

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

Arbitration Case No. 161 of 2016 (O&M)
Date of Decision: 29.01.2018

M/s Shalimar Estates Pvt. Ltd.

.....Petitioner

versus

Inox Leisure Ltd.

.....Respondent

CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE

Present : Mr. Prateek Gupta, Advocate, for the petitioner.
Mr. Rohit Khanna, Advocate, for the respondent.

S.J.VAZIFDAR, CHIEF JUSTICE

This is an application under section 11(6) of the Arbitration and Conciliation Act, 1996 for the appointment of sole arbitrators in respect of two contracts each of which contains an arbitration clause.

2. The parties entered into a lease deed dated 12.02.2009 under which the petitioner leased the premises in favour of the respondent on the terms and conditions contained therein. Clause 14 thereof reads as under:-

“14. GOVERNING LAW & ARBITRATION

14.1. This Deed shall be governed by and construed in accordance with the laws of India.

14.2.1 Any claim, controversy or dispute arising out of or in connection with this Deed, not settled by mutual agreement of the Parties involved within 30 days after a Party is provided written notice for settlement thereof, shall be referred to arbitration to a sole arbitrator jointly appointed by the Parties under the Indian Arbitration and Conciliation Act of 1996. In

the event the Parties are unable to agree upon a sole arbitrator, the claim, controversy or dispute shall be referred to a panel of three arbitrators, one of whom shall be appointed by the Lessee and the other by the Lessor and a third by the aforesaid two arbitrators. Pending the arbitration proceedings, all disputed amount/payments shall be deposited in the custody of the arbitrator(s), appointed under this clause until the completion of the arbitration proceedings. These disputed amounts/payments held by the arbitrator(s) shall be paid to the Parties as per the provisions of the arbitration award after successful completion of the proceedings.

The arbitration proceedings shall be conducted in **Chandigarh**, India and shall be governed by and construed in accordance with the laws of India. The language of the arbitration shall be English. The costs and expenses of the arbitrator(s) and holding the arbitration shall initially be borne in equal shares by Lessee and Lessor. Initially, each Party will bear its own legal, traveling and other similar costs. However, the arbitrator(s) may in his/their award, require any Party to pay such costs as the arbitrator(s) think fit, including the costs and expenses of the arbitration, travel, costs and advocates fees.

14.3. During the pendency of the arbitration, the Parties shall continue to discharge their respective obligations under this Deed.”

3. The parties entered into an EME Usage agreement also dated 12.02.2009 under which the petitioner granted the respondent various electro mechanical and other equipment facilities which it intended installing and operating for the benefit of the respondent. Clause 12 thereof reads as under:-

“ARTICLE 12-ARBITRATION

12.1. The parties hereto have agreed to amicably settle and/or resolve all disputes and differences arising out of these presents amongst themselves but in the event any dispute of whatsoever nature is incapable of being resolved amongst the parties hereto amicably within 30 days after receipt of notice in such regard from either of the Parties, then in that event the parties have agreed to refer all disputes and differences including effect of any of the terms and conditions herein contained and/or the determination of any right and/or liability and/or in any way touching or concerning these presents to the sole arbitration of an arbitrator to be nominated by the parties hereto and the same would be deemed to be a reference within the meaning of the Arbitration and Conciliation Act 1996 or any statutory modification or enactment thereto for the time being in force. The arbitration proceeding shall be conducted at **Chandigarh** and the language shall be English only. This Agreement is subject to the jurisdiction at **Panchkula.**”

4. Disputes and differences having arisen between the parties, the petitioner by a letter dated 14.06.2016 invoked the arbitration agreements in respect of both the contracts.

5. The respondents firstly submit that the petitioner invoked the arbitration clause only in respect of the lease agreement and not in respect of the EME agreement. This would be a rather technical and narrow reading of the letter of invocation. It is true that the letter of invocation specifically refers to clause 14.2.1 of the lease deed and does not specifically refer to arbitration clause No.12 under the EME agreement. The letter, however, refers to the amounts due towards rent as

well as EME charges. The subject of letter itself states that it is a notice for appointment of a sole arbitrator to invoke the arbitration proceedings regarding settlement of claims “towards rent, EME charges, CAM charges, electricity charges and other claims”. Thus the claim is in respect of both the agreements. Merely because only clause 14.2.1 of the lease deed is referred to and clause 12 of the EME agreement is not referred to, it would make no difference. Similarly, the body of the letter also refers to the petitioner’s claim for rent, EME charges, CAM charges, electricity charges and interest on delayed payments in more than just one place. Again the reference to clause 14.2.1 and not to clause 12 does not make a difference. In fact even if the number of arbitration clause is not stipulated in a notice invoking arbitration, it would make no difference. It would still be a valid invocation of the arbitration agreement.

6. It was then submitted that as far as the lease deed is concerned, the arbitration clause cannot be relied upon as it is not registered.

7. Whether the deed is required to be registered or not and if required to be registered the effect of non-registration are issues to be decided by the arbitrator. The arbitration clause is distinct from the underlying contract between the parties. This issue is decided in favour of the petitioner by a judgment of the Supreme Court in *SMS Tea Estates Private Ltd. V. Chandmari Tea Company Private Ltd. 2011(14) Supreme Court Cases 66*. It is important to note that in that case two objections were raised, namely, that the document though compulsory registerable was not registered and that the document had not been duly stamped. The

two defects were dealt with separately. I am concerned with the judgment in so far as it relates to the effect of non-registration of a document that is compulsorily registerable. The Supreme Court held:-

“13. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the *transfer* or transaction affecting the immovable property. It is as if two documents—one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registerable—are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer.

16. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to Section 49 of the Registration Act read with Section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

19. Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.

22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

22.5. If the document is not registered, but is compulsorily registerable, having regard to Section 16(1)(a) of the Act, the court can delink the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the

property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 15 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

22.6. Where the document is compulsorily registerable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance, and (b) as evidence of any collateral transaction which does not require registration.

29. An arbitrator can no doubt be appointed in regard to any disputes relating to the lease deed. But as noticed above, as the lease deed was not registered, the arbitrator cannot rely upon the lease deed or any term thereof and the lease deed cannot affect the immovable property which is the subject-matter of the lease nor be received as evidence of any transaction affecting such property. Therefore, the arbitrator will not be able to entertain any claim for enforcement of the lease.

32. In view of the above this appeal is allowed, the order of the High Court is set aside and the matter is remitted to the learned Chief Justice of the Gauhati High Court to first decide the issue of stamp duty, and if the document is duly stamped, then appoint an arbitrator in accordance with law.

(emphasis supplied).”

8. It is important to note that despite all the observations, in conclusion the Supreme Court remitted the matter to the learned Chief Justice of the Gauhati High Court to decide the issue of stamp duty but not the issue of registration. It follows, therefore, that the issue of registration must be left to the arbitrator. It is clear, therefore, that non-registration of a document is not fatal to an application under section 11 of the Act for the appointment of an arbitrator. Whether the petitioner would be entitled to substantiate its claim, even without a reference to the

document, is for the arbitrator to decide. This is not as open and shut a case as the respondent contends. I do not wish to express any view or even suggest the submissions that may fall for the consideration of the arbitrator. It is for the petitioner to raise and for the arbitrators to decide the same.

9. The respondents reliance upon a judgment of a learned Single Judge of this Court in *Curo India Pvt. Ltd. V. PVR Ltd. 2013 SCC OnLine P&H 4361* is not well founded. It is true that the learned Judge in a similar matter observed that no doubt an arbitrator can be appointed but that would be an exercise of futility. However, it was not suggested in that case that the claim could nevertheless be established and that whether or not it is so established it is for the arbitral tribunal to decide.

10. The petition is, therefore, disposed of by appointing Mr. Justice S.S.Saron, a former Judge of this Court, as the sole arbitrator to adjudicate upon the disputes and differences between the parties. The fees shall be as per the Chandigarh Arbitration Centre (CAC) (Administrative Cost and Arbitrator's Fees) Rules, 2014. The venue of the arbitration shall be the Chandigarh Arbitration Centre.

(S.J. VAZIFDAR)
CHIEF JUSTICE

29.01.2018
ravinder

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No