

(2007) 08 AHC CK 0186

Allahabad High Court

Case No: None

A.R.C. Overseas Private Limited

APPELLANT

Vs

Bougainvillea Multiplex and
Entertainment Centre Pvt. Ltd.
and Another

RESPONDENT

Date of Decision: Aug. 2, 2007

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 8
- Registration Act, 1908 - Section 49

Citation: (2008) 2 AWC 1212

Hon'ble Judges: Pankaj Mithal, J; Amitava Lala, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Amitava Lala, J.

By consent of the parties the appeal is heard on the informal papers being the complete set of the context as per the requirement.

2. This appeal has been preferred by the plaintiff-appellant against the judgment and decree dated 18.8.2006, passed by the court below dismissing the suit as well as rejecting the interim injunction application on the ground that the suit is not maintainable in view of the arbitration clause arising in the purported lease agreement executed by or between the parties on 27.12.2005.

3. The specific grievance of the plaintiff/appellant in the suit is that they were threatened by the representative/s of the respondents to remove from the occupation and in the appeal the specific grievance is that boards of the shop were removed in the night of 4/5.8.2006, a notice of termination of occupancy right was issued to them on 5.8.2006 and they have threatened from entering into the shop from such date.

4. Mr. B.D. Mandhyan, learned senior counsel appearing in support of the appeal, contended that the action on the part of the respondents is as good as "house grabbing". He relied upon few judgments to substantiate that for the purpose of recovery of possession no second suit is required to be filed but necessarily can be considered in the existing suit itself. In [Samir Sobhan Sanyal Vs. Tracks Trade Pvt. Ltd. and others](#), it was held that the Court cannot blink at the unlawful conduct to dispossess the person from the demised premises and would say that the status quo be maintained. If the Court gives acceptance to such high-handed action, there will be no respect for rule of law and unlawful elements would take hold of the due process of law for ransom and it would be a field day for anarchy. Due process of law would be put to ridicule in the estimate of the law-abiding citizens and rule of law would remain a mortuary. Factually, no step had been taken either to have the person in possession impleaded as a party defendant to the suit for specific performance nor a decree was obtained personally against him in any other independent proceedings. [Konda Lakshmana Babuji Vs. Government of Andhra Pradesh and Others](#), has been referred to establish what are the ingredients to construe "land grabbing" being similar to "house grabbing". He also cited a judgment in Lallu Yeshwant Singh (dead) by his Legal Representative v. Rao Jagdish Singh and Ors. AIR 1968 SC 620 to establish the word "trespass" to include forcible entry and dispossession by the landlord. The landlord does commit trespass when he forcibly enters on land in the possession of a tenant whose tenancy has expired.

5. Mr. Shashi Nandan, learned senior counsel appearing for the defendants-respondents, contended that right to occupy the premises as per the agreement is conditional for specific commercial purpose to operate a Chinese Cuisine Restaurant under the name and style of "Yo China". Since the right of such franchise had been withdrawn, termination of occupancy right is automatic. This type of occupancy right in a multiplex/mall etc. is a modern concept which only exists till the existence of franchise. All the occupiers have similar right. This occupier cannot have better right to carry out its business irrespective of termination of agreement for any other purpose and against the goodwill of multiplex/mall consisting of various reputed business houses and/or their franchise. Moreover, the lease agreement contains an arbitration clause under Clause 4.8, which is as follows:

4.8. Arbitration.-In the event of any dispute/difference(s) between the lessor and/or the lessee in respect of any of the terms and/or interpretation thereof or otherwise, the same shall be referred to for adjudication to the sole arbitrator to be appointed by the lessor. The said arbitrator shall decide the issue(s) as per the Arbitration and Conciliation Act, 1996, amended up to date. The venue of the arbitration for the convenience shall be N.O.I.D.A. The decision of the arbitrator shall be final and binding on the parties. The parties to the arbitration shall bear the respective cost of arbitration.

6. For the sake of convenience, the jurisdiction clause under the lease agreement, is also set out herunder:

4.9 Jurisdiction.-This transaction has taken place at N.O.I.D.A. and as such Courts at Uttar Pradesh shall have exclusive jurisdiction to entertain any dispute arising out or in any way touching or concerning this agreement.

7. According to us, Mr. Mandhyan wanted to put the cart before the horse. Unless a forum is selected in accordance with law for the purpose of invocation of the same, subject-matter in merit cannot be heard by such Court. Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter called as the "Arbitration Act") speaks as follows:

8. Power to refer parties to arbitration where there is an arbitration agreement.-(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under Sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

8. In a recent unreported judgment dated 23.1.2007 of the Supreme Court delivered in Civil Appeal No. 326 of 2007, M/s. Agri Gold Exims Ltd. v. M/s. Sri Lakshmi Knits and Wovens and Ors. 2007 (2) AWC 1961 it was held that Section 8 of the Act, 1996 is peremptory in nature. In a case where there exists an arbitration agreement, the Court is under obligation to refer the parties to arbitration in terms of the arbitration agreement. No issue, therefore, would remain to be decided in a suit. In deciding the issue the Supreme Court has relied upon Petition allowed judgment in [Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums](#), where it has been similarly held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator.

9. The suit is Instituted for mandatory injunction in respect of the right of occupancy of the appellant in an immovable property as per the agreement, which owns arbitration clause. As per the Arbitration and Conciliation Act, 1996 even before proceeding with the arbitration, one can get similar relief from the appropriate court of law. Section 9 of the Arbitration Act has given an exhaustive power to the Court under such section to protect the interest of an aggrieved even before or

during arbitration proceedings or at any time after making of the arbitral award but before its enforcement u/s 36 therein. Section 9(ii)(d) is specific on the question of injunction. But what brought them to a civil court to institute a regular suit for mandatory injunction only on the alleged threat of dispossession, is unknown to this Court. The appellant only insisted the Court to believe that the Court is not powerless to pass such order even in the existing suit without understanding the position that the civil court is Coram non-judice.

10. Mr. Mandhyan further contended that the arbitration clause being part and parcel of an unregistered lease deed cannot be used for any collateral purpose. Before going into such controversy, we have to say that one cannot be allowed to approbate and reprobate at the same time. Under the lease deed plaintiff/appellant being lessee is under obligation to get the document registered. If it is not registered then the same is non-fulfillment of the condition of the contract by the lessee itself. Without doing so when the possession has been enjoyed, they cannot be allowed to turn around challenging the enforceability of such document. Such condition, being Clause 2.4 of the lease deed, is as follows:

2.4 Stamp duty and lease registration charges.-The lessee shall bear the cost of the stamp duties/rates for executing this lease and the renewed leases, if any, and, registration charges etc. as may be payable. However, if the lease is not got registered under the relevant statutes, the consequences thereof, if any shall be exclusively to the account of the lessee.

11. Even without prejudice to such observation if we verify the requirement of law, the same will also speak against the appellant. Two sections, one being Section 107 of the Transfer of Property Act, 1882 (hereinafter called as the "Transfer of Property Act") and another being Section 49 of the Registration Act, 1908 (hereinafter called as the "Registration Act"), are relevant for the purpose of due consideration as such quoted hereunder:

107. Leases how made.-A lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the State Government may from time to time, by notification in the official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement

without delivery of possession.

49. Effect of non-registration of documents required to be registered. - No document required by Section 17 or by any other provision of the Transfer of Property Act, 1882, to be registered shall

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument.

12. If we go through the later part of second paragraph of Section 107 of the Transfer of Property Act, as above, we shall be able to find that lease by oral agreement accompanied by delivery of possession need not be registered. Therefore, if the registration of the document is not available to the appellant but it was in the possession, the same is good enough for the purpose of creation of jural relationship between the parties. It is significant to note that the appellant has relied upon his initial possession. In paragraph 14 of the Judgment in [Anthony Vs. K.C. Ittoop and Sons and Others](#), it was held that when it is admitted by both sides that the appellant was inducted into the possession of the building by the owner thereof and that the appellant was paying monthly rent or had agreed to pay rent in respect of the building, the legal character of the appellant's possession has to be attributed to a jural relationship between the parties. Such a jural relationship, on the fact-situation of the case, cannot be placed anything different from that of lessor and lessee falling within the purview of second paragraph of Section 107 of the Transfer of Property Act.

13. Secondly, last part of Section 49 of the Registration Act, as above, specifically speaks that "as evidence of any collateral transaction not required to be effected by registered instrument". Therefore, law is crystal clear to that extent. In [Mattapalli Chelamayya and Another Vs. Mattapalli Venkataratnam and Another](#), the Supreme Court held that it should be noted that Section 49 does not say that the document cannot be received in evidence at all. All that it says the document cannot be received as evidence of any transaction affecting such property. If under the Evidence Act the document is receivable in evidence for a collateral purpose, Section 49 is no bar. This construction of the provision, which was accepted for a long time by the High Courts, has been duly recognized by the amending Act 21 of 1929,

which added a proviso to the section. The proviso clearly empowers the Courts to admit any unregistered document as evidence of a collateral transaction not required to be registered. In [Satish Chand Makhan and Others Vs. Govardhan Das Byas and Others](#), it was held that unregistered lease deed can be admitted in evidence for collateral purpose, invoking proviso to Section 49 of the Registration Act, as terms of lease are not a collateral purpose within its meaning. In [Rai Chand Jain Vs. Miss Chandra Kanta Khosla](#), speaks that it is well settled that unregistered lease executed by both the parties can be looked into for collateral purposes. In [Bondar Singh and Others Vs. Nihal Singh and Others](#), it was held that legal position is clear that Petition allowed document like the sale deed, even though not admissible in evidence, can be looked into for collateral purposes. The Court held that the collateral purpose is to be seen on the nature of the possession of the plaintiffs over the suit land. The sale deed in question at least shows that initial possession of the plaintiffs over the suit land was not illegal or unauthorized. Therefore, the undisputed initial possession herein is the guiding factor about validity of the document.

14. Last but not the least, the argument that the arbitration agreement is non est in the eye of law based on unregistered lease deed, is totally misconceived in nature. In [Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc.](#), it has been categorically held that in the scheme of Arbitration and Conciliation Act, 1996, the arbitration clause is separable from other clauses of a deed (there it was partnership). It has further categorically held that the arbitration clause constitutes an agreement by itself. Therefore, such reference, as above, is a complete answer to the argument. Moreover, Section 7 of the Arbitration Act clearly speaks what is the requirement for holding an agreement as an arbitration agreement, as follows:

7. Arbitration agreement.-(1) In this part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in

(a) a document signed by the parties ;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement ; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

15. Suit is totally misconceived in nature. The appellant has made hara-kiri.

16. Therefore, in totality the appeal stands dismissed. No order is passed as to costs. In any event, passing of this order of dismissal will no way affect the right of the appellant, if any, to initiate proceedings in accordance with law, if so advised.

Pankaj Mithal, J.

17. I agree.