

[2024:RJ-JD:37398]

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT  
JODHPUR**

S.B. Arbitration Application No. 48/2023

Movie Time Cinemas Private Limited, Kamal Cinema Building,  
Safdarjung Enclave, New Delhi - Through Its Authorised  
Signatory - Mr. Anil Kapoor S/o Shri Om Prakash Kapoor, Aged  
About 60 Year, Resident Of C-716 New Friends Colony.

----Petitioner

Versus

M/s Chetak Cinema, Chetak Cinema At Chetak Circle - Through  
Its Partner - Mr. Saifuddin Bhalamwala.

----Respondent

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For Petitioner(s) : Mr. Avin Chhangani

For Respondent(s) : Mr. Rajat Dave

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**HON'BLE DR. JUSTICE NUPUR BHATI**

**Judgment**

**Reserved on: 09/09/2024**

**Pronounced: 11/09/2024**

1. The present Arbitration Application has been filed by the applicant under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act of 1996') seeking appointment of an Arbitrator to resolve the disputes between the parties in accordance with the provisions contained in the Act of 1996 and the arbitration agreement contained in Clause 12.10 of the registered Lease Deed dated 11.01.2023. It is also prayed that the Court may direct the arbitration proceedings to be conducted at Jodhpur, taking into account the distinction between the seat of arbitration and venue thereof. Certain other ancillary relief(s) have also been sought by the appellants.

2. Briefly stated, the facts of the case are that the applicant and respondent entered into a registered Lease Deed dated 11.01.2024 (Annex. 2), whereby it was agreed that the respondent would hand over the possession of 5<sup>th</sup> Floor and 6<sup>th</sup> Floor of the Chetak Mall situated in Udaipur, Rajasthan, to the applicant. After the possession of the said premises was handed over to the applicant on 01.05.2023, the respondent tried creating third party rights over the said premises.

3. Thus, aggrieved of the said actions of the respondent, the applicant sent a letter dated 17.05.2023 (Annex.4) whereby the applicant enumerated a list of work pending completion to the respondent. When the same was not resolved, the applicant sent a legal notice dated 02.06.2023 (Annex. 5), bringing to notice the violations made by the respondent to the said registered lease deed entered between both the parties dated 11.01.2023 (Annex.2) and also invoking the arbitration clause, i.e. Clause 12.10 of the said lease deed.

4. In the absence of any attempts made by the respondent to abide by the contractual obligations as per the registered Lease deed dated 11.01.2023 (Annex.2), the applicant filed an application (Annex.6) under Section 9 of the Act of 1996 before the learned Commercial Court, Udaipur wherein the learned Commercial Court, Udaipur vide order dated 28.06.2023 (Annex.7) directed the respondent to maintain the status quo of the said property. Subsequently, the applicant has preferred an application under Section 11(6) of the Act of 1996 for the appointment of an arbitrator for the resolution of the disputes,

being authorised vide the resolution passed by the Board of Directors, dated 25.09.2023 (Annex.1).

5. Learned counsel for the applicant submitted that even after the existence of a registered lease deed dated 11.01.2023 (Annex.2), the respondent has been trying to create third party rights over the said property and that the respondent has also removed the signage of the applicant put upon the said premises, which the applicant put by virtue of the registered lease deed dated 11.01.2023 (Annex.2), the photographs (Annex.3) of the same are also attested with the application.

6. Learned counsel for the applicant submitted that the applicant has made numerous attempts to bring to notice the violations of the contractual obligations of the lease dated dated 11.01.2023 (Annex.2) and has also tried resolving the dispute, but the attempts have been unsuccessful and thus, the applicant had to apply for an interim relief under Section 9 of the Act of 1996, wherein the learned Commercial Court, Udaipur has dismissed the application on the ground that the applicant has instituted an application under Section 11(6) before this Court.

7. Learned counsel for the applicant also submitted that there exists an arbitration agreement inter-se the applicant and the respondent, merely based on the ground that the applicant did not specify the name of the Arbitrator in the legal notice dated 02.06.2023 (Annex. 5), will not lead to the conclusion that the applicant has not invoked the arbitration agreement.

8. *Per contra*, learned counsel for the respondent submitted that a bare perusal of the Arbitration Clause as stipulated in the lease deed dated 11.01.2023 (Annex.2) would reveal that the

applicant was first required to comply with the said clause by way of naming an Arbitrator, however, the said clause was not complied with inasmuch as the applicant did not specify the name of the Arbitrator in the Legal Notice dated 02.06.2023(Annex.5).

9. Learned counsel for respondent also submitted that under Section 21 of the Act of 1996, it has been specifically stipulated that the proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent, however, in the present case, nowhere in the said notice has the arbitration clause been referred let alone the request for appointing of Arbitrator. He thus submitted that unless there is a request for referring the parties to arbitration, it cannot be said that the arbitration has been invoked by the party.

10. Learned counsel for the respondent also placed reliance upon the judgment passed by the Hon'ble Bombay High Court, Nagpur Bench in the case of M/s D.P. Construction v. M/s Vihsvraj Environment Pvt. Ltd. decided on 06.07.2022, whereby the Hon'ble High Court has categorically held that mere reference to claims and disputes sought to be resolved, would not amount to invoking the arbitration, rather it has to be in clear and unequivocal terms as specified under Section 21 of the Act of 1996. He also placed reliance upon the judgment passed by the Hon'ble Apex Court in the case of **BSNL v M/s Nortel Networks** reported in **AIR 2021 SC 2849**.

11. Heard learned counsel for the parties, perused material available on record and judgments cited at the Bar.

12. This Court at the outset, takes into consideration the judgment of the Hon'ble Apex Court in the case of **Cox & Kings Ltd. v. SAP India Pvt. Ltd. & Anr.** [Arbitration Petition No. 38 of 2020 decided on 09.09.2024] wherein it has been observed by the Hon'ble Apex Court that the requirement of Section 11 of the Act of 1996 is the *prima facie* existence of an agreement and upon the satisfaction of which, the Arbitral Tribunal can be constituted, which then becomes the preferred first authority to look into the questions of arbitrability and jurisdiction and that, the courts at the referral stage shall not venture into the contested question involving complex facts. The relevant para of the judgment is reproduced as under:

"32. As discussed above, the respondents have raised a number of objections against the present petition, however, none of the objections raised question or deny the existence of the arbitration agreement under which the arbitration has been invoked by the petitioner in the present case. Thus, the requirement of *prima facie* existence of an arbitration agreement, as stipulated under Section 11 of the Act, 1996, is satisfied.

33. Once the arbitral tribunal is constituted, it shall be open for the respondents to raise all the available objections in law, and it is only after (and if) the preliminary objections are considered and rejected by the tribunal that it shall proceed to adjudicate the claims of the petitioner."

Thus, this Court, at this stage, has to look into the fact that whether there was an arbitration agreement existing between the parties, and in the present case, there is no denial to such agreement by the learned counsel for the respondents.

13. Upon perusal of the record, the Arbitration Agreement is existing as per Clause 12.10 (ii) of the registered lease deed dated 11.01.2023 (Annex.2), which reads as under:

“12.10 Governing Law and Dispute Resolution

(i) xxxx

(ii) All disputes or differences between Parties in respect of or concerning or connected with the interpretation or implementation of this Agreement or arising out of this Agreement shall be referred to arbitration in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof. The reference shall be to a two arbitrator, one from each side. In the event of the Parties not being able to agree on the name of a Sole Arbitrator, each Party hereto shall be entitled to appoint one arbitrator each and the two duly appointed Arbitrator shall appoint the third arbitrator, who shall act as the presiding arbitrator (“Arbitrators”). The Parties shall be bound by the nomination of the presiding Arbitrator. Unless otherwise agreed to between the Parties, the venue and seat of the arbitration shall be at UDR. The arbitration proceedings shall be in writing and conducted in English language.”

Therefore, it is seen that admittedly there is an existing arbitration clause providing for arbitration to be the mode of dispute resolution.

14. Furthermore, this Court takes into consideration the judgment passed by the Hon’ble Apex Court in the case of **BSNL and Anr. v. Nortel Networks India (P) Ltd.**, reported in **(2021) 5 SCC 738**, which has been reiterated by the Hon’ble Apex Court in the case of **NTPC Ltd. v. M/S SPML Infra Ltd.**, [Civil Appeal No. 4778 of 2022, decided on 10.04.2023], this Court, in exception to the general rule, should grant indulgence only when it is demonstrated that the application under Section 11

is ex-facie time-barred and dead or, there is no subsisting dispute, which is not the case in hand. The relevant para of the judgment passed by the Hon'ble Apex Court in the case of **NTPC (supra.)** is reproduced as under:

"24. Following the general rule and the principle laid down in Vidya Drolia (supra), this Court has consistently been holding that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engg. Pvt. Ltd., Sanjiv Prakash v. Seema Kukreja and Ors., and Indian Oil Corporation Ltd. v. NCC Ltd., the parties were referred to arbitration, as the prima facie review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the exception to the general principle that the court may not refer parties to arbitration when it is clear that the case is manifestly and ex facie non-arbitrable, in BSNL and Anr. v. Nortel Networks India (P) Ltd. and Secunderabad Cantonment Board v. B. Ramachandraiah & Sons, arbitration was refused as the claims of the parties were demonstrably time-barred.

25. **Eye of the Needle:** The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject



claims which are manifestly and ex-facie non-arbitrable. Explaining this position, flowing from the principles laid down in Vidya Drolia (supra), this Court in a subsequent decision in Nortel Networks (supra) held:

“45.1 ...While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time-barred and dead, or there is no subsisting dispute...”

15. Moreover, looking into the intent of the legislation, i.e. the Act of 1996, is to minimize the supervisory role of the court, which could otherwise undermine the very objective of the parties for choosing an arbitral Tribunal as the preferred forum for dispute resolution and also their desire to carry out the dispute resolution process in a less formal and more flexible ways. In order to underline the very objective and intent of the legislators while enacting the Act of 1996, while incorporating the principles of the New York Convention and UNCITRAL Model Law, this Court takes into consideration the judgment passed by the Hon’ble Apex Court in the case of ***IN RE: INTERPLAY BETWEEN ARBITRATION AGREEMENTS UNDER THE ARBITRATION AND CONCILIATION ACT 1996 AND THE INDIAN STAMP ACT 1899*** [Curative Petition (C) No. 44 of 2023 decided on 13.12.2023]. The relevant paras of the judgment are reproduced as under:

“69. The principle of judicial non-interference in arbitral proceedings is fundamental to both domestic as well as international commercial arbitration. The principle entails that the arbitral proceedings are carried out pursuant to the agreement of the parties or under the direction of the tribunal without unnecessary interference by the national courts.<sup>61</sup> This principle



serves to proscribe judicial interference in arbitral proceedings, which would undermine the objective of the parties in agreeing to arbitrate their disputes, their desire for less formal and more flexible procedures, and their desire for neutral and expert arbitral procedures.<sup>62</sup> The principle of judicial non-interference in arbitral proceedings respects the autonomy of the parties to determine the arbitral procedures. This principle has also been incorporated in international instruments, including the New York Convention<sup>63</sup> and the Model Law.

Xxxx

81. One of the main objectives behind the enactment of the Arbitration Act was to minimize the supervisory role of courts in the arbitral process by confining it only to the circumstances stipulated by the legislature. For instance, Section 16 of the Arbitration Act provides that the arbitral tribunal may rule on its own jurisdiction "including ruling on any objection with respect to the existence or validity of the arbitration agreement." The effect of Section 16, bearing in view the principle of minimum judicial interference, is that judicial authorities cannot intervene in matters dealing with the jurisdiction of the arbitral tribunal. Although Sections 8 and 11 allow courts to refer parties to arbitration or appoint arbitrators, Section 5 limits the courts from dealing with substantive objections pertaining to the existence and validity of arbitration agreements at the referral or appointment stage. **A referral court at Section 8 or Section 11 stage can only enter into a prima facie determination.** The legislative mandate of prima facie determination ensures that the referral courts do not trammel the arbitral tribunal's authority to rule on its own jurisdiction."

Thus, taking into account the dictum of the Hon'ble Apex Court and looking into the fact that there was an existing arbitration agreement between the applicant and the respondent, on the basis of which the applicant had invoked the Arbitration Clause by way of sending the legal notice dated 02.06.2023 (Annex.5).

16. Accordingly, in view of the above discussion and in light of the judgments cited, taking into consideration the intent of the



legislation as well the clause 12.10 of the registered Lease Deed (Annex.2), this Court deems it fit to appoint and Arbitrator and thus, the instant application, filed by the appellant/applicant, is allowed, and while exercising the power conferred under Section 11 of the Act of 1996, **Hon'ble Justice Shri. Prakash Chandra Tatia (former Chief Justice)**, (Mobile No.7340060665), R/o 754, Tatia Bhawan, Near Geeta Bhawan, Umaid Hospital Road, Jodhpur – 342003, Rajasthan, is appointed as the Sole Arbitrator, to adjudicate the dispute between the parties. The payment of cost of arbitration proceedings and arbitration fee shall be made as per the 4th Schedule appended to the Act of 1996.

17. The intimation of appointment, as aforesaid, may be given by the counsel for the parties as well as by the Registry to Hon'ble Justice Shri. Prakash Chandra Tatia (former Chief Justice). The above appointment is subject to necessary disclosure being made under Section 12 of the Act of 1996. The respondent shall be at liberty to raise all the objections before the Arbitrator.

18. All pending applications, if any, stand disposed of.

**(DR. NUPUR BHATI),J**