

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 28th March, 2008

Date of Decision : 4th April, 2008.

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OMP NO.183/2008

M/S EXCLUSIVE MOTORS PVT. LTD.

..... PETITIONER

Through Mr. A.S. Chandiok, Sr. Advocate with Mr. Ravi Gupta,
Mr. Ankit Jain, Ms. Yashodhara and Ms. Benu Sodhi, Advocate.

versus

M/S INDIA TOURISM DEVELOPMENT

..... DEFENDANT

Through Mr. Rajiv Nayyar, Sr. Advocate with Mr. Sushant Kumar,
Mr. Kaustubh Sinha and Ms. Shreya Sharma, Advocate.

CORAM: MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

S. RAVINDRA BHAT, J.

1. In this proceeding, under section 9 of the Arbitration and Conciliation Act, 1996 – (hereafter called the Act), a direction to restrain the respondents with an ad interim order from

taking forcible possession of suit premises, which is a 5248 sq. ft. space situated at the lower ground, located in Hotel Samrat, (hereafter called “ the suit premises”) are claimed. The petitioner also seeks suspension of the operation of a letter dated 8 January 2008 and directions that the respondents, their employees agent etc should carry out necessary repairs for stopping the seepage and leakage of water in various portions of the suit premises.

2. The brief facts necessary for deciding this case are that after negotiations between the parties, the respondent agreed to let out on license basis, the suit premises to the petitioner, for use as a world-class showroom for luxury cars, so as to feed a "high class clientele". The respondent informed the petitioner that its competent authority had approved letting out the area of approximately 5200 sq.ft @ Rs. 50 per square feet, per month, excluding taxes, if applicable and electricity charges. The offer was initially valid for three years but renewable for another three years subject to the condition that the showroom is a "high profit clientele" and of world class standards. The parties entered into an agreement on the 18th of December 2004.

3. The petitioner relies on some of the conditions in the agreement such as Clause 4 which stipulates that the license agreement is renewable by the licensor, namely the respondent on expiry of the period stipulated in clause 3 subject to the showroom being high-profile clientele and world class standard and on existing terms and conditions. The same condition also went further to state that the duration of each extended period would not be for a more than three years

for each such extension and that at the time of each such a renewal or extension, the parties were to execute a fresh license deed, for the premises, licensed, on the same terms and conditions, the licensee had to apply for renewal three calendar months before the expiry of license. Clause 5 stated that at the time of each such renewal, the licensee was to a fresh license deed for the premises and in case the licensee failed secure renewal of the licence for the period, on the expiry of the licensed deed, the licensee was to be considered to be in unauthorized occupation of the space, leaving the licensor with liberty to initiate proceedings under the due process of law. Clause 11 stipulated that during currency of the licence, if the licensee required any structural alterations to the premises including that of its frontage, for purpose of his business, he was to request, in writing, to the licensor to carry out such alterations at the cost of the licensee. The licensor had the absolute right to carry out any external renovation work during the term of the licence period. The licensee, under clause 12, had to get the space organized and carry out the interior decoration of the premises at its cost after getting the plans and overall designs of the finishing, approved by the General Manager of the Hotel.

4. The petitioner has further relied on Clauses 39, 47, 48 and 60 in support of its claim. Clause 39 stipulates that the monthly license fee is Rs. 260,000/- exclusive of taxes, effective for the period 18-02-2004 to 17-02-2007 in advance in monthly instalments on the first of each month through post-dated cheques. The licensee was permitted 90 days renovation period from

the date of possession of the area. Clause 47 stipulated that in case the licensee committed any breach or infringement of any of the terms and conditions of the licence by his act or omission, the licensor had the right to cancel or terminate the licence after giving three months notice; the opinion of the General Manager of the hotel or his nominee was agreed to be final and binding about whether any breach had been committed. Clause 48 stipulated that the licensor and the licensee could terminate the licence agreement by giving three months notice in writing, from either side. In case the licensee terminated or abandoned the licence, prior to the said period of notice, it was liable to pay liquidated damages equal into the licence fee payable to the licensor for the unexpired notice period. Clause 60 stated that in respect where provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 could be invoked by the licensor, in respect of the premises, for which the provisions of that Act were to apply. In respect of any other dispute relating to the terms of their license deed, the matter was to be referred to the sole arbitration of the Vice-President, of the Hotel or any other person appointed by him in that behalf and the award of such arbitrator would be final and binding upon the parties.

5. Pursuant the agreement, physical possession of the premises were handed over to the Petitioner on 22-04-2004. However it is alleged that old furniture, rusted files and other junk materials lying in the space and owned by the respondent were not cleared by it by that time. The latter had assured the petitioner that such material would be removed soon. It is also alleged

that the problem of leakage and seepage of water was not rectified by the respondent nor did it remove LPG gas lines from the space at the time of handing over the possession; it however assured that the LPD gas line pipes would be removed from the premises and also that the leakage and seepage would be repaired. The petitioner claims that on the strength of these assurances it started renovation work, to make the premises into a world class showroom. It engaged the services of international interior designers and also made various commitments with them; it ordered furniture from overseas for importation for its showroom. The petitioner claims to have spent a huge amount of money to make the premises of "world class standard". The petitioner further alleges that immediately after taking over possession of the premises, it realized that the respondent was not co-operating with it in any manner. The petitioner was not provided with adequate electricity load to complete renovation work; for this purpose the petitioner relies upon the electricity bill issued by the respondent upon the petitioner wherein only minimum charges was claimed; similarly the petitioner could use the phone only when the electricity connection was furnished to it and it was made to pay the rent from the date of commencement of business.

6. The petitioner relies upon several letters written to the respondent on 17-05-2004, 28-05-2004, 31-05-2004, 07-06-2004, 11-06-2004; 17-06-2004 and 26-07-2004, whereby it was asked to complete various works. The petitioner further relies upon a letter of the 11-08-2004 of the

respondent requiring it (the petitioner) to stop renovation work, which was immediately complied with. The work was at a standstill for more than seven months, leading to huge losses both financial and as regards its reputation of the petitioner due to the delay. The petitioner claims that suddenly on 04-11-2004 it was asked to vacate the premises without furnishing any reasons. The petitioner protested to various officials of the respondent and engaged in correspondence, with the respondents. It was then revealed that the respondent had not secured the completion plan from the NDMC. The respondent thereafter took up the matter with that agency and later 19-03-2005 permitted the petitioner to resume its renovation work. In the meanwhile the respondent was time and again extending the period of 90 days mentioned in clause 39 of the agreement between the parties. The petitioner further alleges that the problem of leakage was not attended to by the respondent; it was being asked to do so through several representations and written communications including those mentioned in paragraph 18 of the petition. The respondent similarly did not remove the goods and the LPG gas line; The petitioner of several letters to the respondent in this regard.

7. A reference to these is made in Paragraph 19 of the Petition. It is alleged that NDMC stopped the work at site, through the letter dated 30-06-2006. The work was stopped till December 2006. Thereafter the petitioner resumed work of renovation at instructions of the respondent. The electricity load of 85 KW could not be given to it; the petitioner was the

furnished it only on and after 0108-2007; it could start its business thereafter.

8. The petitioner claims to have spent huge amounts of money on renovation of premises so as to make it a world-class showroom and serve high profile clientele. Though the licence fee was payable after renovation of the premises, yet the respondent due to threats of discontinuing the arrangements, charged monthly rents from September 2005. The rent for the period September 2005 to July 2007 was not payable by the petitioner, because during this period renovation work had not been completed and at most times were stopped on the direction of the respondent. The delay was due to acts and omissions on the part of the respondent; however the petitioner under protest kept on paying amounts in order to minimise its losses. The petitioner was forced to pay these amounts for the premises which were in completely dilapidated condition. The premises were entirely raw and comprised old and worn out structures without any proper flooring.

9. The petitioner undertook the entire development work of the premises as well as the common areas around it and for this purpose used imported tiles in the common areas, including the passage. The petitioner alludes to the supplementary agreement between the parties, dated 09-03-2007, amending the original agreement of 18-02-2004 in which the initial period of three years was agreed to commence on 01-04-2005. The petitioner also alleges that the respondent did not remove its goods, connections and pipes completely and that it could not use the total

space of 5248 square feet; it was able to use only 4600 square feet, with effect from 01-08-2007.

It is claimed that the petitioners therefore liable to pay rent only for the area used by it and of the total premises, 600 square feet were never used by it. The petitioner is aggrieved that the respondent not agree for any amended agreement making the lease period for initial three years, effective from first of August 2007, in spite of renewing the arrangement through communication dated 26-12-2007 to the respondent.

10. The petitioner claims to have spent an amount of Rs. 5000/- per square feet as cost of renovation, or Rs. 2.3 crores for the renovation of 4600 sq. feet. It further alleges that the respondent has no right to refuse renewal of the arrangement in terms of the license deed of 18-4-2004. The petitioner is aggrieved by a letter dated 8-1-2008 sent by the respondent, stating that the arrangement would not be renewed. According to the petitioner, the respondent cannot do this, as the only condition for renewal of the liecense arrangement is that the petitioner should have developed a high profile, world class clientale, which it has done. The said letter, it is stated, is illegal and unsustainable in law.

11. Mr. A. S. Chandhoik, learned counsel for the petitioner urged that the court should grant an injunction restraining the respondent from taking any steps towards dispossession of the petitioner, from the premises. It was urged that the phraseology of Clause 4 casts an obligation on the respondent to grant renewal of the license arrangement; the only condition imposed is that

the petitioner should have developed a world class clientele, which stipulation it has fulfilled. It was urged that the condition was agreed to be mandatory for sound reasons. The petitioner was to take sub-standard premises and develop it into quality space, at its expense; once it did so, and created goodwill, the respondent could not withhold the renewal without rhyme or reason.

12. Learned counsel contended that the respondents position about its choice or discretion regarding whether to continue with the arrangement not to continue with it, depended on the petitioners fulfilling its terms. In the facts of the case the petitioner was the victim because the respondent did not fulfil its part of the bargain. The necessary approval from the local authorities were just not available; the premises were in an utter state of disrepair. When renovation work was being carried out, the respondent directed the petitioner to stop it on two occasions. This delayed the effective use of the space for the showroom. Renovation work could be finally taken up and completed only in 2007. The space was actually available only with effect from August 2007. The respondent had assured that the supplemental agreement would be made effective from the actual date ie August 2007 and not with effect from 2005. It has not only resiled from such a commitment but without applying its mind and in an utterly arbitrary manner, asked the petitioner to discontinue the arrangement through the impugned notice.

13. Learned counsel submitted that the petitioner had admittedly given its choice of renewing

the agreement within the stipulated three months. The petitioner had also spent huge amounts, in the range of Rs. 2.3 crores, which is now sought to be taken advantage of by the respondent. The petitioner had developed an exclusive, high profile clientele, in respect of the premises, refurbished it at considerable expense and now the respondents could not have refused renewal.

14. Learned counsel also relied upon the decisions reported as *Pioneer Publicity Corporation –vs- Delhi Transport Corporation* 103 (2003) DLT 442 and *Atlas Interactive (India) Pvt. Ltd –vs- Bharat Sanchar Nigam Ltd.* 126 (2006) DLT 504, where the court, after considering several judgments of the Supreme Court, held that under Section 9 of the Act, the powers of the Court were wide enough to grant reliefs, even in cases involving contracts that were determinable. It was also held that the public bodies awarding the contract were under an obligation to support their actions with reasons; if there were no cogent reasons, the courts were justified in making appropriate interim orders, under Section 9. He also relied upon the decision of the Supreme Court in *Bhatia International-vs- Bulk Trading SA and Anr* 2002 (4) SCC 105, where it was that if a party cannot secure during pendency of the arbitral proceedings, an interim order in respect of the items provided in Section 9, the result may be that the arbitration proceedings may get frustrated; this could never have been the intention of the legislature. He also relied upon another decision of a single judge in *Frankfinn Aviation Services (Pvt) Ltd –vs- BC Gupta* 2007 (IX) AD (Del) 449 in support of the submission that injunctive relief can be granted in

inappropriate commercial cases involving great likelihood of damages the reputation and compensatable injury, for which the provisions in Section 14 and 41 of the Specific Relief Act would not be applicable. Learned counsel also relied upon the decision in *International Trading Co –vs- Union of India* AIR 2002 Del 488 for the submission that a renewal of contractual arrangement should ordinarily be inferred, unless there are overwhelming public policy considerations to the contrary. It was lastly urged, by drawing strength from the decision in *Olex Focas Pvt. Ltd –vs- Skodaexport Company Ltd* 2000 (1) AD 527 that the court's power to grant interim relief even strengthens arbitration proceedings otherwise, in some cases the award may in fact be reduced only to a paper award.

15. Mr. Rajiv Nayyar, Learned senior counsel submitted that this court cannot grant injunction, since the decision not to renew the license has been taken. Whatever be the nature of disputes raised, the petitioner cannot claim an injunction which would resulting in mandating extension of a contract that has lapsed. If the injunction is granted, the court would be directing a contractual relationship, contrary to the intention of one of the parties. He submitted that a Division Bench of this court has ruled, in *India Trade Promotion Organization vs. International Amusement Ltd.* 142(2007) DLT 342 that provisions of the Act cannot be construed as overriding the Public Premises (Eviction of Unauthorized Occupants) Act.

16. It was also contended that the option of renewing or not renewing the license is with the

respondent. Counsel relied on the text of Clauses 4, 50, 59 and 60 and submitted that the discretion to extend the license or deny it is with the licensor, i.e the respondent. Therefore, the petitioner's argument that the owner licensor is bound to grant extension is without basis. It was contended that in any case, the question of eviction and matters covered by the Public Premises Act are not arbitrable; if any other interpretation is given to the agreement, it would render some parts of it redundant, a result which the court should avoid. It was also contended that the nature of injunction sought in this case, cannot be granted due to provisions of the Specific Relief Act; in case the petitioner has any grievance about monetary losses, such disputes can be computed in monetary terms. It was also argued that where a party is enabled to terminate a contract specific relief cannot be granted, and consequently injunction cannot be claimed in law. Counsel submitted that the only exception enacted is Section 42 of the Specific Relief Act and that the present case would not be covered by such exception.

17. From the facts narrated above it is clear that the Petitioner entered into an agreement on 18.12.2004 whereby the Respondent licensed 5248 sq.ft in Hotel Samrat for three years. Later the licence was made effective from 1.4.2005, by a supplementary agreement dated 9.3.2007. Clause 4 enables extension of the licensed arrangement by the licensor if the showroom is of high profile clientele and world class standard on existing terms and conditions. Clause 4 enabled either party to terminate the License Agreement after giving three months notice in writing. The relevant clauses are extracted below

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“4. The Licence agreement is renewable by the Licensor on the expiry of the period stipulated under clause 3 subject to if showroom in high profile clientate and of world class standard, and on existing terms and conditions as before. The duration of each extended period will not be for more than 3 years for each such extension. At the time of each such renewal or extension, the parties, hereto shall execute a fresh Licence Deed in respect of the premises given on license on the same terms and conditions. The Licensee will apply for the renewal of his licence 3 (three) calendar months before expiry of the licence and on failure to do so, the licensor will be free to negotiate with any other party to allot the space. It is also clearly understood by and between the parties that the licensor will exercise the sole discretion with regard to the renewal of the licence and also the terms and conditions of the renewed licence and the Licensor’s decision in this regard shall be final and binding on the licensee.

5. At the time of each such renewal, the licensee shall execute a fresh Licence Deed in respect of the premises given on licence to it. In case the Licensee fails to get the licence renewed for the period coming into effect from the expiry of this Licence Deed, the Licensee shall be considered to be in unauthorized occupation of the Licensed Space and the Licensor shall be within its right to initiate proceedings under the due process of law.

49. On termination of the licence, the licensee shall have no right under the licence and shall further have no right to enter the premises of the Hotel as a licensee. The licensee shall remove his articles goods from the licensed premises within such period as may be informed by the licensor and in case the licensee does not remove his articles and goods, the same shall be removed by the licensor at the risk and cost of the licensee and the licensee shall have no claim whatsoever on this account against the licensor. The licensor shall, however, have lien over the goods and the articles and the licensee shall not be allowed to remove the same unless all the dues of the licensor have been paid by the licensee. The licensor also reserve the right to auction the materials & goods of the licensee if the licensee does not remove the goods and articles within a reasonable time after clearing all outstanding dues. In such an event, the licensor shall adjust the auction

proceeds with the amount due and return the balance to the licensee.

50. *Upon the expiry of the period of this licence or earlier termination of the licence for any cause whatsoever, the licensee shall have no right to carry on business at the said licensed premises. The licensor shall have undisputed right to make use of the said licensed premises at his discretion thereafter. It will be lawful for the licensor without notice to enter upon the licensed premises after the termination/expiry of the licence.*

59. *The performance of the licensee shall be of a standard as befits a Hotel of repute and in keeping with the standards desired by the customers from such a Hotel. If and when complaints regarding inadequate performance/services of the licensee or complainants on any other count are received by the licensor, the same shall be communicated to the licensee with advise to improve the performance. If the performance of the licensee still continues to be below the desired standards the same shall be considered a violation of the terms of this agreement and the licensor shall be at liberty to terminate the contract.*

60. *In respect where provision of Public Premises (Eviction of Unauthorised Occupants) Act, 1971 can be invoked by the Licensor in respect of the licensed premises the provisions of the said Act shall apply. In respect of any other dispute or difference relating to the terms of his licence deed, the matter shall be referred to the sole arbitration of the vice President (Hotels) or any other person appointed by him on his behalf. The award given by the arbitrator shall be binding upon the parties. It is specifically agreed by the licensees that it will have no objection to any such appointment that the arbitrator so appointed in an employee of the licensor or he has already expressed view on, for or nay of the matters in dispute or difference. The arbitrator so appointed shall have power to extend the time for making an award. Save as above, the said Arbitrator shall act under provisions of the Arbitration and Conciliation Act, 1996. Subject to above, only Delhi Courts will have jurisdiction."*

18. It is not in dispute that the Petitioner sent a notice for extension of the licence requesting the continuation of the arrangement for a further period. Its grievance today is the letter dated 8.1.2008 whereby the Respondent has declined to continue with the arrangement or renew the

licence. The Petitioner seeks interim relief pending invocation of the arbitration clause, and alleging that the Respondent's conduct has been blame-worthy for the entire duration of the licence. According to it the Respondent defaulted many times and did not ensure that the premises, on a commercially usable basis was handed over. Besides the Petitioner has spent a colossal amount of money. In the circumstances, the refusal to renew is characterized as arbitrary and illegal. The argument is founded on two decisions of the Court in *Pioneer Publicity Corporation vs. Delhi Transport Corporation* 103 (2003) DLT 442 and *Atlas Interactive (India) Pvt. Ltd-vs- Bharat Sanchar Nigam Ltd.* 126 (2006) DLT 504, where some observations were made that even in cases involving contracts that are determinable if the public bodies do not disclose any reasonable basis for their action, the Court can direct relief under Section 9 of the Act. It is alleged that unless the interim relief is granted, the entire purpose of the arbitral proceedings would be defeated. The rulings in *Bhatia International-vs-Bulk Trading SA and Anr* 2002(4) SCC 105, and *Frankfinn Aviation Services (Pvt) Ltd – vs- BC Gupta* 2007 (IX) AD (Del) 449 are relied upon for this purpose.

19. A close reading of the license agreement would show that the power to renew the relationship is with the licensor. Now this is not a case where the license arrangement had been terminated; undeniably it ended on the date agreed upon by the parties. In the circumstances, the question is whether this Court can mandate continuation of an arrangement which admittedly

lapsed. That public bodies or agencies are under a duty to act within the bounds, cannot be disputed any longer. However, in the realm of contractual relationships the question which the Court has to focus upon (in a case like this) is whether an interim order mandating entering into a fresh relationship after the existing contract or agreement has ended can be granted. The answer surely would be in the negative. It is one thing to assert that the determination of a contract, during its subsistence is illegal and that the Court should equitably protect the aggrieved party, in regard to its property or assets or even investments. However, the principles of contract formation would be given go-bye if one party is compelled through interpretive determination by the Court to enter into a fresh contract – in this case clause 5 of the contract states that renewal would have to be followed with execution of fresh licence deed. That is precisely what the Petitioner is inviting this Court to do; it cannot be done in the circumstances of this case.

20. As far as the question whether in respect of a contract or transaction which is determinable in terms, the relief of injunction is available, there can be no two opinion on the issue. *Indian Oil Corporation –vs- Amritsar Gas* 1991 (1) SCC 533 and *Hindustan Petroleum Corporation Ltd. Vs. Shri Srinam Narain* AIR 2002 SC 2598 are two clear authorities of the Supreme Court, on the issue that where contracts are determinable, the court cannot grant specific performance and therefore also cannot grant injunction. The latter case is

also authority on the point that correctness of an order of revocation or determination can be considered at the stage of interim injunction only for the limited purpose of ascertaining whether there is *prima facie* case in favour of the plaintiff/petitioner and not for determination of the question finally. The decision of *Amritsar Gas* was followed in two Division Bench judgments in *Rajasthan Breweries Ltd –vs- Stroh Brewery Company* AIR 2000 Del 450 and *North Eastern Handloom and Handicraft –vs- Sports Station Ltd* (FAO(OS) 127/2007; Decided on 09.07.2007). This court held that an agreement inherently and intrinsically terminable in nature cannot be specifically enforced and only an action for damages lies where a party complains unlawful termination.

21. Here, though the respondent is a public agency, the freedom of choice of entering into contract, renewing or denying renewal cannot be denied to it. The agreement, though entered into in December, 2004, was made effective from 31-3-2005 through a supplementary deed executed between parties in 2007. Neither clause 4 nor Clause 5, in the opinion of the court disclose *prima facie*, that the respondent had to necessarily renew the license, so that an interim injunction of the kind sought here should be granted. The court is unable to *prima facie*, discern any obligation or compulsion on the respondent to renew the license merely because the petitioner built a “high profile” clientele of “world class standard”; certainly that would be a

consideration for the licensor to take into account when deciding whether or not to renew the license; but the clause in the agreement does not suggest that it is the only consideration.

22. There is another reason why the court is unable to accept the contention of the petitioner.

Facially, the license agreement stipulates that if the license is not renewed, the occupier would have no right to continue; Clause 60 also states that arbitration is not available, where the matter falls within the jurisdiction of the authorities constituted under the Public Premises (Eviction of Unauthorized Occupants) Act. That part of the contract cannot be ignored and must be read as a limitation on the arbitration agreement; to ignore it would be to ignore giving effect to what was agreed to by the parties. The cause of action to seek vacant possession would be squarely within the domain of the officer under that Act. Any order made in this proceeding would impinge on the independent statutory power of such an Officer, which is impermissible. This position is also reinforced by Section 15 of that Act, which bars jurisdiction of civil courts. This conclusion is supported by the decision of a Division Bench of this court, in *India Trade Promotion Organization* where it was held, in a similar case that such condition should be read harmoniously and that matters that can be made subject matter under the Public Premises Act and decided there cannot be subject to the order to be passed in arbitral proceedings. The jurisdiction of the former is exclusive.

23. For the above reasons, this court is of the opinion the claim for interim measures under Section 9 has not been made out by the present petitioner. The petition, OMP 183/2008, therefore, fails and is dismissed, without order as to costs. Order dasti.

APRIL 4, 2008

(S. RAVINDRA BHAT)

JUDGE