

IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE ANAND PATHAK

ARBITRATION CASE No. 121 OF 2017

BETWEEN:-

- 1 MOHD. SUHAIL KHAN S/O- LATE M.I. KHAN, R/O- D-44, B.D.A, KOH-E-FIZA, BHOPAL (MADHYA PRADESH)
- 2 QUMAR SUHAIL W/O- M.S. KHAN, R/O- D-44, B.D.A, KOH-E-FIZA, BHOPAL (MADHYA PRADESH)

..... APPLICANTS

(BY SHRI SATYAM AGRAWAL - ADVOCATE)

AND

- 1 MS/ SAGAR AUTOMOBILES PVT. LTD THROUGH SHRI YAHYA KHAN SHIRANI, DIRECTOR, R/O- DEWAS NAKA, A.B. ROAD, INDORE (MADHYA PRADESH)
- 2 SHRI YAHYA KHAN SHIRANI, DIRECTOR, M/S SAGAR AUTOMOBILES PVT. LTD. R/O- DEWAS NAKA, A.B. ROAD, INDORE (MADHYA PRADESH), R/O- B-100, HOUSING BOARD COLONY, KOH-E-FIZA, BHOPAL (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI KAPIL DUGGAL - ADVOCATE)

Reserved on : 05/01/2023

Pronounced on : 12/06/2023

This application having been heard and reserved for order coming

on for pronouncement this day, this Court passed the following:

ORDER

The present application has been preferred by the applicants under Section 11(6) of the Arbitration and Conciliation Act, 1966 (hereinafter referred as “Act”) for appointment of Arbitrator / Arbitral Tribunal for settlement of dispute.

2. Precisely stated facts of the case are that the applicants are the landlords/licensors and respondents are the tenants/licencees. As submitted, an agreement executed between the parties on 10.02.2012 by way of transfer of lease of the property of landlord for a term of six months subject to certain conditions under the contract. Photocopy of the lease and licence agreement was referred as Annexure A/1.

3. It is the submission of the learned counsel for the applicants that as per agreement tenants/licencees had to pay a sum of Rs.1,00,000/- as advance on the 7th day of every calendar month. It appears that licencee vacated the leased premises in March, 2014 allegedly without giving three months' notice. Therefore, on 31.11.2015 a legal notice was issued on behalf of the applicants to the respondents for non-payment of outstanding rent. Later on, vide notice dated 17.04.2017 another legal notice was issued for the same prayer and thereafter, this application has been preferred under Section 11(6) of the Act for appointment of Arbitrator. Later on, alongwith application under Section 11(6) of the Act, an application vide I.A. No.18759/2017 was filed for exemption from filing of certified copy of the agreement.

4. It is further submitted that dispute erupted between the parties regarding non-payment of leased rent. Therefore, Arbitrator be appointed for dispute resolution.

5. Learned counsel for the respondents vehemently opposed the prayer and termed it as misconceived application. It is the submission of learned counsel for the respondents that no such lease agreement was ever executed between the two. Instead of producing original copy of the agreement, applicants are trying to take undue advantage of a document filed in photocopy so that a dispute can be created and Arbitrator be appointed on false pretext. No such agreement was ever executed between the parties and if any agreement existed ever then it was the duty of the applicants to produce it in original.

6. It is further submitted that the case is of tenancy and the same is barred by the judgment of Apex Court in the case **N.N. Global Mercantile Vs. Indo Unique Flame Limited and others** reported in **(2021) 4 SCC 379**, therefore, he prayed for dismissal of this application.

7. Heard the learned counsel for the parties and perused the documents appended thereto.

8. This is a case where applicants as landlord are trying to resort to the application under Section 11(6) of the Act for appointment of Arbitrator for dispute resolution.

9. Applicants have filed photocopy of the lease and licence agreement and moved an application vide I.A. No.18759/2017 to demonstrate that original copy lies with the tenant, therefore, tenant be

directed to produce in original but tenant has specifically denied from existence of such agreement and raised the doubt about the plea of landlord that the such document in original lies with the landlord and not with the tenant. In absence of any valid agreement prima facie scope of interference constricts.

10. Section 11(6) and 11(6)-A of the Act is reiterated as under for ready reference:-

“11(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provided other

means for securing the appointment.”

11(6)-A. The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court confine to the examination of the existence of an arbitration agreement.”

11. The said section has been discussed by the Apex Court in the case of **Duro Felguera, S.A. Vs. Gangavaram Port Limited** reported in (2017) 9 SCC 729 in paragraph 48 which is reads as under:-

“11(6)-A. The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court confine to the examination of the existence of an arbitration agreement.” (emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect – the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple – it needs to be seen if the agreement contains a clause which

provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.”

12. In the present case, no arbitration agreement exists. Respondents have categorically denied their signatures on the alleged photocopy of the agreement placed on record. Therefore, in absence of any arbitration agreement, parties cannot be forced to enter into arbitration because this would come against the very concept of dispute resolution through arbitration.

13. Even otherwise, in the case of **N.N. Global Mercantile (Supra)** has been relied upon by the respondents, the eviction or tenancy matters governed by the special statutes are disputed which are not arbitrable.

“40. In our view, all civil or commercial disputes, either contractual or non-contractual, which can be adjudicated upon by a civil court, in principle, can be adjudicated and resolved through arbitration, unless it is excluded either expressly by statute, or by necessary implication. The Arbitration and Conciliation Act, 1996 does not exclude any category of disputes as being non-arbitrable. Section 2(3) of the Arbitration Act however recognizes that certain categories of disputes by law may not be submitted to arbitration. In all jurisdictions, certain categories of disputes are reserved by the legislature, as a matter of public policy, to be adjudicated by a court of law, since they lie in the realm of public law.

41. Traditionally, disputes relating to rights in rem are

required to be adjudicated by courts and / or statutory tribunals. A right in rem is a right exercisable against the world at large. Actions in rem refer to actions which create a legal status such as citizenship, divorce, testamentary and probate issues, etc. A lis in rem is not arbitrable by a private tribunal constituted by the consent of parties. Actions in personam determine the rights and interests of parties to the subject-matter of the dispute, which are arbitrable.

42. The broad categories of disputes which are considered to be non-arbitrable are penal offences which are visited with criminal sanction offences pertaining to bribery/corruption; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody and guardianship matter; which pertain to the status of a person; testamentary matters which pertain to disputes relating to the validity of a will, grant of probate, letters of administration, succession, which pertain to the status of a person, and are adjudicated by civil courts.

43. Certain categories of disputes such as consumer disputes; insolvency and bankruptcy proceedings; oppression and mismanagement, or winding up of a company; disputes relating to trusts, and beneficiaries of a trust are governed by special enactments.

44. *This Court in Booz Allen & Hamilton Inc. Vs. SBI Home Finance Ltd. Has recognized some examples of disputes which are not arbitrable, and held that : (SCC pp. 546-47, para 36)*

“36. The well-recognized examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding – up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

14. Although recently Apex Court in the case of **Intercontinental Hotels Group (India) Private Limited and another Vs. Waterline Hotels Private Limited** reported in (2022) 7 SCC 662 has referred the judgment passed in **N.N. Global Mercantile (supra)** Constitution Bench of Five Judges but it is in respect of Section 35 of the Stamp Act, 1899 and it's applicability over the agreement. Besides that, in the case of **Indian Oil Corporation Limited Vs. NCC Limited** reported in (2023) 2 SCC 539, Apex Court has further held that court under the limited

jurisdiction under Section 11(6) of the Act can look beyond the bare existence of arbitration clause to cut the deadwood. Here, the very existence of agreement is doubtful.

15. In view of the above discussion, no case is made out for interference. Therefore, prayer of the applicants for appointment of Arbitrator is misconceived. Resultantly, application is hereby **dismissed**.

(ANAND PATHAK)
JUDGE

Vishal