PDL called upon FRL to pay the same within a period of seven days of the receipt of the notice.

9. FRL responded by a letter dated 27.09.2018, disputing the payment of service tax and stated that no stipulation was contained in the Contract for payment of service tax.

10. In view of the disputes, PDL issued a notice dated 19.06.2019, invoking the Dispute Resolution Clause – Clause 11.1 read with Clause 11.2 of the Contract – and, called upon FRL to mutually resolve the

disputes within a period of forty-five days of the receipt of the notice.

11. FRL did not respond to the aforesaid notice dated 19.06.2019. Subsequently, by a notice dated 03.09.2019, PDL invoked the Arbitration Clause contained in Clause 11.3 of the Contract and nominated Mr. S.C. Jain to act as one of the arbitrators.

12. On 07.09.2019, FRL responded to PDL's notice dated 19.06.2019, denying its liability to pay the service tax. Further, it stated that majority of the claims of PDL were barred by limitation and thus, were unsustainable.

13. Thereafter, on 11.10.2019, PDL sent another notice to FRL, reminding it to nominate its arbitrator within a period of seven days of the notice. However, FRL did not respond to the said notice dated 11.10.2019.

14. PDL has filed the present petition in the aforesaid context.

Submissions

15. FRL has opposed the present petition, essentially, on two grounds. First, it submits that the Contract is insufficiently stamped and therefore, the same cannot be looked at this stage. It is contended that since the Arbitration Clause is incorporated as a part of the Contract, the recourse to courts in respect of the said clause is currently unavailable. According to FRL, the Contract requires to be impounded and sent for adjudication of the stamp duty and the penalty payable thereon. In addition, it is submitted that the Contract also requires to be

compulsorily registered; and, since it is an unregistered document, the same would not affect the rights and obligations of the parties.

16. Mr. Makkar, learned senior counsel appearing for FRL, had referred to the decision of the Supreme Court in *Associated Hotels of India Ltd. v. R.N. Kapoor: AIR 1959 SC 1262; Pradeep Oil Corporation v. Municipal Corporation of Delhi and Anr.: (2011) 5 SCC 270*; and *Vidya Drolia and Ors. v. Durga Trading Corporation: (2021) 2 SCC 1*, in support of his contention.

17. Second, it is contended that the disputes raised by PDL are, *ex facie*, barred by the Limitation Act, 1963.

18. Mr. Makkar submits that renting and licensing of immovable properties for commercial use was included as a taxable service for the purposes of service tax by virtue of the Finance Act, 2007. The service tax in respect of licensing of premises in question became payable with effect from 01.06.2007. He states that during the period of 2007-2012, PDL sent several letters to FRL, calling upon it to make payments towards this tax. However, FRL responded to each of the said communications denying its liability to pay service tax. He stated that by a letter dated 07.01.2012, FRL explicitly denied its liability to pay service tax and therefore, the cause of action, if any, had arisen on 07.01.2012, if not earlier. PDL had taken no steps to refer the disputes to arbitration within the period of three years from the said date and therefore, its claims for reimbursement of service tax are grossly belated and barred by the provisions of the Limitation Act, 1963. He referred

to the decision of the Supreme Court in *Geo Miller & Co. Pvt. Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.:* (2020) 14 SCC 643; *Bharat Sanchar Nigam Ltd. and Anr. v. Nortel Networks India Pvt. Ltd.:* (2021) 5 SCC 738; and *Secunderabad Cantonment Board v. B. Ramachandraiah & Sons:* (2021) 5 SCC 705, in support of his contention. He also referred to the decision of this Court in *Golden Chariot Recreations Pvt. Ltd. v. Mukesh Panika & Anr.:* (2018) SCC OnLine Del 10050.

19. Mr. Malhotra, learned counsel for PDL, countered the aforesaid submissions. He submitted that the Contract was in the nature of a leave and license agreement and was sufficiently stamped. He submitted that PDL had also filed a writ petition (being W.P.(C) 9047/2015), impugning the decision of the Stamping Authority to *suo motu* consider such agreements as leases or as instruments creating any interest in the licensed premises. Next, he submitted that in any event, the question of validity of an agreement falls within the jurisdiction of the Arbitral Tribunal and the scope of examination under Section 11 of the A&C Act is now limited by virtue of Section 11(6A) of the A&C Act. He referred to the decision of the Coordinate Bench of this Court in *Bhupender Singh Bhalla v. Neelu Bhalla & Neelam Singh:* (2013) SCC OnLine Del 4356, whereby this Court had held that the question whether the agreement is liable to be treated as a lease or a license is a triable question.

20. Insofar as the issue of limitation is concerned, he contended that the claims raised by PDL are not barred by limitation. The license in

question had continued till 19.06.2017, and the accounts between the parties were required to be settled thereafter. PDL continued to hold a security deposit, which was liable to be adjusted against the dues owed to PDL. However, it was found that after adjusting the service tax payable by FRL, there were substantial amounts still outstanding. He submitted that in any event, PDL's claim for reimbursement of service tax paid during the last three years, prior to 19.06.2017, were live claims as cause of action demanding reimbursement of such amounts would arise only once PDL had paid the same.

Reasons and Conclusion

21. In the present case, there is no dispute that the parties had entered into the Contract and the same includes an Arbitration Agreement, which reads as under:

“11. Arbitration Clause

11.1 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 Sub-License Agreement or arising out of this Sub-License Agreement, and such consultation shall begin promptly after a Party has delivered to another Party a written request for such consultation.

11.2 In the event that the Parties have been unable to resolve a dispute within a period of forty five [45] days in accordance with the mechanism provided in Section 11.1, such dispute shall be finally settled according to the procedures set forth in Section 11.3.

- 11.3 In the event of any dispute or difference between any of the Parties in respect of or concerning or connected with the interpretation or implementation of this Sub-License Agreement or arising out of this Sub-License Agreement, such dispute or difference shall be referred to arbitration by a panel of 3 number of arbitrators, one arbitrator to be appointed by each of the disputing Parties and the arbitrators so appointed shall mutually appoint a third arbitrator to constitute an arbitral forum. For the avoidance of doubt, it is hereby clarified that each Party shall have the right to appoint only 1 arbitrator.
- 11.4 The arbitration proceedings shall be held in New Delhi.
- 11.5 The decision of such arbitration shall be binding and conclusive upon the Parties and may be enforced in any court of competent jurisdiction.
- 11.6 The Parties to the arbitration shall equally share the costs and expenses of any such arbitration.
- 11.7 The existence of any dispute(s) or difference(s) or initiation or continuance of the arbitration proceedings shall not permit the Parties to postpone or delay the performance by the Parties to the arbitration of their respective obligations pursuant to this Sub-License Agreement. If court proceedings are stayed by litigation or compelled arbitration are necessary, the Party who unsuccessfully opposes such proceedings shall pay all associated costs, expenses and attorney's fees, which are reasonably incurred by the other party to the arbitration.
- 11.8 The provisions contained in this Article 11 shall survive any termination of this Sub-License Agreement.”

22. The question whether the petition for appointment of an arbitrator

is required to be rejected on the ground that the main agreement is insufficiently stamped, is a vexed question.

23. In *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Limited & Ors.*: (2021) 4 SCC 379, the Supreme Court had observed that non-payment or deficiency of stamp duty did not invalidate the main contract. The Court had also referred the decision in the case of *Garware Wall Ropes Limited v. Coastal Marine Constructions & Engineering Limited*: (2019) 9 SCC 209 for reconsideration to a Constitution Bench.

24. An arbitration agreement, even though embodied in a main agreement, is a separate agreement. Invalidation of the main agreement does not necessarily invalidate the arbitration agreement. An arbitration agreement is not required to be compulsorily registered. Thus, following the doctrine of severability, denying the benefit of an arbitration agreement to a party on the ground of any deficiency in the main agreement, may not be apposite.

25. In *Vidya Drolia and Ors. v. Durga Trading Corporation* (*supra*), the Supreme Court had observed that “hands off” approach at the reference stage would be counter-productive. Undeniably, an exercise at a pre-reference stage is not required to be mechanical and if it is found that the disputes *ex facie* are not arbitrable or the principal agreement is plainly invalid and unenforceable, the courts may decline to refer the parties to arbitration. However, it is essential to bear in mind that the bar set for denying reference to arbitration on these grounds is

very high. The Courts would deny referring the parties to arbitration if there is no vestige of doubt that the disputes are not arbitrable, or if the agreements are invalid. The Courts would refrain from carrying out any adjudicatory exercise in respect of any contentious issue at a pre-reference stage as the agreement between the parties that all disputes must be adjudicated by an arbitral tribunal, is required to be implemented.

26. It is now well settled that by virtue of Sub-section (6A) of Section 11 of the A&C Act, the scope of examination under Section 11 of the A&C Act is confined to the existence of an Arbitration Agreement. In ***Duro Felguera, S.A. v. Gangavaram Port Limited: (2017) 9 SCC 729***, the Supreme Court had held as under:

“48. ... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP & Co. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]* and *Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]*. This position continued till the amendment brought about in 2015. After the amendment,

all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

27. In *Mayavati Trading Pvt. Ltd. v. Pradyut Deb Burman: (2019) 8 SCC 714*, the Supreme Court had referred to the aforementioned decision and observed as under:

“10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [*United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785*], as Section 11(6-A) is confined to the examination of the *existence* of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in *Duro Felguera, S.A. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764]*”

28. In *Bharat Sanchar Nigam Limited and Ors. v. Nortel Networks India Pvt. Ltd. (supra)*, the Supreme Court had referred to the earlier decisions and clarified as under:

“37. The upshot of the judgment in *Vidya Drolia* is affirmation of the position of law expounded in *Duro Felguera* and *Mayavati Trading*, which continue to hold the field. It must be understood clearly that *Vidya Drolia*

has not resurrected the pre-amendment position on the scope of power as held in *SBP & Co. v. Patel Engineering (supra)*.

It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.”

29. The standard for rejecting a reference on the ground that the disputes are not arbitrable or the agreement is invalid is that of ‘beyond any doubt’. In cases where there is no vestige of doubt that the claims are not arbitrable or the agreement is invalid, the courts may decline to refer the parties to arbitration but not in any other case.

30. It is also relevant to refer the decisions of the Coordinate Bench of this Court in *NCC Limited v. Indian Oil Corporation Limited: (2019) SCC OnLine Del 6964*. In that case, the Court had observed as under:

“Thus, unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the concerned Court hearing Section 11 petition should follow the more conservative course of allowing parties to have their say before the Arbitral Tribunal”

31. The aforesaid passage was also referred by the Supreme Court with approval in *Vidya Drolia and Ors. v. Durga Trading Corporation and Ors. (supra)*.

32. In the present case, there is a dispute whether the Contract is sufficiently stamped. According to PDL, it is in the nature of leave and license and did not create any interest in respect of the premises in question, in favour of FRL. Clearly, this is a contentious issue and is required to be adjudicated. As stated above, the standards of examination under Section 11 of the A&C Act do not extend to adjudicating any contentious disputes between the parties.

33. The question whether the claims are barred by limitation is also required to be examined by the Arbitral Tribunal. The question whether a claim is barred by limitation is a mixed question of fact and law. PDL claims reimbursement of service tax. According to Mr. Malhotra, the cause of action of such reimbursement could not arise prior to PDL making payment for the same. Thus, according to him, in any view of the matter, PDL's claim for service tax paid during the three years prior to the invocation of the dispute resolution mechanism would not be barred by limitation.

34. It is also relevant to refer to the recent decision of the Supreme Court in *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.: (2020) 2 SCC 455*. In that case, the Supreme Court had allowed an appeal against the High Court's decision to reject the petition under Section 11 of the A&C Act on the ground that the claims raised by the petitioner were barred by limitation. The relevant extract of the said decision is set out below:

“7.10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine

the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.

7.11. The doctrine of “kompetenz-kompetenz”, also referred to as “compétence-compétence”, or “compétence de la recognized”, implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [*Dresser Rand S.A. v. Bindal Agro Chem Ltd.*, (2006) 1 SCC 751. See also *BSNL v. Telephone Cables Ltd.*, (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to *PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust*, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1]. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication

thereon, under the law of the country where the award was made.

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, “including any objections” with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

7.14. In the present case, the issue of limitation was raised by the respondent Company to oppose the appointment of the arbitrator under Section 11 before the High Court. Limitation is a mixed question of fact and law. In *ITW Signode (India) Ltd. v. CCE* [*ITW Signode (India) Ltd. v. CCE*, (2004) 3 SCC 48] a three-Judge Bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law. Reliance is also placed on the judgment of this Court in *NTPC Ltd. v. Siemens Atkeingesellschaft* [*NTPC Ltd. v. Siemens*

Atkeingesellschaft, (2007) 4 SCC 451], wherein it was held that the Arbitral Tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34. In *Iffco Ltd. v. Bhadra Products* [*Iffco Ltd. v. Bhadra Products*, (2018) 2 SCC 534 : (2018) 2 SCC (Civ) 208] this Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the Uncitral Model Law which enshrines the kompetenz principle.”

35. This Court is of the view that it would not be apposite for this Court to adjudicate the issue whether PDL’s claims are barred by limitation, in these proceedings. The same is also required to be decided by an Arbitral Tribunal.

36. In view of the above, this Court considers it apposite to allow the present petition.

37. PDL had nominated Mr. S.C. Jain, Additional District Judge (Retired) as its nominated Arbitrator. Accordingly, Mr. Laxmi Kant Gaur, District Judge (Retired) (Mobile no.: 8800881765), is appointed as FRL’s nominated Arbitrator. Both the Arbitrators shall appoint the third Arbitrator for constitution of the Arbitral Tribunal. It is clarified that this is subject to the learned Arbitrators making the necessary

disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

38. The petition is allowed in the aforesaid terms.

APRIL 12, 2022
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VIBHU BAKHRU, J

