
Rohit Bhasin and Another Vs Nandini Hotels

Arbitration Petition No. 70 of 2012

Court: Delhi High Court

Date of Decision: July 1, 2013

Acts Referred:

Arbitration and Conciliation Act, 1996 " Section 11(6), 17, 2(1)(e), 20, 37#Civil Procedure Code, 1908 (CPC) " Section 20

Citation: (2013) 5 AD 710

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: P.M. Saigal, for the Appellant; Noopur Singhal, for the Respondent

Final Decision: Disposed Off

Judgement

Manmohan Singh, J.

The petitioner has filed the present petition u/s 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of

a sole independent arbitrator. As per petition, the facts are that the International Recreation Parks Pvt. Ltd. (IRPPL) entered into a Memorandum

of Understanding dated 20th June, 2006 with the petitioners for transfer of the leasehold rights of the premises bearing No. 309A on the Third

Floor of Tower ""A admeasuring approx. 90.11 sq. mts. (940 sq. ft.) situated at Plot No. A2, Sector 38A, Noida, District Gautam Budh Nagar,

Uttar Pradesh (hereinafter referred to as the ""said premises"" to the petitioners. Agreement for sub-lease dated 19th July, 2006 executed between

IRPPL and the petitioners whereby the petitioners became the owners of the said premises. Clause 5 of the said agreement to sub-lease authorized

IRPPL to induct a licensee in the said premises and execute all or any document required for the purpose on behalf of the petitioners.

2. IRPPL inducted the respondents as the licensee in the said premises vide an agreement to license dated 23rd June, 2007. Article 3.1 of the

license agreement provided a license fee of Rs. 110 per sq. ft. of the total super area (970 sq. ft.) amounting to a license fee obligation of Rs.

1,06,700/- to be paid by the respondents per month for the initial period of three years. It was further agreed that the initial license would be for a

period (term) of three years only and if the license was to be renewed for a second term as per the license agreement, the license fee would be

increased by 15% and therefore, the license fee for the second term would be Rs. 126.50 per sq. ft. or Rs. 1,22,705/- per month for the said

second term. Article 15.2 of the said license agreement provided for disputes, differences and disagreement arising out of, in connection with or in

relation to this agreement, which cannot be amicably settled shall be finally decided by arbitration to be held in accordance with the Arbitration and

Conciliation Act, 1996. Clause 15.4 provided for a sole arbitrator to be appointed by the Licensor (petitioners herein). Further, vide Article 10.2,

IRPPL was vested with the right to sell, transfer or create third party rights with respect to the said premises during the period of license to any

third party. Further upon the petitioners purchasing the said premises from IRPPL, the said petitioners have now become the owners of the

premises and have stepped into the shoes of IRPPL.

3. Tripartite agreement dated 8th April, 2008 executed among IRPPL, petitioners and the respondents whereby the petitioners stepped into the

shoes of IRPPL and all the rights, claims, liabilities, obligations etc. of IRPPL under the agreement to license dated 23rd June, 2007 stood

transferred to the petitioners. The said tripartite agreement also obligated the respondents to pay license fee to the petitioners w.e.f. 1st June,

2008. IRPPL wrote a letter dated 23rd May, 2008 to the respondents directing the respondents to pay rent directly to the petitioners w.e.f. 1st

June, 2008. The respondents made the payments as per the license agreement till the month of January, 2009. On 6th January, 2009 the

petitioners received a letter from respondents informing that the respondents had unilaterally decided to reduce the license fee from Rs. 106,700/-

to Rs. 74,690/-.

4. The petitioners vide letter dated 3rd February, 2009 protested against the unilateral reduction of the license fee by the respondents. However,

the respondent continued to pay the reduced license fee despite protest by the petitioners which was clearly in breach of their obligations stipulated

under the License Agreement read alongwith the Tripartite Agreement. As per the license agreement, with effect from July, 2010, the second term

of the license in respect of the said premises had commenced. The respondents were liable to pay enhanced license fee at Rs. 126.50 per sq. ft. or

Rs. 1,22,705/- per month for the second term but they continued to pay the reduced license fee.

5. Petitioners wrote a letter dated 30th November, 2010 to the respondents accepting the reduced licensee fee under protest and without

prejudice. The respondents have also failed to get the license agreement stamped and registered as per law despite repeated requests by the

petitioners and hence the petitioners are seeking relief in respect thereof. Since all the efforts to amicably resolve the disputes had failed, the

petitioners issued a notice invoking Arbitration Agreement and appointed Sh. Vibhu Bakhru, Senior Advocate as the Arbitrator and sought

consent of the respondents. But no reply or consent given by the respondent.

6. It is further stated by the petitioners that with effect from July, 2010 as per the terms of the licence agreement, the petitioners were entitled to a

revision in the rate of licence fee for second term after three years. However, the respondents failed and neglected to make the payment of the

reduced license charges. The petitioners also sent a protest letter dated 30th November, 2010 to the respondents. The respondents also refused to

get the License Agreement stamped and registered as per law despite repeated requests.

As the disputes arose which could not be resolved amicably, the petitioners issued a notice dated 3rd October, 2011 invoking arbitration

agreement and appointed Sh. Vibhu Bakhru, Sr. Advocate as the Arbitrator and sought consent of the respondents. However, no response was

received from the respondents. The total claim of the petitioners as on 1st November, 2011 is Rs. 17,44,380/-. The respondents are still in

continued use and occupation of the said premises and are not even getting the agreement stamped and registered. Hence, the present petition.

7. Notice of the petition was served upon the respondents. Reply has been filed wherein various objections have been raised to the maintainability

of the petition on the ground of territorial jurisdiction.

8. Learned counsel appearing on behalf of the respondent argued that the petitioners stepped into the shoes of developer and therefore, the

petitioner is bound by the terms and conditions of agreement to licence dated 23rd June, 2007. It is also argued that the tripartite agreement dated

8th April, 2008 was entered into at Noida. In the earlier agreement clause 14.2 provides that Civil Court at Noida and High Court of Allahabad

shall have jurisdiction in all matters originally out of and/or concerning this transaction. Therefore, this Court has no jurisdiction to entertain the

territorial jurisdiction.

9. It is contended by the learned counsel for the petitioners that the Agreement to Licence, which forms the basis of the present proceedings, was

signed, sealed and delivered at New Delhi. It is further contended that the Tripartite Agreement between the parties does not have any overriding

effect over the Agreement to Licence. Therefore since the agreement was executed in Delhi, this Court has the territorial jurisdiction. It is further

contended by the counsel that subject matter of the dispute involved in the present proceedings is in the nature of recovery of money from the

respondents which rent is payable at New Delhi and was being paid at New Delhi.

The respondent is also carrying on its business from New Delhi i.e. S-196 Panchsheel Park, New Delhi therefore, in terms of clause 15.1 of the

Agreement to licence dated 23rd June, 2007 between IRPPL, petitioners and respondent, this Court has jurisdiction to entertain this petition.

10. Clause 15 of the agreement referred by both side are reproduced below :

Article 15

Arbitration

15.1 All disputes, differences or disagreement arising out of, in connection with or in relation to this Agreement shall be mutually discussed and

settled between the parties.

15.2 All disputes, differences or disagreement arising out of, in connection with or in relation to this Agreement, which cannot be amicably settled,

shall be finally decided by arbitration to be held in accordance with the provisions of the Arbitration and Conciliation Act, 1996. Any arbitration as

aforesaid shall be a domestic arbitration under the Applicable Law.

15.3 The venue of arbitration shall be New Delhi or such other place as may be mutually agreed between the parties and the language of

arbitration shall be English.

15.4 The arbitration shall take place before the sole arbitration, appointed by the Licensor. The award shall be rendered in English Language.

11. No doubt as far as civil disputes between the parties are concerned as per clause 14, the jurisdiction for civil court at Noida and High Court of

Uttar Pradesh at Allahabad alone would have jurisdiction concerning this transaction but from Clause 15 (2) and 15(3) is clear that all disputes and

differences arising out of this agreement shall be mutually discussed and settled between the parties as far as arbitration is concerned. The venue of

arbitration shall be New Delhi or other place as may be mutually agreed between the parties.

12. The Supreme Court in Civil Appeal No. 7019 of 2005 titled as Bharat Aluminum Company vs. Kaiser Aluminum Technical Service, Inc. has

explained the meaning of the term ""court"" as has been provided for in Section 2(1)(e) of the Act and as has follows:-

95. ...

Section 2(1) (e) of the Arbitration Act, 1996 reads as under:

2. Definitions

(1) In this Part, unless the context otherwise requires -...

(e) ""Court"" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil

jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit,

but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

96. We are of the opinion, the term ""subject matter of the arbitration"" cannot be confused with ""subject matter of the suit"". The term ""subject

matter"" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify

the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of

the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give

recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render

Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where

the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may

provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would

be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are

from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in

Delhi passes an interim order u/s 17 of the Arbitration Act, 1996, the appeal against such an interim order u/s 37 must lie to the Courts of Delhi

being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the

obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi.

In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and

the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located.

97. The definition of Section 2(1)(e) includes ""subject matter of the arbitration"" to give jurisdiction to the courts where the arbitration takes place,

which otherwise would not exist....

13. From the above, it is clear that the Supreme Court while explaining the meaning of the term ""court"" as defined in Section 2(1)(e) has held that

the subject matter on the basis of which the jurisdiction of a court can be decided is not confined within the barriers of Section 20 CPC but has a

wider meaning thereby also concurring jurisdiction upon the Court where the seat of arbitration will be located. It is pertinent to mention here that

the meaning of Section 2(1)(e) of the Act was not in dispute before the Supreme Court in the above said judgment and the Supreme Court has not

overruled any previous law in relation to the same but has clarified the intent of the legislature in ascribing such broad meaning to the term ""court"" in

Section 2(1)(e).

14. In the present case, undisputedly the venue under Clause 15(3) is agreed to be in New Delhi by mutual consent even the matter also covered

within the meaning of Section 2(1)(e) of the Act as part of cause of action has arisen in Delhi.

15. Thus, this court has got the territorial jurisdiction to entertain the present petition.

16. Admittedly, the petitioners have issued legal notice dated 3rd October, 2011 to the respondent by referring the earlier legal notice dated 23rd

October, 2010 and informed the respondents that since the respondent have failed to amicably settle the dispute and neglected to pay rent,

therefore, by invoking clause 15.2 the petitioner asked the respondent to agree for appointment of sole Arbitrator.

The relevant extract of legal notice dated 3rd October, 2011 are reproduced below :

1. Further to our Clients Legal Notice dated 23rd November, 2010, as you have failed and neglected to pay the rent as per contract, our Clients

hereby invoke clause 15.2 of the Agreement to License dated 23.06.2007 (read along with the Tripartite Agreement dated 08.04.2008), whereby

the parties had agreed that if, any dispute, differences or disagreement arises in relation to the agreement dated 23.6.2007 (read with Tripartite

Agreement dated 8.4.2008) arise which cannot be amicably settled, the same shall be finally decided by arbitration. Pursuant thereto, it was

agreed, as per Clause 15.4, that the arbitration shall take place before the sole arbitrator appointed by our clients.

2. We hereby give you notice that as per the rights stipulated and agreed under provisions of the License Agreement (read with Tripartite

Agreement), our clients have appointed Sh. Vibhu Bakhru, Senior Advocate as the sole arbitrator for the adjudication of the dispute that has arisen

on account of your deliberate and willful failure to adhere to the contracted obligations as per the Agreement to License dated 23.06.2007 (read

along with the Tripartite Agreement dated 08.04.2008).

3. That, you are hereby called upon to give consent or file any objections to the abovementioned appointment within thirty days of this notice. In

case you fail to give consent or file any objections, as stated hereinbefore, within thirty days from the receipt of this notice, then such failure will be

deemed as your consent to the appointment of the abovementioned arbitrator.

17. Despite of receipt of notice, no reply or consent has given for appointment of Arbitrator by the respondent till date. Thus, the petitioner has

filed the present petition.

18. In view of abovesaid reasons mentioned above, the prayer made in the petition is liable to be allowed. Accordingly, Mr. Karan Bharihoke,

Advocate (Mob. No. 8826122888/23385717) is appointed as sole Arbitrator to adjudicate the disputes between the parties arising out of the

agreement. Total fee of the Arbitrator is fixed at Rs. 70,000/- which shall be paid by both parties in equal proportion.

19. The petition is accordingly disposed of. The learned Arbitrator shall commence the proceedings after the service of notice to both parties.

Copies of the order be given dasti to the parties. A communication be also issued to the learned Arbitrator in this regard along with copy of this

order.