OD-6

ORDER SHEET

AP/472/2023

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

K2V2 HOSPITALITY LLP
VS
LIMTON ELECTRO OPTICS PVT. LTD. AND ORS.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 16th July, 2024.

Appearance:
Mr. Dhiraj Trivedi, Adv.
Mr. Bikash Kumar Singh, Adv.
Mr.Sunil Gupta, Adv.
…for the petitioner

Mr. Sourajit Dasgupta, Adv.
Mr. Ashis Kr. Mukherjee, Adv.
Mr. Sourabh Prasad, Adv.
…for the respondents

The Court: The petitioner entered into two different agreements of lease with respondent nos.1 and 2 companies.

The said two lease agreements referred to tenancy being granted in respect of the same property.

Learned counsel for the petitioner argues that the respondent nos.1 and 2 are the co-owners of the property and as such, two agreements were entered

into between the parties. However, it is argued that the arbitration clauses contained in the same are identical. That apart, the said two agreements arise out of the same transaction and as such, a composite reference is tenable in law.

It is further argued that the directors of the two companies have also been impleaded in the present application since they were signatories to both the agreements.

Learned counsel also argues that the documents do not contemplate any grant of lease *in praesenti* and as such, are not compulsorily registrable. In any event, it is argued that the registrability of the documents are not to be looked into at this stage of Section 11 of the Arbitration and Conciliation Act, 1996.

Learned counsel appearing for the respondents contends that the application is bad as framed in its present form, since the respondent nos.3 and 4 are the two directors of the respective companies being respondent nos.1 and 2 and were not parties to the arbitration agreement and cannot be joined in any reference to arbitration.

That apart, it is argued that since the disputes arise out of two distinct and separate agreements between the petitioner and two separate juristic entities/companies, the same cannot be clubbed together for the purpose of a composite reference to arbitration. Thus, both the notice of invocation of the arbitration clause as well as the present application are not maintainable in the eye of law.

Thirdly, learned counsel argues that the petitioner entered into new agreements with the respondent nos.1 and 2 subsequent to the agreements referred to in the present application. Copies of such agreement have also been annexed to the affidavit-in-opposition of the respondents. It is argued that by virtue of entering into fresh agreements, the petitioner gave a go-bye to the agreements, the arbitration clauses of which are now sought to be invoked. Since the said agreements do not exist any more, the reference itself would be bad in law.

Lastly, it is argued that the arbitration clauses in both the agreements in question refer to the disputes between the parties being arbitrable except those specified in sub-Clause 'M'. It is shown from the document that there is no such sub-Clause M in either of the documents. As such, the agreements may not be true copies of the actual agreements entered into between the parties. Moreover, the agreements are visited with uncertainty in the absence of any such sub-Clause M containing the exception clauses of the same.

Insofar as the objection raised by the respondents regarding the respondent nos.3 and 4, the directors of the companies being impleaded, it is well-settled that mis-joinder can only give rise to superfluity but does not vitiate the maintainability of an application.

Hence, in any event, such excess addition of party, even if the respondent nos.3 and 4 are not necessary parties, does not vitiate the application as a whole.

However, the respondents have a point inasmuch as the respondent nos.3 and 4 cannot be necessary parties to the arbitration in their independent

capacities but can only be referred to while describing the respondent nos.1 and 2 as their authorized representatives.

In any event, the respondent nos.3 and 4 have not been impleaded in the present application in their individual capacities but have been described as representatives and directors of the respondent nos.1 and 2 companies respectively. In fact, the cause title of the application clearly depicts that the said directors represent the respective companies in the agreement in question. Hence, in the absence of any impleadment of the respondent nos.3 and 4 in their individual capacities, it is to be deemed that the reference sought is against the respondent nos.1 and 2 companies who were parties to the respective agreements and not against their directors.

Insofar as the next argument is concerned, the novation of contract and/or giving a go-bye to the agreements in question by the petitioner is a debatable issue which could at best the subject-matter of the issues raised before an Arbitrator, if appointed.

Admittedly, there were changes in the fresh agreements which were proposed by the petitioner, from the end of the respondent. In paragraph no.10 of the affidavit-in-opposition, the respondents indicate that there were "minor changes" when the respondents reverted back the proposed copies of new agreements to the petitioner. Whether the changes were minor or not can only be decided upon taking evidence and upon hearing parties at length. Since the petitioner categorically raises an issue as to such changes being major and the petitioner having not accepted the fresh agreements, the said

arguable issue cannot be decided at the threshold while taking up an application under Section 11 of the 1996 Act.

The respondents also raise an issue as to the composite reference sought by the petitioner not being maintainable in view of two distinct agreements having been entered into between the parties. The petitioner entered into separate agreements with two different companies/juristic entities having separate arbitration clauses.

Learned counsel for the petitioner, to counter such objection, has cited *R.R.Shah, Shares and Stock Brokers Private Limited vs. B.H.H. Securities Private Limited and Others* reported at *(2012) 1 SCC 594*, where the Supreme Court has held, inter alia, that if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B and C.

Learned counsel next cites the judgment of *Oil and Natural Gas Corporation Limited vs. Discovery Enterprises Private Limited and Another* reported at *(2022) 8 SCC 42* where Supreme Court, inter alia, observed that in deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, certain factors were to be looked into. Such factors include mutual intent of the parties, relationship of a non-signatory to a party which is a signatory to the agreement, the commonality of the subject matter, composite nature of the transaction and performance of the contract.

The said citation is apt in the present context.

All the tests as laid down by the Supreme Court in *ONGC (supra)* are satisfied in the instant *lis*.

Although the respondent nos.1 and 2 are different juristic entities in the eye of law, vis-à-vis the demised property, they are co-owners. A careful perusal of the agreements indicate that both the agreements describe as their subject matter the same space measuring about 10430 square feet. The rest of the description of property is also exactly identical. Thus, although two different agreements were entered into between the parties, the fact remains that both the agreements refer to the self-same demised property. Moreover, both the agreements were entered into by the same proposed lessee with two co-owners of the self-same property. The ownership of co-sharers in respect of a property are mutually intertwined in such a manner that their rights are inextricable from each other and cannot be segregated, each of them having title over every inch of the property.

In fact, if two different references were to be made, there would be ample scope of conflict of decision pertaining to the self-same subject matter between the co-owners of the self-same property.

To obviate the same, a composite reference is the only recourse which satisfies the requirements of law as well as equity. Thus, a composite reference is the requirement in the present case and not separate ones.

Lastly, the respondents have raised a specious issue of the elusive sub-Clause M being absent in either of the documents. Although the arbitration clauses referred to sub-Clause M, the same does not find place in the

agreements. However, the said sub-clause, conspicuous by its absence, was merely intended to contain the exception clauses to the subject matter of reference. In the absence of such sub-clause in the agreements, it should be deemed that there is no exception, since the exception then becomes nil. Hence, on a composite reading of the documents on record, all the disputes arising in the context of the agreements are referable to arbitration by way of a composite reference. M, in absentia, cannot create a difference in such reference.

In view of the above discussions, the petitioner is justified in seeking an arbitration, since the claim of the petitioner is squarely covered by the arbitration clauses which are identical in both the agreements and as the issues involved are otherwise valid subject matters of arbitration.

Accordingly AP 472 of 2023 is allowed, thereby appointing Ms. Deblina Lahiri, Advocate (Mob No. 9831155553) as the sole arbitrator to resolve the disputes between the parties, subject to obtaining a disclosure under Section 12 of the Arbitration and Conciliation Act, 1996 from the said Arbitrator. The learned Arbitrator shall, in consultation with the parties and in consonance with the provisions of the 1996 Act and its Schedule –IV, fix her own remuneration.

(SABYASACHI BHATTACHARYYA, J.)

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