

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

ON THE 26th OF JUNE, 2023

ARBITRATION CASE No. 13 of 2023

BETWEEN:-

CARNIVAL FILMS ENTERTAINMENT PRIVATE LIMITED THROUGH ITS AUTHORISED REPRESENTATIVE CARNIVAL HOUSE, GEN. A.K. VAIDYA MARG. OFF WESTERN EXPRESS HIGHWAY, DINDOSHI MALAD EAST MUMBAI (MAHARASHTRA)

.....APPLICANT

(MS. GUNJAN CHOWKSEY ALONGWITH MS. SHRIYA JADHAV AND MS. YUKTA JOSHI, LEARNED COUNSEL FOR THE APPLICANTADVOCATEs)

AND

M/S MP ENTERTAINMENT AND DEVELOPERS PRIVATE LIMITED THROUGH ITS DIRECTORS REGD. OFFICE- 11TH FLOOR, C-21 BUSINESS PARK, C-21 SQUARE, OPP. RADDISON BLU HOTEL, M R 10, INDORE (MADHYA PRADESH)

..... NON-APPLICANT

(SHRI VIJAY KUMAR ASUDANI, LEARNED COUNSEL FOR THE NON-APPLICANT.)

Reserved on : 26.06.2023

Delivered on : 24.07.2023

This petition coming on for orders this day, the court passed the following:

ORDER

1- The applicant has filed the present petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 seeking the appointment of a Retired High Court Judge or District Judge as an independent Arbitrator in terms of Clause 3 of the lease agreement. The applicant is also seeking an injunction against the sole arbitrator Shri Arpit Oswal from continuing with the proceeding passed on the false and concocted possession document.

The facts of the case are as under:-

2- The Non-applicant is a company registered under the provisions of the Companies Act having its registered office at 11th Floor, C-21, MR-10, Indore which is involved in the business of Real Estate and Development. The Non-applicant is the owner of the second, third and fourth floor at Malhar Mall (hereinafter referred to as “the multiplex”). The Non-applicant entered into ***a lease agreement dated 28.07.2011*** with HDIL Entertainment Pvt. Ltd. whereby the multiplex was leased out to the lessee. Thereafter, a supplementary agreement dated 26.06.2014 was executed between the same parties for extending the period of the lease from 15 years to 21 years.

3- The applicant is a private limited company incorporated on the month of 11.11.2014 engaged in the business of management of multiplex under the brand name of Kulraj Broadways Cinema. The applicant entered into ***a share purchase agreement dated 02.07.2014*** with HDIL Entertainment Pvt. Ltd. to purchase/ acquire a 100% share of the company. After the execution of this share purchase agreement, the name of the said lease between the non-applicant and HDIL was changed to Commercial Films Entertainment Pvt. Ltd.

4- According to the applicant, the directors of the Non-applicant company were well aware of the execution of this share purchase agreement, the applicant took over the operation and management of the multiplex. A dispute started between the applicant and the Non-applicant in the year 2020, the Non-applicant sent a demand notice to the applicant under Section 8 of the Insolvency and Bankruptcy Act and also filed an application under Section 9 by way of Company Petition No.891/2021 before the NCLT, Mumbai. According to the applicant, despite the aforesaid dispute, the applicant continued to operate and manage the said multiplex till 09.11.2022. On 09.11.2022, the Non-applicant illegally and forcibly took possession of the said multiplex for which the applicant sent an e-mail dated 10.11.2022 and thereafter, filed a criminal complaint dated 20.11.2022 under the relevant sections of the Indian Penal Code.

5- In the said agreement between the Non-applicant and HDIL Entertainment Pvt. Ltd., there is a Clause 13 relating to governing the law and dispute resolution hence in order to invoke the said arbitration clause the applicant sent a legal notice dated 03.12.2022 to the Non-applicant and thereafter, approached the Commercial Court under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act of 1996) alongwith an application under Section 151 of CPC seeking status-quo in the case due to the urgency. The learned Commercial Court at Indore took cognizance of the matter and passed an order of status quo on 09.12.2022 in MJCAV No.98/2022 in favour of the applicant.

6- The Non-applicant appeared before the Commercial Court

and filed a reply dated 21.12.2022 to an application under Section 9 of the Limitation Act. In the reply, the first time the Non-applicant disclosed that a possession document dated 09.05.2022 had been executed between the applicant and the Non-applicant whereby the possession of multiplex in dispute had been handed over to the Non-applicant with the condition of withdrawal of the case initiated under Section 131 of CPC of Negotiable Instruments Act. It is further submitted that in the said possession document there is a provision of arbitration clause under which Shri Arpit Oswal Advocate is named as an arbitrator to decide the dispute between the parties. The Non-applicant also submitted that Mr. Arpit Oswal has initiated arbitration proceedings. The applicant immediately submitted a response that no such possession document was executed by them and the same is the false and concocted document.

7- It is further submitted the applicant was operating the multiplex till 09.11.2022 and the documents to that effect are cumulatively filed as Annexure P/11 in this petition, to establish that the possession document is forged & concocted. The applicant was served a letter dated 19.12.2022 invoking an arbitration clause by the Non-applicant, the applicant immediately submitted an objection dated 02.01.2023 denying the execution of said possession document. According to the applicant, the said possession document bears the signature of its Manager Mr. Manish Kansal. The applicant immediately sent an e-mail to Manager to confirm his signature and vide the return e-mail he denied execution of the possession document as per his knowledge. Arpit Oswal has initiated the arbitration proceedings and

sent a notice to the applicant for appearance.

8- The Non-applicant submitted a statement of claim before the arbitrator claiming the amount of Rs.3,50,58,096/- and also seeking a declaration that the possession document dated 09.05.2022 is legal, valid and binding on the claim as per the Non-applicant . The t Non-applicant also filed an application under Section 17 of the Arbitration and Conciliation Act, 1996 seeking an injunction against the applicant in respect of booking of tickets through online platforms like Book My Show, Paytm, etc. The applicant has appeared before the arbitrator and submitted an objection in writing. Vide order dated 16.02.2023, the learned Arbitrator has passed an injunction order against the applicant.

9- Meanwhile, the learned Commercial Court passed an order dated 19.01.2023 under Section 9 of the Act, of 1996 in favour of the applicant, by restraining the Non-applicant from alienating rights in respect of Cinema / Multiplex pending commencement and during the arbitration proceedings and making the final award therein. Being aggrieved by the above order dated 13.01.2023, the Non-applicant filed an ***Arbitration Appeal No.16/2023*** before this Court. Vide order dated 06.07.2023 the Division Bench of this Court has dismissed the arbitration appeal on the ground that the applicant had initiated the arbitration proceeding by approaching the Commercial Court on 09.12.2022 by filing an application under Section 9 of Arbitration and Conciliation Act, 1996 as well as Section 151 of CPC and thereafter the Non-applicant appointed an Arbitrator who initiated proceedings on 03.01.2023 hence on 09.12.2022 neither arbitral tribunal proceedings were initiated nor arbitrator was appointed or approached to settle the

dispute. The operative part of paragraphs No.14 and 15 are reproduced below:

14. On or about 16th July 2021, the Appellant filed an interim application being Commercial Civil Miscellaneous Application No.2 of 2021, praying for reference of both the applications filed by the Appellant and the T Non-applicant respectively under Section 9 of the Arbitration Act, to the learned Tribunal.

15. Paragraph 3 of the said application filed by the Appellant is set out hereinbelow for convenience. “3. I say and submit that this Hon’ble Court had heard the AMNS Petition and the EBTL Petition extensively, and reserved the petitions for pronouncement of orders. The matters are listed on 20 July 2021 for pronouncement of orders.”

Submission of Applicant’s counsel

10- Ms. Chowksey, learned counsel for the applicant submitted that there is no dispute in respect of the existence of an arbitration agreement between the Non-applicant and HDIL Enterprises Pvt. Ltd. Thereafter, the applicant entered into a share purchase agreement with HDIL on 02.07.2014, hence now an arbitration agreement between the applicant and the Non-applicant under which this dispute with the Non-applicant is liable to be referred to an arbitrator appointed by this Court. It is further submitted that the Non-applicant on the basis of a forged and concocted agreement has appointed Shri Arpit Oswal as an arbitrator and started the arbitration proceedings illegally. Mr. Oswal in the capacity of an advocate has been associated with Mr. Vijay Kumar Asudani in a number of cases, therefore, he cannot act as an arbitrator in this matter in which Shri Asudani is representing the Non-applicant

hence the arbitration proceedings are per-se illegal and void, Shri Oswal he is liable to be restrained to act as an Arbitrator in the dispute between the parties.

11- It is further submitted by the learned counsel that so far as the so called possession document is concerned, it is said to have been signed by the Manager of the applicant Mr. Ashish Kansal who has specifically refused and denied his signature therein . Clause No.13 in the lease agreement still exists which is an undisputed document hence, the arbitrator is liable to be appointed under Clause No.13 in this AC. At the most, the Non-applicant can raise all objections about the subsequent so-called possession document before the arbitrator to be appointed by this court. Learned counsel in support of his submission has placed reliance on a judgment passed by the Apex Court in the case of *Pravin Electricals Pvt. Ltd. v/s Galaxy Infra and Engineering Pvt. Ltd. (Civil Appeal No.825 of 2021)* in which the Apex Court has held that since it is a preliminary issue regarding the validity of agreement and when the issue is regarding false and fabricated document then the learned arbitrator shall first determine the same as a preliminary issue and accordingly appointed a Retired High Court Judge as a sole Arbitrator. Learned counsel has further placed reliance on a judgment passed in the case of *M.R. India Ltd. v/s Tarun Agrawal (Civil Appeal No.667/2022)* in which also the Apex Court has remitted the matter back to the High Court to decide the application under Sections 11, 5 and 6 of the Act, 1996 afresh.

12- Learned counsel for the applicant further submitted that in the present case, the Non-applicant is relying on a possession

document which is a one-page non-stamped, non-notarized document, therefore, the arbitration clause therein is unenforceable. In support of her contention she has placed reliance on the Constitution Bench judgment passed in the case of *N.N. Global Mercantile Pvt. Ltd. v/s M/s Indo Unique Flame Ltd. and others reported in 2023 SCC OnLine SC 495* in which the Apex Court has held that the instrument which attracts the stamp duty may contain an arbitration clause and if it is not stamped or insufficiently stamped, same cannot be said to be a contract which is enforceable within the meaning of Section 2(h) and 2(g) of Indian Contract Act. It is further held that the arbitration agreement within the meaning of Section 7 of the Act which attracts the stamp duty if not stamped or insufficiently stamped cannot be acted upon in view of Section 35 of the Indian Stamps Act.

13- Ms. Chowksey, learned counsel for the applicant further urged that in the so called possession document, it is nowhere mentioned that this document will amount to a novation of agreement and lease agreement. It is further submitted that the lease agreement between the parties still exists and the arbitration clause survives even on termination expiry of a contract. In support of her contention, she has placed reliance on a judgment passed by the Delhi High Court in the case of *Knowledge Podium System Pvt. Ltd. v/s S.M. Professional Services Pvt. Ltd. reported in (2021) 1 Arbitration Law Reporter 236 (Delhi)* in which it has been held that the novation takes place only when there is a complete substitution of a new contract in place of old. The learned counsel has also placed reliance on a judgment passed by the Apex Court in the case of *TRF Limited v/s Energo Engineering Project*

reported in (2017) 8 SCC 377 on the point that the arbitrator is associated with the counsel for the Non-applicant and he is appearing in various cases since last three years with him, therefore, he cannot be appointed as an Arbitration in view of Section 12(5) of the Arbitration and Conciliation Act, 1996. The Apex Court in the case of *TRF Limited (supra)* in similar facts and circumstances has set aside the appointment of an arbitrator. It is further submitted that even in case a dispute is pending before the NCLT, the High Court still has the power to entertain the application for appointment of an arbitrator as held by the Apex Court in the case of *M/s Sunflag Iron and Steel Company Ltd. v/s Ms J. Poonamchand and Sons (MCA No.374/2020)* hence, Ms. Chowksey prays that this Court may kindly appoint an arbitrator to adjudicate the dispute between the parties.

Submission of Non-applicant's counsel

14- Shri Vijay Kumar Asudani, learned counsel for the Non-applicant contended that once the arbitrator has initiated the proceeding under the Act of 1996 the mandate cannot be terminated by the High Court under Section 11(5) of the Act, 1996. Only the civil Court having original jurisdiction under Section 15 of the Act, 1996 can remove the Arbitrator, therefore, now the dispute cannot be referred by appointing a new Arbitrator under Section 11(5) of the Act, 1996. Learned counsel has relied on the case of *Swadesh Kumar Agrawal v/s Dinesh Kumar Agrawal and others reported in (2022) 10 SCC 235* the Supreme Court of India categorically defined under which circumstances the Sub-Section (5) and (6) of Section 11 of Arbitration and Conciliation Act,

1996 will be attracted. The application under Section 11(6) of the Act, 1996 shall be maintainable only in cases where there is a contract between the parties containing the arbitration clause and the appointment procedure prescribed. Sub-Section (5) of Section 11 of the Act, 1996 shall be attracted only in a case where there is no procedure for appointment of an Arbitrator agreed upon as per Sub-Section (2) of Section 11 of the Act, 1996 and sub-Section (6) of Section 11 of the Act, 1996 shall be applicable in case where there is a contract containing an arbitration agreement.

15- It is further submitted by Shri Asudani learned counsel that the agreement clause contained under the lease agreement dated 28.07.2011 does not survive due to the novation of the contract by executing the possession document. The only remedy available to the applicant to seek termination of a contract by approaching the Civil Court under Section 14 of the Act, 1996 hence, this arbitration case is liable to be dismissed and the applicant be directed to participate in the arbitration initiated under the possession document. Shri Asudani learned counsel has placed reliance on a judgment passed in case of ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Ltd.*** reported in ***2018(12) SCC 471*** in which the Apex Court has held that in order to determine whether an arbitrator is *de jure* unable to perform his function, it is not necessary to go to the Arbitral Tribunal under Section 13 of the Act of 1996 an application may be filed under Section 14(2) of the Act of 1996 to decide on the termination of his or her mandate on this ground. As per learned counsel in case of ***Avitel Post Studioz Ltd. and others v/s HCBC (2021) 4 SCC 713***, the Apex

Court has held that if it is clear that the civil dispute involved questions on fraud, misinterpretation etc. which can be a subject matter of such proceeding under Section 17 of the Contract Act and the mere fact that the criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that dispute which is otherwise arbitrable.

16- It is further submitted by the learned counsel Shri Asudani learned counsel that the issue of fraud or the concocted document cannot be adjudicated in arbitration proceedings. The allegation of fraud will not be arbitrable only if either of the following two tests laid down is satisfied, firstly, does this plea of fraud permeate the entire contract and above all the agreement of arbitration rendering it void, secondly, where the allegation of fraud touch upon the internal affair of the party *inter se* has no implication on the public domain. Shri Asudani learned counsel has placed reliance on the judgment passed by the High Court of Delhi in case of *B.L. Kashyap and Sons Ltd. v/s MIST Avenue Private Ltd. [O.M.P. (COMM) 190/2019]* in which in similar facts and circumstances, the validly executed contract can also be extinguished by a subsequent agreement between the parties where the new contract constitute a wholesale novation of an original contract, the arbitration clause would also stand extinguished by virtue of a new agreement hence, Shri Asudani prays for dismissal of this application.

Appreciations & Conclusion

17- Except execution of the possession documents non of the facts discussed above are in dispute between the parties . As has been

held by the Division Bench of this High Court, the applicant first initiated a proceeding under the lease agreements dated 28.07.2011 and 26.06.2014 by approaching the Civil Court under Section 9 of the Act of 1996. The applicant also filed an application under Section 151 of CPC seeking *ex-parte* injunction which entertained interim protection was given and thereafter application filed under Section 9 of the Act of 1996 allowed by passing the order of *status quo* in favour of the applicant. The Non-applicant did participate in the proceedings by raising an objection that the arbitration proceedings had been initiated by virtue of the arbitration clause in the possession document. The aforesaid contention was negated by the Commercial Court and granted the injunction in favour of the applicant. Being aggrieved by the order dated 19.01.2023, passed by Commercial Court in MJCAV No.98 of 2022, an Arbitration Appeal No.16 of 2023 was filed before the Division Bench of this Court. Vide order dated 06.07.2022, the Division Bench of this Court had dismissed the appeal solely on the ground that the applicant first approached the Commercial Court by way of an application under Section 9 of the Act of 1996 and on 09.12.2022 and at that time, neither Arbitral Tribunal proceedings were initiated nor arbitrator was appointed or approached to settle the dispute. The Division Bench has relied upon the judgment passed in the case of ***Arcelor Mittal Nippon Steel India (supra)*** where the expression "entertain" has been examined. The Apex court has held that when an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement

to conduct the exercise arises only when the application is being entertained and / or taken up for consideration. As observed above, there could be numerous reasons which render the remedy under Section 17 inefficacious.

18- In this case, the distinguishable fact is that the section 9 application was filed under the lease agreements by the applicant and arbitration proceedings have been started under the Possession document (which the applicant is disputing) by the Non-applicant. Therefore the sole question would be whether the subsequent so-called Possession Document agreement will supersede the first arbitration agreement under which the proceedings were initiated first by the applicant? That section 42 of the arbitration clause although deals with the territorial jurisdiction of the court and says that notwithstanding anything contained elsewhere in this part or any other law for the time being enforced where with respect to an arbitration agreement, an application under this Section has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent application arising out of that agreement and the arbitration proceedings shall be made in that Court and in no other Court. Although Section 42 of the Act, 1996 deals with the territorial jurisdiction of the Court to entertain subsequent applications, but it gives emphasis upon all subsequent applications / proceedings with respect to an arbitration agreement that Court alone shall have jurisdiction . Hence taking aid from this provision of the Act of 1996 not only for territorial jurisdiction but for all subsequent proceedings also the arbitration agreement would be the same. All subsequent proceedings would be entertained under the

same arbitration agreement under which the application under section 9 was initiated first. Therefore, it can be held that all the subsequent applications are liable to be filed under the lease agreements between the parties under which the application under Section 9 of the Act of 1996 was filed, hence the arbitration proceeding are also liable to be initiated under the same lease agreement not under the possession document.

19- In order to avoid the conflict of jurisdiction, the application under Section 11 of the Act of 1996 is also liable to be filed in High Court having a supervisory jurisdiction of a civil court (The Commercial Court) , where the application is filed under Section 9 of Act of 1996 Act. That sub-section 11 of Section 11 of the Act of 1996 also says that where more than one request has been made under sub-section 4 or 5 or 6 of the Act of 1996 to a different arbitral institution, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint. Therefore, as per the conjoint reading of Section 11 and 42 of the Act 1996, it can safely be held that only the arbitration clause and agreement dated 28.07.2011 and 26.06.2014 is liable to be acted upon.

20- The subsequent proceedings initiated by the Non-applicant under the so-called possession document have wrongly been initiated. Division Bench of this Court has rightly ignored these subsequent proceedings initiated by Shri Oswal advocate as sole Arbitrator under the possession document and held that the proceedings initiated under Section 9 of the Act of 1996 are the first proceedings initiated under the lease agreement, therefore, this application under Section 11(5) of Act of

1996 is maintainable. The Arbitrator is liable to be appointed under Section 11(6) of the Act of 1996.

21- In addition to the above is also to be taken into consideration that the moment the applicant came to know about the possession document and initiation of arbitration proceedings, at the very first instance, an objection was raised that it is a forged and concocted document which cannot be acted upon. The so-called possession document is neither a notarized nor a stamped document, therefore, in view of the Constitution Bench judgment i.e. *N.N. Global Mercantile Pvt. Ltd. (supra)*, this document cannot be considered under Section 11 of Act of 1996 for initiation of the arbitration proceeding. An Arbitrator is liable to be appointed under this agreement.

22- Shri Asudani learned counsel has argued that the present application under Section 11(5) of the Act of 1996 is not maintainable, as Section 11(5) applies to a situation where the parties failed to agree on the Arbitrator within 30 days from the receipt of the request by one party from the other party to so agree, the appointment shall be made on an application of the party in accordance with the provision contained in sub-Section (4) of Section 11 of the Act of 1996. Sub-section (6) of Section 11 of the Act of 1996 also deals with the situation where under an agreement procedure agreed upon by the parties, and a party fails to act as required under that procedure, an application shall be made on an application of a party by a High Court in case of arbitration. That under both the provisions the Arbitrator is to be appointed by the High Court hence this applicant can be treated under section 11(6) of the Act of 1996.

23- It is made clear here that the non-applicant shall be free to raise his objection, especially the validity of the possession document before the sole Arbitrator appointed by this Court.

24- In view of the above, I deem it proper to appoint Hon'ble Shri Justice J.K. Jain, Former High Court Judge as a sole arbitrator to resolve the dispute between the parties.

25- After obtaining the written consent from Hon'ble Shri Justice J.K. Jain, Former High Court Judge the Registry is directed to dispatch a copy of this order to the following:-

26- Name of Arbitrator- Hon'ble Shri Justice J.K. Jain, Former High Court Judge.

Mob. Number – 9425430484.

27- The Arbitration Case stands disposed off to the extent indicated above.

(VIVEK RUSIA)
JUDGE

Divyansh