

Ip Support Services (India) Pvt. Ltd & Anr vs.millenium Plaza Limited & Anr

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SooperKanoon Citation : sooperkanoon.com/1206971

Court : Delhi

Decided On : Jul-17-2017

Appellant : Ip Support Services (India) Pvt. Ltd & Anr

Respondent : Millenium Plaza Limited & Anr

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI CS(OS) 2071/2015 IP SUPPORT SERVICES (INDIA) PVT. LTD & ANR..... Plaintiffs Reserved on:

28. 11.2016 Decided on:

17. 07.2017 Through: Mr. Peeyosh Kalra and Mr. Amol Dixit, Advocates. versus MILLENIUM PLAZA LIMITED & ANR Defendants Through: Mr. Sarojanand Jha and Mr. Yash Srivastava, Advocates. CORAM: HON'BLE MS. JUSTICE DEEPA SHARMA JUDGMENT IA No.14611/2016 (U/s 8 of Arb. Act. on behalf of defendants) 1. Vide present application the defendants have sought the reference of the present dispute to Arbitrator alleging that the dispute arises out of the two contracts dated 02.12.1997 and 12.11.1999 which contains Arbitration Clauses and pursuant to these clauses 46 & 45 of the Contracts, all the disputes arising out of the contract has to be referred to the Arbitrator under the provisions of Arbitration and Conciliation Act, 1996 and this Court has no jurisdiction. It is submitted that the plaintiffs have sought declaration of their ownership rights in the property which was the subject matter of the CS(OS) No.2071/2015 Page 1 agreement to sell and hence the matter needs to be referred to the Arbitrator.

2. No reply to the application was filed by the plaintiffs. It is argued on behalf of the plaintiffs that the dispute between the parties relates to the payment of maintenance charges. The dispute arose when the defendants served the impugned notice dated 17.07.2015 demanding the maintenance charges. It is submitted that the issue relating to the maintenance charges is outside the purview of the agreement to sell and, therefore, the Arbitrator has no jurisdiction. It is argued that the Arbitrator has himself, in its award, dated 26.03.2011 has held that it had no jurisdiction to decide the issue of maintenance charges. The award was challenged in OMP No.895/2014 and OMP No.896/2014 and both the OMPs were dismissed vide order dated 15.07.2015. The Court also held that the issue of maintenance charges was outside the purview of arbitration agreement to sell containing the arbitration clause. The existence of Arbitration clause in the agreements to sell does not bar the jurisdiction of this Court and matter cannot be referred to Arbitrator and the application has no merit and is liable to be dismissed.

3. I have heard the arguments of the learned counsel for the parties and given thoughtful consideration to the rival contentions of the parties. CS(OS) No.2071/2015 Page 2 4. The arguments of the learned counsel for the defendants are two- fold. It is argued that the present suit wherein the plaintiffs are seeking declaration of their rights in the properties described in the plaint (hereinafter referred to as the property), the dispute relating to rights in the property is duly covered under the arbitration clauses of the agreements and the present suit in the present form is not maintainable here and the matter needs to be referred to the arbitrator under Section 8 of the Arbitration Clause and Conciliation, Act, 1996.

4. The brief facts of the case are as under:-

"(i) Defendant No.1 owned the plot of land admeasuring 2.968 acres located in Sector 27, Gurgaon, Haryana approved for commercial use. (ii) Defendant No.2 was engaged in the business of real estate development and construction and was jointly developing the aforesaid plot by constructing multi-storey commercial complex under the name Millennium Plaza having two towers A and B as per the approved building plan. (iii) On 2.12.1997, plaintiff No.1 and the defendants entered into an agreement. The said agreement had the following clauses,

reproduced herein for ready reference:-

"CS(OS) No.2071/2015 Page 3 Clause 1.2 The Allottee shall be entitled to undivided impartible proportionate share in the land on which the Premises will be situated. Clause 3 The aforesaid sale price shall remain fixed and shall not be subject to change notwithstanding escalation in the cost of material and labour during the period of construction and shall, subject to Clause II hereof also include the cost of Fire Fighting equipment and systems, air conditioning, elevator and other facilities herein provided and Electric Sub-station. Clause 6 The Allottee agrees that for the purpose of the said sale price of the Premises, the super area shall include covered area, area under periphery walls, columns and walls, area utilized for common use, services and facilities viz. areas covered by and under staircases, by elevators, shafts, passages, corridors and lobbies, on pro-rata basis. However, the ownership of the terrace above the top floor of Tower "A " of the Millennium Plaza shall remain with the Developers: Clause 11 The fire safety measures at the Millennium Plaza Complex will be provided as per existing Fire Safety Code/Regulations. However, if due to any subsequent legislation. Government Regulations, orders, directives or guidelines any further fire safety measures are required to be undertaken, charges in respect thereof shall be payable on demand by the Allottee on pro-rata basis. Clause 16 Save as otherwise herein provided Allottee shall have no claim, right, title or interest of any nature or kind whatsoever except the right of ingress/egress over or in respect of land, open spaces, common areas, the terrace and the basement in the Millennium Plaza Complex, the possession whereof shall remain with the Developers and whose responsibility it will be to maintain and upkeep the same until the same are taken over by any legally constituted body or association of the allottees of the Millennium Plaza Complex or occupiers of office spaces in the said Complex, as the case may be, or until the Haryana CS(OS) No.2071/2015 Page 4 Apartment Ownership Act becomes applicable to the Millennium Plaza Complex. In the last mentioned event, the provisions of the said Act and rules framed thereunder shall supersede and govern the rights and obligations covered by this Clause. Clause 17 The Developers shall undertake the maintenance of Millennium Plaza Complex including the basement thereof. They may, however, for this purpose, employ a Maintenance Agency. The Allottee shall sign a separate

Maintenance Agreement which shall contain the full scope of such maintenance and shall pay the maintenance charges as per the provisions of Clause 20 hereinbelow on pro-rata basis. Clause 18 The maintenance charges shall, inter alia, include the following: Open Area Maintenance Charges: These charges relate to the maintenance of open spaces within the boundary wall of the Millennium Plaza Complex, such as compound wall, landscaping, electrification, water supply, tubewell, sewerage, drainage roads and paths, open car parking and other services including security relating to the Millennium Plaza within the boundary wall thereof but outside the building. Common Area Maintenance: These charges relate to the operation and maintenance of various services in the common areas: elevators, fire fighting equipment, garbage disposal and other services inside the building. However, the maintenance of inside of Premises will be the responsibility of the Allottee. Maintenance Charges of Basement and Common Services in the Basement: These charges shall, inter alia, relate to the operation and maintenance of the services in the basement like D. G. Sets, air conditioning plant, pumps, fire rooms, car parking spaces and security. Clause 19 The Developers shall maintain the Millennium Plaza Complex for a period of 3 years and shall recover at the time of handing over possession of the Premises to the Allottee advance maintenance charges for one year. CS(OS) No.2071/2015 Page 5 Clause 20 The indicative charges per sq. ft. per month towards maintenance have been determined to be Rs. 11 (Rupees eleven) per sq. ft. per month. Firm charges shall be determined six months before the handing over of possession of the Premises taking into consideration, inter alia, the prices of diesel, electricity, minimum wages prevailing in Gurgaon/Haryana State. Firm charges as arrived at shall be valid for a period of one year from the date of handing over possession of the Premises subject, however, to any further revision as may become appropriate during the period due if any variation in any of the prices aforementioned. The Developers shall make available or have the Maintenance Agency employed by it, make available to the Allottee , on a periodic but no longer than six- monthly basis, audited accounts related to maintenance of the Millennium Plaza Complex to enable the Allottee to assess the accuracy and/or justifiability thereof. The Developers shall consider any suggestions/comments that the Allottee may have to offer on such audited accounts, (emphasis supplied). Clause 38.2 The Developers shall provide, without

any extra cost to the Allottee, a dedicated high-speed elevator from the ground floor to the 4th, 5th, 6th and 7th floors for the exclusive use of the Claimant and the occupants of the Premises. Clause 46 If at any time, any dispute, shall arise between the parties the validity, construction, meaning or effect of this Agreement or any clause hereof or their respective rights or liabilities hereunder, the same shall be referred to a sole arbitrator to be appointed with the mutual consent of the Allottee and the Developers. The arbitration proceedings shall be held at New Delhi and in accordance with the Arbitration Law of India from time to time. Delhi Courts alone shall have jurisdiction in respect of legal proceedings, if any, in this regard, (emphasis supplied). including any dispute relating to CS(OS) No.2071/2015 Page 6 (iv). Another agreement dated 02.12.1997 was also executed between the plaintiff No.1 and defendants relating to the use of eight consecutive car parking space in the basement on certain terms and conditions which were mentioned in the said agreement. (v). One more agreement dated 4.12.1997 entered into between the plaintiff No.1 and defendants whereby the defendants agreed to grant to the plaintiff no.1 a perpetual right to use seven consecutive car parking spaces. Subsequently, the prices of the premises were also reduced by the defendants. (vi). The plaintiff No.2 and the defendants entered into an agreement dated 12.11.1999 having almost identical provisions to the agreement concluded by the plaintiff No.1 except that the number of elevators for the exclusive use of the plaintiff was increased to two. (vii) The possession was handed over to the plaintiffs for purpose of interiors on 15.11.2000 and parties agreed that the final possession would be given by 01.07.2001.

5. The plaintiff nos. 1 and 2, aggrieved by certain acts and omissions on the part of the defendants, invoked arbitration clause on 11.08.2006 and 21.12.2006 respectively and with consent of the parties, the Mr. Justice CS(OS) No.2071/2015 Page 7 R.C. Chopra (Retd.) was appointed as Arbitrator. The matter was contested by the defendants before the Arbitrator. The Arbitrator gave its award on 05.09.2012. Following directions relevant to the present suit were given by the Arbitrator reproduced as under:-

"1. The

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are not left with any right to maintain the building in question or claim maintenance charges from the Claimant. The owners/occupiers may or, may not form an Association for the maintenance of the building in question but that does not entitle the maintenance of the building or maintenance charges unless the owners or occupiers of all or some apartments enter into fresh agreements with the

... RESPONDENTS

for maintenance of entire building or some part thereof....

2. to execute and register the Sale Deed in respect of the demised premises in favour of the Claimant. the

... RESPONDENTS

for to insist 6. The defendants challenged the said award in OMP No.315/2013 and OMP No.324/2013. Since during the pendency of the OMPs and after passing of the award, the defendants continued to raise the maintenance charges and on non-payment of the maintenance charges by plaintiffs disconnected all the essential services to the plaintiffs premises, the plaintiffs filed petitions being OMP No.895/2014 and OMP No.896/2014. During the hearing in the said petitions, the Court passed the following order on 06.08.2014. Reproduced as under:

"Arguments heard at length. CS(OS) No.2071/2015 Page 8 During the course of arguments, learned counsel for the petitioner makes an offer to pay a sum of Rs.2 crores to the respondent without prejudice to their rights within a week for restoring all the services by the respondent. Learned counsel for the respondent has submitted that although a sum of Rs. 4.5 crores are due towards the petitioner towards the maintenance charges as principle amount, however, without prejudice to their rights, they are ready to accept the offer and subject to payment of Rs.2 crores to them by petitioner they are ready to restore all the services. It is also submitted that the petitioner should undertake to pay the service charges for the services which they are ready to provide on request of petitioner. The learned counsel for petitioner undertakes that the petitioner shall pay the service charges for the services which will be provided by respondents as per the order of this court in future. Learned counsel for the respondent has submitted that he will restore all the services today itself in view of the undertaking of the petitioner to

pay a sum of Rs.2 crores within a week. Parties shall be bound by the undertaking/submissions of their counsels. 7. The defendants however continued to raise the demands towards maintenance charges. The plaintiffs filed applications IA No.20248/2014 and I.A. No.20249/2014 in OMP No.895/2014 and OMP No.896/2014 respectively. During the hearing of the said applications on 15.10.2014, the Court passed the following order:-

""Arguments heard on the applications of the petitioner. CS(OS) No.2071/2015 Page 9 It is submitted that pursuant to the undertaking dated 6th August, 2014, the petitioner had deposited a sum of Rs. 2 crores with the respondents and respondents pursuant to their outstanding restored the services. The contention of the petitioner is that although the respondent restored the services which they had been providing to the petitioner under the agreement dated 12th November, 1999 but suddenly they have disconnected the said services on the ground that the service charges for the restored services had not been paid. It is submitted that the petitioner is ready to pay the service charges for the restored services at the rate of Rs.12 per square feet, which they had been paying to the respondent till the year 2012, when the dispute has arisen between them. Learned counsel for the respondent has submitted that as per Clause 20 of the agreement, the service charges were subject to revision on account of increase in rate of diesel, electricity, minimum wages etc. It is also submitted that other occupants of the same building are now paying the service charges at the enhanced rate of Rs.18.7 per square feet. It is further submitted on behalf of the respondent that this court cannot in the present proceedings, decide the issue of entitlement of the respondent for enhanced rates of services charges. Heard. From the perusal of the order of this court dated 6th August, 2014, it is apparent that the respondent had undertaken to supply the services to the respondent, on the undertaking of the petitioner to pay the service charges. The petitioner has offered to pay the services charges at the rate of Rs.12 per square feet on restored services. The respondent claims services charges at the rate of Rs. 18.7 per square feet, at par with other occupants of the building. This CS(OS) No.2071/2015 Page 10 alleged entitlement of respondent cannot form the subject matter of petition under Section 9 of the Act. Since, the petitioner has agreed to pay the service charges at the rate of Rs.12 per square feet, the respondent is directed to restore the services, on the

petitioner clearing the arrears accrued for the period of restored services and also continue to pay the service charges at the rate of Rs. 12 per square feet on restoration of the services. This order shall remain effective till the next date of hearing. With the aforesaid directions, the applications stands disposed of. 8. OMP No.315/2013 and OMP No.341/2013 filed by the defendants for setting aside the award dated 05.09.2012 were finally disposed of by the Court vide order dated 15.07.2015. The relevant paragraphs are reproduced as under:-

"17. As regards the dispute regarding payment of the maintenance charges, under Clause 16, the responsibility of the developers i.e. MPL and UL to maintain and upkeep the complex was till it is taken over by the association of the allottees or occupies the office spaces in the Millennium Plaza Complex...

19. ... With HAO Act coming into force on 19th April. 2002, in terms of Clause 68 of the Agreement, the responsibility no longer remained with all the developers to maintain the complex.

20. The conclusion of the Arbitrator was that "all the rights and obligations of the parties in respect of the maintenance of the building in question are now governed by the provisions of the CS(OS) No.2071/2015 Page 11 the parties in respect of aforesaid Act and the Rules framed thereunder which supersede the Agreement between the maintenance of the building."

The said conclusion is consistent with the aforementioned Clause 18 of the agreement.

22. Under Clause 16 of the Agreement, once it is clear that with the coming into force of the HAO Act, UL and MPL do not have any responsibility to maintain the premises in question, they cannot insist by the incorporation of a clause in the sale deed mandating that the purchasers, i.e., ISSIPL and LHIPL, must enter into separate maintenance agreements with UL and MPL. While it is true that the agreements to sell envisage insertion of clauses to that effect in the sale deed, the said clauses are inconsistent with the legal position and other clauses of the agreement itself. As pointed out by the learned Arbitrator, the parties are now bound by the terms of the HAO Act and the Rules and that fact may be recorded in

the sale deed. However, this does not preclude the parties entering into separate agreements for maintenance but for the

... Petitioner

s to insist that clause should be incorporated in the sale deed does not appear to be legally permissible. The said claim of the

... Petitioner

s was, therefore, rightly rejected by the learned Arbitrator.

25. The

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s were aware on 26th March 2011 itself that the learned Arbitrator had upheld the

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' objections to his jurisdiction to entertain the

... Petitioner

s' counter-claim' for maintenance charges. That order of the learned Arbitrator, under Section 23 (3) read with Section 16 (2) of the Act, was not challenged under Section 37 of the Act and thus became final. Therefore, in the final Award, apart from noting in para 8 of the Final Award that by the order dated 26th March 2011 the attempts by the

... Petitioner

s to amend their Statement of Defence to include their counter-claims had been negatived, the learned Arbitrator had no occasion to deal with the counter-claims on, merits. Consequently, to permit the

... Petitioner

s to raise such a plea at this stage. this Court declines CS(OS) No.2071/2015 Page 12 26. The other issues that requires to be considered is whether the

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s were obliged to provide two lifts to the executive use of the

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and whether the learned Arbitrator was justified in allowing that claim. Mr. Sharma could not point anything in the impugned Award which is contrary to the clauses of the agreements to sell with each of the

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. Both the agreements make it abundantly clear that the

... Petitioner

s have to provide two exclusive lifts for the use of the

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27. Consequently, this Court finds no error whatsoever in the learned Arbitrator allowing the said claim.

28. No grounds have been made out by the

... Petitioner

s for interference with the impugned Award on any of the grounds in Section 34 of the Act.

29. The petitions are dismissed with costs of Rs. 20,000 which will be paid by the

... Petitioner

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within four weeks from today."

9. The plaintiffs petitions OMP No.895/2014 and OMP No.896/2014 seeking restoration of essential service to their premises were also finally disposed off by the Court vide its order dated 15.07.2015. The relevant paragraphs are reproduced as under:-

"3. Earlier, the learned Arbitrator, by a separate order dated 26th March 2011 dismissed the application of the

... RESPONDENTS

herein under Section 23 (3) of the Act seeking to amend their statement of defence to include counter claims for past, current and future maintenance charges. The learned Arbitrator thus upheld the contention of the

... Petitioner

s herein that the said question of CS(OS) No.2071/2015 Page 13 payment of maintenance charges did not arise with reference to the agreements to sell and was therefore was beyond the scope of his reference. The said order dated 26th March 2011 was not challenged by the

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and thus attained finality.

4. O.M.P. Nos. 314 and 315 of 2013 filed by the

... RESPONDENTS

under Section 34 of the Act challenging the aforementioned Awards dated 5th September 2012 have been today dismissed by the Court by a separate common order. During the pendency of the said petitions, certain interim orders were passed by the Court in the present petitions whereunder an ad hoc amount was to be paid by the

... Petitioner

s to the

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towards arrears of maintenance charges.

5. However, the Court by the order dismissing the Section 34 petitions, has upheld the view of the learned Arbitrator that the issue of maintenance charges is outside the scope of the agreements to sell containing the arbitration clause. In other words, the said issue has been held to be not arbitrable.

6. Consequently, as a logical corollary, the present petitions under Section 9 of the Act which presuppose the existence of an arbitration agreement qua the relief

being sought, are not maintainable.

7. The petitions are, accordingly dismissed. The interim orders passed by this Court stand vacated. However, it is clarified that the amount already paid by the

... Petitioner
s to the

... RESPONDENTS

pursuant to the said orders shall stands adjusted against any claims that may be raised and found payable by one party to the other. The dismissal of these petitions will not preclude the

... Petitioner
s from seeking other appropriate remedies, in relation to the reliefs sought in these petitions, in accordance with law."

10. From the order dated 15.07.2015 in OMP No.895/2014 and OMP No.896/2014, it is apparent that the Court has categorically held that the CS(OS) No.2071/2015 Page 14 issue of maintenance charges is outside the purview of the agreement to sell containing the arbitration clause and, therefore, the said issue held to be not arbitrable. The said finding which has attained finality is binding on the parties and cannot be re-agitated again.

11. It is however argued by learned counsel for the defendants that present suit does not relate to the claim of maintenance charges, but the plaintiffs are seeking declaration of their rights in properties mentioned in plaint. Any claim to rights in the property subject matter of agreement to sell is outside the purview of this Court and only Arbitrator has jurisdiction over the dispute. It is however argued by learned counsel for the plaintiffs that the cause of action in favour of the plaintiffs arose when the defendants denied the plaintiffs their right to enjoy their ownership rights in the Fire Fighting equipment and systems, air conditioning, Electric Sub-station and other facilities and areas of which the plaintiffs are proportionate owners. It is also argued that the defendants cannot restrain the plaintiffs from enjoying their property in the garb of non-payment of maintenance charges.

12. The present suit is filed by the plaintiffs seeking following reliefs in para 53 reproduced as under:-

"CS(OS) No.2071/2015 Page 15 licensees, from interfering with lobbies of franchisees, partners, 53. In light of the above facts and circumstances of the case, the Plaintiffs most humbly pray that this Hon'ble Court may be pleased to:

(a) Pass and pronounce a decree of declaration that the Defendants, their promoters, assigns, relatives, successors-in-interest, representatives, servants, distributors, employees, agents, authorized or nominated agency etc. or anyone associated with them cannot interfere with the Plaintiffs proportionate ownership of the Fire Fighting equipment and systems, air conditioning, elevators and other facilities including covered area, area under periphery walls, columns and walls, area utilized for common use, services and facilities viz. areas covered by and under staircase, by elevators, shafts, passages, corridors and the Millennium Plaza Complex, Sector-27 Gurgaon and/or enjoyment and/or use of the same and/or services/facilities emanating therefrom and the same is illegal; Pass and pronounce a decree of perpetual/mandatory (b) injunction restraining the Defendants, their promoters, assigns, relatives, successors-in-interest, licensees, franchisees, partners, representatives, servants, distributors, employees, agents, authorized or nominated agency etc. or anyone associated with them the Plaintiffs proportionate ownership of the Fire Fighting equipment and systems, air conditioning, elevator and other facilities including covered area, area under periphery walls, columns and walls, area utilized for common use, services and facilities viz. areas covered by and under staircases, by elevators, shafts, passages, corridors and lobbies of the Millennium Plaza Complex, sector- 27 Gurgaon and/or enjoyment and or/use of the same and/or services/facilities emanating therefrom; (c) Pass and pronounce a final money decree in favour of the Plaintiffs and against the Defendants for payment of damages in the sum of Rupees Two Crore and One Lakh and One Thousand or in such higher sum as may be determined by this Honble CS(OS) No.2071/2015 Page 16 Court on account of the Plaintiffs having being deprived of their contractual rights which stood accrued in their favour.

13. From the prayers, it is apparent that the plaintiffs are claiming the declaration that the defendants or their representative etc cannot interfere with the plaintiffs proportionate ownership rights in properties mentioned in detail in suit and herein be called as the property. Although, the plaintiffs have sought a declaration of ownership rights but they have not sought any consequential relief. The case of the plaintiffs is based on the fact that the defendants are interfering in the plaintiffs right to enjoy the property on the grounds that the plaintiffs have not paid the maintenance charges for the upkeep of the property. The plaintiffs are in fact challenging the authority of the defendants to maintain the property on which they claim their ownership rights and challenge the rights of defendants to maintain it and raise the charges for such maintenance and on non-payment denying the plaintiffs their rights to enjoy and maintain the property. The issue thus solely relates to the rights of the defendants to claim maintenance charges in respect of the property.

14. In view of the findings of the learned Arbitrator that the Act and the Rules framed thereunder which supersede the Agreement between the parties in respect of the maintenance of the building, the application has CS(OS) No.2071/2015 Page 17 no merit and is dismissed. The Arbitrator has referred to Haryana Apartment Ownership Act. IA No.14689/2016(by defendants u/s 149 CPC) Vide the present application, the defendants have sought the leave of this Court to pay the requisite Court fee on its counter claim on disposal of its application under Section 8 of Arbitration and Conciliation Act, in the eventuality of the said application being dismissed. In view of the above order by which this Court has dismissed the application of the defendants seeking the reference of dispute to Arbitration, the leave as prayed for is granted to the defendants. The application stands disposed of in these terms. CS(OS)2071/2015 Matter be put up before the concerned roster bench for 20.07.2017. DEEPA SHARMA (JUDGE) JULY17 2017 ss CS(OS) No.2071/2015 Page 18