

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Arbitration Case No. 136 of 2015 (O&M)
Date of Decision: 09.10.2015

Jitender Lalwani and others

..Applicants

Versus

M/s Dhir International Pvt. Ltd.

..Respondent

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

Present : Mr. Anil K.Kher, Sr. Advocate with
Mr. P.K.Khindria, Advocate, for the petitioners.

Mr. V.K.Jain, Senior Advocate with
Mr. J.L.Malhotra, Advocate, for the respondent.

S.J.VAZIFDAR A.C.J. (Oral)

CM No. 21630-CII of 2015

Short reply filed on behalf of the respondent is taken on record. Application stands disposed of.

Arbitration Case No. 136 of 2015 (O&M)

This is an application under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of a sole arbitrator to adjudicate upon the disputes between the parties.

2. The parties had entered into a lease agreement dated 12.09.2002, clause 16 whereof contains an arbitration agreement. Disputes and differences arose between the parties. The applicants filed an application for ejectment of the respondent on account of non-payment of the lease amount. The respondent opposed the application by filing an application under Section 8 of the Act which was allowed by the Rent Controller vide order dated 01.12.2011. The Rent Controller referred the matter to arbitration. The arbitrator, however, was not named. The

applicants, therefore, filed Arbitration Case No. 75 of 2012 also under Section 11 of the Act for appointment of an arbitrator.

3. By an order and judgment dated 08.02.2013 the learned Single Judge of this Court appointed a former Judge of this Court as an arbitrator. It is important to note the objections that were raised by the respondent even in that petition. Firstly, it was contended that only the Courts at Delhi have jurisdiction to appoint an arbitrator. Secondly, it was contended that the dispute was not arbitrable in view of the provisions of the Haryana Urban (Control of Rent and Eviction) Act, 1973. The learned Judge rejected both the contentions and appointed an arbitrator.

The respondent filed a petition for Special Leave to Appeal before the Supreme Court which was dismissed by an order dated 06.05.2013. The matter, therefore, attained finality as far as that application under Section 11 of the Act was concerned.

4. The learned arbitrator entered upon reference and the matter proceeded before him. Allegations were made by the respondent against the learned arbitrator. The learned arbitrator in view thereof declined to act as an arbitrator. It is in these circumstances that the present petition has been filed for appointment of an arbitrator in place of the earlier arbitrator.

5. The contentions that were raised in the earlier petition under Section 11 of the Act were also sought to be raised in this petition. That matter had attained finality by virtue of the Supreme Court having dismissed the appeal against the order appointing an arbitrator. It is not open to the respondent to raise those contentions in this application.

6. It was further contended that the lease deed has neither been duly stamped nor registered and that the arbitration agreement contained therein cannot, therefore, be enforced.

7. A document not being duly stamped or not being registered would not affect the arbitration clause. The issue as to whether the

document is duly stamped or not and as to whether the document is registered or not and the effect of the document not being duly stamped and/or registered can be decided by an Arbitral Tribunal. It is open to the respondent to take these contentions before the Arbitral Tribunal.

8. Section 16(1) of the Arbitration and Conciliation Act, 1996

reads as under:-

16. Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

9. The arbitration agreement even if incorporated in the document containing the underlying contract is distinct from and independent of the underlying contract. It is not necessary for an arbitration agreement to be registered or stamped. An arbitration agreement by virtue of its own force entitles an arbitral tribunal to decide all the issues relating to the underlying contract. Issues of registration and stamping arise under the underlying contract. It follows, therefore, that an arbitral tribunal has the jurisdiction and is competent to decide whether a document is registered or not or duly stamped or not as well as the effect of the document not being registered or not being duly stamped.

10. The arbitration agreement could have been incorporated in a separate document. In that event the underlying contract being not registered or not duly stamped would not have affected the arbitration agreement. An arbitration agreement being separate from the main/underlying agreement, there is no reason why it should make any

difference if it is contained in the document containing the underlying contract.

11. In *Today Homes and Infrastructure Private Limited v. Ludhiana Improvement Trust and another* 2014(5) Supreme Court Cases 68, it was contended that once the main agreement had been found to be void, the contents thereof, including any arbitration agreement, would also be rendered void and would stand automatically dissolved. Referring to an earlier judgment of the Supreme Court in *SBP & Co. v. Patel Engineering Ltd.* (2005) 8 SCC 618, it was held that that the arbitration agreement would stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void. In para No. 14, the Supreme Court held as under:-

14. *The same reasoning was adopted by a member of this Bench (S.S. Nijjar, J.), while deciding the case of Reva Electric Car Company Private Limited Vs. Green Mobil [(2012) 2 SCC 93], wherein the provisions of Section 16(1) in the backdrop of the doctrine of kompetenz kompetenz were considered and it was inter alia held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the contract. Reference was made in the said judgment to the provisions of Section 16(1)(b) of the 1996 Act, which provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void.*

The ratio of this judgment would apply with greater force to a case where the agreement has not been duly stamped or registered. Such an agreement is not even void.

12. In *Enercon (India) Ltd. and others v. Enercon GMBH and another* 2014(5) SCC 1, the Supreme Court held as under:-

“82. Further, the arbitration agreement contained in Clauses 18.1 to 18.3 of IPLA is very widely worded and would include all the disputes, controversies or differences concerning the legal relationship between the parties. It would include the disputes arising in respect of the IPLA with regard to its *validity, interpretation, construction, performance, enforcement* or its *alleged breach*. Whilst interpreting the arbitration agreement and/or the arbitration clause, the court must be conscious of the overarching policy of *least intervention by courts or judicial authorities* in matters covered by the Indian Arbitration Act, 1996. In view of the aforesaid, it is not possible for us to accept the submission of Mr Nariman that the arbitration agreement will perish as the IPLA has not been *finalised*. This is also because the arbitration clause (agreement) is independent of the underlying contract i.e. the IPLA containing the arbitration clause. Section 16 provides that the arbitration clause forming part of a contract shall be treated as an agreement independent of such a contract.

83. The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract. The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the national courts would be required to ensure the success of arbitration, but this would not detract from the legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unenforced by one of the parties.”

This judgment was followed by the Supreme Court in *Ashapura Mine-Chem Ltd. v. Gujarat Mineral Development Corporation* 2015(8) SCC 193.

13. This application cannot, therefore, be rejected on the basis of the respondent's contention that the agreement is not duly stamped or registered. Such contentions do not affect the arbitration agreement entered into between the parties. They are infact disputes which fall within the jurisdiction of the arbitral tribunal.

14. In the circumstances, Mr. Justice Permod Kohli, former Chief Justice of the Sikkim High Court, is appointed as the sole arbitrator to adjudicate upon the disputes between the parties. It will be open to the arbitrator to decide whether to continue the proceedings *de novo* or whether to continue from the point at which the earlier arbitration stopped.

15. The petition is accordingly disposed of.

09.10.2015
'ravinder'

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

Whether to be referred to the Reporter or not.	Yes✓	No.
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