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

+ Date of Decision: 29.09.2011

% ARB.P. 33/2011

MARUTI SUZUKI INDIA LTD Petitioner
Through: Mr. T.K. Ganju, Senior Advocate
with Mr. S.K. Chaudhary and
Mr.A.K. Thakur, Advocates.

versus

INDIA TOURISM DEVELOPMENT
CORPORATION LTD Respondent
Through: Mr. C.M. Oberoi and Ms. Surekha
Raman, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may
be allowed to see the judgment? : **No**
2. To be referred to Reporter or not? : **Yes**
3. Whether the judgment should be reported
in the Digest? : **Yes**

VIPIN SANGHI, J. (Oral)

I.A. Nos. 9273-74/2011 & Arb.P. No. 33/2011

1. I.A. No. 9273/2011 has been preferred by the respondent ITDC for recall of the order dated 23.05.2011 passed by this Court, whereby the aforesaid arbitration petition preferred under Section 11 of the Act was disposed of with the appointment of the second Arbitrator by this Court. I.A. No. 9274/2011 has been preferred to seek stay/suspension

of the order dated 23.05.2011. Upon issuance of notice the petitioner has filed its reply to I.A. No. 9274/2011.

2. Before I proceed to deal with these applications, I consider it appropriate to set out the factual background in which this petition was preferred by the petitioner. The petitioner MSIL had obtained a sub-lease of an industrial property from the respondent for the purpose of running a workshop. The tenure of the sub-lease executed on 19.02.2002 was from 01.02.2002 up to 31.01.2011. The lease itself provided for a further tenure of nine years from 01.02.2011 to 31.01.2020, subject to enhancement of rent @ 20% per three years. The arbitration agreement is contained in the sub-lease agreement dated 01.06.2000.

3. The case of the petitioner is that with the consent of the respondent, the petitioner had invested a huge amount of money in the development of the property. The respondent issued a notice dated 14.06.2010 purporting to terminate the petitioner's tenancy with the expiry of the calendar month on 30.06.2010. The case of the petitioner is that the respondent could not have terminated the sub-lease as there was no breach of any term thereof by the petitioner. It is the case of the petitioner that the petitioner invoked the arbitration agreement by nominating Mr. Justice J.K. Mehra (Retd.) as one of the

nominees, and called upon the respondent to nominate the second Arbitrator vide a notice dated 29.06.2010. According to the petitioner the issues/disputes which arose for determination by the Arbitral Tribunal were:

- “(i) Whether the petitioner has violated any terms of the sub-lease agreement dated 19.02.2002.
- (ii) Whether the MSIL has taken prior approval from ITDC to construct the model workshop at C-119, Naraina Industrial Area Phase-I, New Delhi by demolishing of the then existing workshop structure in phased manner?
- (iii) Whether the notice dated 14.06.2010 for termination of the sub-lease agreement dated 19.02.2002 is valid, void and against the terms and conditions of the sub-lease agreement dated 19.02.2002 executed between ITDC and MSIL, therefore, unenforceable?
- (iv) Whether the ITDC has violated the terms of sub-lease dated 19.02.2002 and MSIL has suffered losses and harassment due to the same, whereby ITDC is liable to compensate MSIL for all such losses, harassment and litigation expenses, and if yes, what extent.”

4. The petitioner also sought to raised the dispute:

- “(v) Whether in terms of the Sub-Lease Agreement dated 19.02.2002 and after having spent huge amount to the extent of more than Rs.16.00 crores on

construction of the Model Workshop with the permission and consent of the respondent, the petitioner has the vested right to continue/extension of the lease up to 31.01.2020.”

5. The case of the petitioner is that the respondent, instead of appointing the second Arbitrator invoked the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (Public Premises Act for short) who issued a show-cause notice under the said Act to the petitioner returnable on 15.07.2010. The petitioner submits that in view of the said development the petitioner preferred W.P.(C.) No. 5011/2010 before this Court, inter alia, to seek a writ of certiorari quashing the termination notice dated 14.06.2010. The petitioner also sought the quashing of the proceedings initiated under the Public Premises Act with the issuance of the show-cause notice under Section 4 of the said Act. The said writ petition is still pending consideration.

6. Notice had been issued to the respondent in the present petition vide order dated 08.02.2011, returnable on 23.05.2011. On 23.05.2011, despite notice being served, the respondent had failed to appear. Consequently, the Court proceeded to allow the arbitration petition. Under the arbitration agreement, the parties agreed to the constitution of a 3-member Tribunal to resolve their disputes. Since the petitioner had already nominated one Arbitrator, the Court

proceeded to nominate the second Arbitrator, and left it to the two learned Arbitrators to nominate the Presiding Arbitrator.

7. The reason disclosed by the respondent to seek recall of the order dated 23.05.2011 is that the notice on the arbitration petition was served on the respondent at about 04:00 P.M. on Friday the 20th May, 2011. It is stated that 21st & 22nd May, 2011 were Saturday & Sunday respectively and were holidays and consequently, the office of the respondent was closed. 23.05.2011 was the immediately first working day thereafter. By the time the respondent could take action on the Court Notice served on 20.05.2011, the matter had been taken up and concluded by this Court on 23.05.2011 itself. It is also stated that the petitioner had preferred W.P.(C.) No. 5011/2010 to challenge the notice of termination of the lease which is also pending. The respondent submits that it has a substantive defence to the petition inasmuch, as, the arbitration agreement was subject to the provisions of the Public Premises Act and the issues sought to be raised by the petitioner before the Arbitral Tribunal were clearly beyond the jurisdiction of the Tribunal, as they fall exclusively within the jurisdiction of the Estate Officer appointed under the Public Premises Act.

8. The petitioner does not dispute the position with regard to the

service of notice on the respondent on 20.05.2011. Learned senior counsel for the petitioner has, in fact, advanced his arguments on merits to defend the orders passed by this Court on 23.05.2011.

9. Looking to the fact that the respondent was served with the Court Notice on 20.05.2011, which was a Friday at 04:00 P.M., as also the fact that 21st & 22nd May 2011 were holidays being Saturday & Sunday respectively, the non-appearance of the respondent on 23.05.2011, in my view, is sufficiently explained. Therefore, the respondent is entitled to be heard on the merits of the petition.

10. Mr. Ganju submits that under the arbitration agreement entered into between the parties all issues, disputes & differences between the parties are referable to arbitration. He submits that the Estate Officer appointed under the Public Premises Act, in any event, cannot grant the relief of specific performance sought by the petitioner requiring the respondent to renew the sub-lease in terms of the sub-lease dated 19.02.2002 in question. Mr. Ganju submits that, at the highest, what could be said is that the arbitration agreement in question provides for excepted matters, which are carved out from the scope of arbitration. He submits that the issue as to whether, or not, there are any excepted matters and the issue with regard to the scope of the arbitration agreement, can only be determined by the Arbitral Tribunal

and not by this Court in proceedings under Section 11 of the Act. He places heavy reliance on the decision of the Supreme Court in ***National Insurance Co. Ltd. Vs. Boghara Polyfab (P) Ltd.***, (2009) 1 SCC 267, and in particular to para 22 thereof, which reads as follows:

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co v. Patel Engineering Ltd., (2005) 8 SCC 618. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1 The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3 The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

(emphasis supplied)

11. He submits that, therefore, the issue whether the claim or any part thereof falls within the arbitration clause or not should not be determined by this Court but be left to be determined by the Arbitral Tribunal. He also relies upon a decision of this Court in ***M/s Oriental Building & Furnishing Co. Ltd. V. Union of India***, AIR 1981 Delhi 293. In this case, this Court had held that where in an lease of public premises the parties have provided for an arbitration agreement to resolve their disputes, the provisions of the Public Premises Act do not bar the arbitration. He submits that this Court has taken the view that

merely because proceedings under the Public Premises Act had been initiated in respect of the public premises, the dispute/issue whether the leasee can be evicted during the period of the lease would be referable to arbitration.

12. On the other hand, the submission of Mr. C.M. Oberoi, learned counsel for the respondent is that the petitioner having filed the writ petition before this Court, inter alia, to challenge the legality of the notice dated 14.06.2010, it has waived its right to seek resolution of the said dispute through arbitration. He further submits that Clauses 14 & 17 of the sub-lease deed in question are clear and they provide that the provisions of the Public Premises Act shall be applicable to the agreement. The agreement specifically provides that disputes & differences, decision whereof is expressly provided for, or to which Public Premises Act is applicable shall not be referred to arbitration. He submits that the issue whether or not the petitioner has become an unauthorized occupant upon the termination of the lease vide a notice dated 14.06.2010 squarely falls for determination by the Estate Officer. The said issue cannot be determined by any other authority, including the Arbitral Tribunal. Mr. Oberoi submits that the respondent had rejected the petitioner's request for invocation of the arbitration agreement on 28.07.2010 by clearly stating that the dispute regarding termination of the sub-lease agreement vide notice dated 14.06.2010

was outside the purview of the arbitration clause and that the matter was pending before the Estate Officer under the Public Premises Act. He submits that the petitioner deliberately suppressed the said letter from this Court. Mr. Oberoi submits by reference to the judgment of the Supreme Court in ***SBP & Co. Vs. Patel Engineering Ltd., (2005) 8 SCC 618***, that it is only in cases where the Arbitral Tribunal has been constituted by parties, without recourse to Section 11(6) of the Act, that the Arbitral Tribunal would have the jurisdiction to decide all matters as contemplated by Section 16 of the Act. It is argued that the question of renewal or specific performance of the sub-lease agreement cannot arise unless and until the primary issue with regard to termination of the sub-lease by the respondent vide notice dated 14.06.2010 is first adjudicated.

13. In his rejoinder, Mr. Ganju submits that the petitioner is willing to make a statement that the petitioner would give up its relief prayed for in the writ petition to seek the quashing of the termination notice dated 14.06.2010 if the matters are referred to arbitration.

14. The Clauses 14 & 17 of the sub-lease deed in question are relevant, and read as follows:

“14. The Provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the Rules

framed thereunder which are now in force or which may hereafter come into force shall be applicable for all matters provided in this Agreement.”

“17. **All disputes and differences arising out or in any way touching or concerning this sub-lease Agreement except those** the decision whereof its otherwise herein before expressly provided for or **to which the Public Premises (Eviction of Unauthorised Occupants) Act and the Rules framed thereunder which are now in force or which may hereafter come into force are applicable shall be referred to a tribunal of three arbitrators one to be appointed by the Lessee and the second by the sub-lessee and third by both arbitrators in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any statutory modification or re-enactment thereof shall apply to such arbitration.** The award of the Arbitrator so appointed shall be final and binding on both parties. The Arbitration & Conciliation Act, 1996 and the amendments made therein from time to time shall be applicable. The venue of Arbitration shall be at Delhi. The Rules and Procedures of Indian Council of Arbitration shall apply to the arbitration proceedings.” (emphasis supplied).

15. The Public Premises Act applies to public premises as defined in Section 2 (e) of the said Act. It is well-settled that the determination of

the issues : Whether a premises is a public premises or not; whether the occupant is an unauthorized occupant or not – which depends on the determination of the issue whether the termination/expiry of the lease/ license is valid and effective or not, and; to what amount of damages, if any, the owner is entitled to, are all issues which are required to be determined under the Public Premises Act in respect of public premises as defined in Section 2(e) of the said Act. Under Section 15 of the Public Premises Act there is a clear bar of jurisdiction of any Court to entertain any suit or proceeding in respect of, inter alia, eviction of any person who is an unauthorized occupant of any public premises, etc.

16. In the present case, unlike the case dealt with by this Court in ***Oriental Building & Furnishing Co. Ltd.*** (supra) the arbitration agreement in explicit terms carves out from the scope of arbitration, the decision of disputes and differences to which the Public Premises Act and the Rules framed thereunder apply. Consequently, there is absolutely no overlap of jurisdiction of the Arbitral Tribunal that may be constituted under Clause 17 of the sub-lease, and of the Estate Officer appointed under the Public Premises Act. Those disputes which fall for determination within the jurisdiction of the Estate Officer appointed under the Public Premises Act certainly cannot be referred for determination by the Arbitral Tribunal.

17. I may refer to the decision of the Division Bench of this Court in ***India Trade Promotion Organisation V. International Amusement Limited***, 142 (2007) DLT 342 (DB). The Division Bench in this decision has observed as follows:-

“37. Section 15 read with Sections 5 and 7 of the PP Act confers exclusive jurisdiction on the Estate Officer appointed under Section 3 of the aforesaid Act to deal with the applications under Sections 5 and 7. Section 15 of the PP Act bars and prohibits any Court from entertaining any suit or proceeding for eviction etc. as provided under Clauses (a) to (e) therein. The general power of the Court under Section 9 of the Code of Civil Procedure, 1908 to entertain suit or proceedings is therefore ousted if a dispute raised falls in Clauses (a) to (e) of the aforesaid Section. Sections 5 and 7 of the PP Act empowers an Estate Officer appointed under Section 3 to deal with applications for eviction of unauthorised occupants and applications for payment of rent and damages in respect of public premises. The Act also prescribes a procedure for filing an appeal by a person aggrieved by an order passed by the Estate Officer under Section 9 of the PP Act. The aforesaid Act is, therefore, a special Act which also prescribes complete procedure for adjudication of proceeding under the PP Act. The said Act is a complete code in itself. **We do not think that proceedings under Sections 5 and 7 of the PP Act can be made subject matter of arbitration. The said enactment is a special legislation, whereby specific powers have been**

conferred on an Estate Officer to adjudicate and decide applications under Section 5 and 7 of the PP Act. Courts have been prohibited and restrained from exercising jurisdiction over matters mentioned in Section 5 and 7 of PP Act in view of Section 15 of the PP Act. Reading of Section 5 and 7 makes it clear that it is the Estate Officer alone who has the sole and exclusive jurisdiction to decide applications under Sections 5 and 7 of the Said Act. The said jurisdiction conferred by the statute cannot by a contract be conferred upon an arbitrator or made subject matter of reference before an arbitrator. PP Act has given exclusive jurisdiction to an Estate Officer, who alone has authority to determine the specified disputes and matters and, therefore, these are not matters that can be referred to an Arbitrator. There cannot be waiver of statutory provisions. Contract must be within the legal framework. Parties cannot contract out of the statute. The matters on which an Estate officer has exclusive jurisdiction are not arbitrable and parties by a contract cannot agree to refer matters on which jurisdiction has been conferred and given to Estate Officer. Arbitrability of the claims covered by Sections 5 and 7 of PP Act is therefore excluded. We are fortified in our conclusion by the judgment of the Supreme Court in the case of Ashoka Marketing Limited and Anr. v. Punjab National Bank and Ors., (1990) 4 SCC 406 . In the said case the question arose whether the Rent Control Act which also a special Act will over-ride the

provisions of PP Act. It was held that the PP Act is a special statute relating to eviction of unauthorised occupants from public premises and will prevail over Delhi Rent Control legislation which is intended to deal with the general relationship of landlords and tenants in respect of premises other than government premises. Rent Control legislation, it was held is also a special statute but was enacted earlier in point of time. However, both enactments are special statutes in relation to the matters dealt with therein and in such circumstances, it is the objective and purpose behind the two enactments, that determines which enactment will apply and given preference.

The purpose and objective underlying the two Acts and intentment are conveyed by the language of the relevant provisions. [See: Shri Ram Narain v. The Simla Banking and Industrial Co. Limited 1956 SCR 603]. Applying the said principles in Ashoka Marketing (supra) it has been held that PP Act was enacted to control the rampant unauthorised occupation of public premises by providing machinery for eviction of persons in unauthorised occupation. The said enactment has a public purpose and interest. Special powers in this regard have been conferred under the enactment on the Estate Officer to deal with the problem of unauthorised occupation in premises belonging to government, public companies and corporations controlled and owned by the Central Government. Same reasoning will equally apply to PP Act and Arbitration and Conciliation Act.” (emphasis supplied)

18. The decision relied upon the petitioner in the case of ***Oriental Building and Furnishing Co. Ltd.*** (supra) is of no avail, firstly, in view of the above decision of the Division Bench; secondly, for the reason that the arbitration agreement in the present case expressly excludes from its scope the disputes and differences which fall for determination under the Public Premises Act and the Rules framed thereunder, and; thirdly, for the reason that this Court in a subsequent decision has held that the decision in ***Oriental Building and Furnishing Co. Ltd.*** (supra) is no longer good law in view of the decision of the Supreme Court in ***Ashoka Marketing Ltd. & Anr. v. Punjab National Bank & Ors.***, AIR 1991 SC 855. In this regard, I may refer to the judgment of this Court in ***C.J. International Hotels Ltd. v. NDMC & Ors.***, ILR (1991) I DELHI 321.

19. The primary issue which arises for determination in the facts of the present case is whether the termination of the petitioner's sub-lease vide notice dated 14.06.2010 is valid or not. To determine the said issue, it would be necessary to determine the issue whether the petitioner has breached the terms of the sub-lease deed, which appears to be the ground for termination of the said sub-lease deed. The defence that the petitioner may raise to the said termination founded upon equity or estoppel, or on any other ground, would also require to be determined. These issues can be determined only by the

Estate Officer under the Public Premises Act, and by no other authority- including by the Arbitral Tribunal.

20. I may also refer to the decision of a learned Single Judge of this Court in ***Exclusive Motors Private Ltd V. ITDC***, reported as *MANU/DE/0834/2009*. This was a petition preferred under Section 9 of the Act. In that case, it appears the arbitration agreement was similarly worded as in the present case. The learned Single Judge dismissed the said petition by observing as follows:

“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 Unauthorised 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, O.M.P. No. 183/2008, therefore, fails and is dismissed, without order as to costs. Order dasti.” (emphasis supplied)

21. The appeal preferred by the petitioner against the above referred order of the learned Single Judge dated 4.4.2008 was dismissed by the Division Bench of this Court vide judgment and order dated 18.8.2008 in FAO(OS) No.190/2008 and the relevant portion of the order of the Division Bench is extracted below:-

“It is then submitted that the question of the petitioner continuing in possession would, in the circumstances of the case, not be a matter for which the Public Premises Act would have to be invoked. We are unable to agree. Clearly the relief sought by the appellant in the application under Section 9 would be a matter that would fall within

the realm of the Public Premises Act. If the ITDC was entitled, in terms of the contract, to terminate the agreement by giving three months notice or retain the discretion not to renew the licence, the net result would be that the occupation by the appellant of the premises in question would be rendered unauthorized. We concur with the view expressed by the learned Single Judge that the issue arising in the petition falls within the realm of the Public Premises Act."

22. The petitioner, *Exclusive Motors Private Ltd.* thereafter preferred an Arbitration Application No.269/2008 under Section 11(6) of the Act. That petition was opposed by ITDC on the ground that the agreement excluded, from the scope of arbitration, disputes which fell for determination under the Public Premises Act. The learned Single Judge, after taking note of the aforesaid decisions of the learned Single Judge in the petition under section 9 of the Act, as well as well as the decision of the Division Bench in the First Appeal, inter alia, observed as follows:

"7. The appointment of the Arbitrator prayed for by the petitioner in the present petition is strongly opposed by Mr.Rajiv Nayyar, learned senior counsel appearing on behalf of the respondent, inter alia, on the ground that the Division Bench of this Court has already held that the dispute raised by the petitioner is not arbitrable because the said dispute has to be decided by the statutory

authority under the provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971. To meet this argument advanced on behalf of the respondent, Mr.Ravi Gupta, learned counsel appearing on behalf of the plaintiff has relied upon Clause 60 in the licence agreement dated 18.12.2004/9.3.2007 and relying upon the same he has contended that the petitioner has raised several disputes in connection with the licence agreement executed between the parties and all those disputes raised by the petitioner according to him cannot be decided under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. It is contended by the learned counsel appearing on behalf of the petitioner that the parties had consciously entered into an agreement that except those disputes which can be decided under Public Premises (Eviction of Unauthorised Occupants) Act, 1971, all other disputes between the parties under the agreement have to be decided by reference to the Sole Arbitrator named in the agreement. Clause 60 in the licence agreement dated 18.12.2004/9.3.2007 is an arbitration clause and the said clause reads as under:-

“60. That in respect where provisions of public premises (eviction of unauthorized occupants) Act, 1971 can be invoked by the licensor in respect of the license premises, the provisions of the said Act shall apply. In respect of any other dispute or difference relating to the terms of this license deed, the matter shall be referred to the sole arbitration of the Vice-President, Hotel or any other person appointed by him in this 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 is an employee of the licensor or has already expressed view on, for or any of the matters in dispute or difference. The arbitrator so appointed shall have power to extend the time for making an award. Same as above the Arbitrator shall act under the provisions of the Arbitration and Conciliation Act, 1996. subject to above only Delhi Courts will have jurisdiction."

8. On a plain reading of above referred Clause-60 contained in the licence agreement dated 18.12.2004/9.3.2007, it may be seen that the parties had entered into an agreement that where provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971 can be invoked, the provisions of the said Act shall apply. However, in respect of any other dispute or differences regarding the terms of the licence deed, the matter was agreed to be referred to the sole arbitration of the Vice President (Hotels) or to any other person appointed by him in this regard.

9. The petitioner in this petition has raised the following disputes:-

"i. That the petitioner is entitled to with-hold the possession of the premises for initial period of three years starting w.e.f. 01.08.2007 and thereafter the petitioner is

entitled for three renewals of this agreement after every three years each.

v. That the petitioner is liable to claim damages from the respondent for the several damages suffered by the petitioner on account of breaches on the part of the respondent for the loss of business, goodwill and reputation.

vi. Petitioner is also entitled for refund of the amount spent by it for carrying out repairs, renovations in the suit premises, which otherwise was the duty and obligation of the respondent corporation.

vii. Issuance of letter dated 08.01.2008 by the respondent corporation is absolutely malafide, illegal and is liable to be quashed.”

10. Having regard to the facts and the circumstances of the case and the submissions made by the counsel for the parties and also having regard to the orders passed by the Division Bench in FAO(OS) No.190/2008, **this Court is of the opinion that the dispute in so far it relates to eviction of the petitioner is concerned, the said dispute is to be decided by the statutory authority under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and the dispute in regard to that is excluded from the purview of arbitration as is so evident from Clause-60 referred hereinabove. The above referred claim Nos. i, ii, iii, iv and vii made by**

the petitioner are in regard to possession of the licensed premises and the said claims are subject matter of provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971. As far as claim Nos. 'v' and 'vi' referred hereinabove are concerned, they relate to alleged damages suffered by the petitioner on account of alleged breach of terms and conditions of licence deed on the part of the respondent and the said claims fall in the category of any other dispute mentioned in Clause-60 referred hereinabove. The claims No.'v' and 'vi' made by the petitioner as referred above have to be decided through the process of arbitration agreed between the parties in the licence agreement dated 18.12.2004/09.3.2007. The claims No.'v' and 'vi' are disputes which do not fall within the domain of the provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

11. The respondents are stated to have already appointed the named Arbitrator, i.e. Vice President (Hotels) as Sole Arbitrator vide its letter dated 27.6.2008 sent to the petitioner in response to its notice dated 9.6.2008. Let the named Arbitrator who has already been appointed should decide claims No.'v' and 'vi' referred above as per law. The petitioner is given liberty to file a quantified claim with regard to alleged damages mentioned in Item Nos.'v' and 'vi' referred above before the learned Arbitrator within three weeks from today. The respondent will be entitled to defend the claim of the petitioner before the learned

Arbitrator with regard to alleged damages." (emphasis supplied)

23. The only issues, from out of the various issues raised by the petitioner, which the Estate Officer cannot determine are: (i) Whether the ITDC has violated the terms of sub-lease dated 19.02.2002 and MSIL has suffered losses and harassment due to the same, whereby ITDC is liable to compensate MSIL for all such losses, harassment and litigation expenses, and if yes, what extent, and; (ii) whether the petitioner, is entitled to enforce its right to seek renewal of the sub-lease deed.

24. According to the petitioner, the termination of the lease vide termination notice dated 14.06.2010, is invalid and ineffectual. Eventually, if it were to be held that the termination notice dated 14.06.2010 was not valid and unenforceable, the petitioner would be entitled to press for its claim to seek renewal of the sub-lease for a further period of nine years. Therefore, the petitioner is not wrong in staking its claim to seek renewal of the sub-lease. If the said claim is not lodged by the petitioner at this stage, even if the termination notice dated 14.06.2010 is eventually held to be invalid and ineffective, the petitioner may be faced with a situation that its claim may become barred by limitation, or it may be accused of not showing

its readiness and willingness to perform its part of the obligation to seek renewal of the sub-lease, and on that basis, denied relief. At the same time, if the termination of the sub-lease vide notice dated 14.06.2010 is eventually held to be good and effective, there would be no question of the petitioner being able to seek the relief of specific performance for renewal of the sub-lease in question.

25. The submission of Mr. Ganju founded upon the decision in **Boghara Polyfab** (supra), though on the face of it attractive, in my view, has no merit. It is well-settled that the judgment of a Court cannot be read as a Statute. It is the ratio of the judgment of the superior Court which is to be culled out and is binding on the Courts. Before reaching para 22.3(i) of the decision in **Boghara Polyfab** (supra), which categorises issues which fall for determination by the Arbitral Tribunal, one has to cross the hurdle contained in para 22.2 (a) of the said judgment. Therefore, it needs to be determined by the Court whether there is a “live” claim which requires to be adjudicated through arbitration at this stage.

26. As I have already noted, the claim of the petitioner to seek specific performance of the sub-lease agreement and thereby to seek renewal thereof from 01.02.2011 onwards would entirely depend upon the determination of the issue whether or not the termination of the

sub-lease vide notice dated 14.06.2010 is valid and has taken effect or not. Unless the said issue is determined by the Estate Officer appointed under the Public Premises Act, who has the exclusive jurisdiction to do so, the claim for specific performance alleged by the petitioner by invoking the arbitration agreement cannot be proceeded with or adjudicated. In that sense the said claim for specific performance alleged by the petitioner is premature and not yet “live”.

27. Even if an arbitral tribunal were to be now constituted to determine the said claim of the petitioner, and the arbitral tribunal were to award the said claim in favour of the petitioner, the said award would be conditional and dependant on the determination of the primary issue as to whether, or not, the termination of the sub lease vide notice dated 14.06.2010 is valid and effectual or not. Therefore, even if the arbitral tribunal were to grant the said claim of the petitioner (for specific performance for renewal of the lease), and subsequently the Estate Officer were to find that the termination notice is legal and has taken effect, the award that the petitioner may obtain from the arbitral tribunal shall be rendered nugatory.

28. Therefore, I am not inclined to agree with the submission of Mr. Ganju that the issue as to whether, or not, the disputes and differences exclusively falling within the domain of the Estate Officer under the

Public Premises Act constitute excepted matters, should be left to be determined by the arbitral tribunal. Adopting such a course of action would amount to snatching away the jurisdiction of the Estate Officer statutorily vested in him under the Public Premises Act. As this issue of jurisdiction of the Arbitral Tribunal has arisen in the present proceedings under Section 11 of the Act, the same can be determined by the Court in view of the judgment of the Supreme Court in **SBP & Co.** (supra). In **Harjit Singh Son of Late Shri Harbans Singh V. DDA through its Vice-Chairman**, MANU/DE/0397/2009, the Division Bench of this Court had held:

“A plain reading of Section 16 of Arbitration and Conciliation Act, 1996 makes it evident that the said statute enable the Arbitral Tribunal to rule on its own jurisdiction. The Act, however, does not exclude the Court from returning a finding on this issue. The decision of the Supreme Court in *S.B.P. and Co. v. Patel Engineering Ltd. and Anr.*; AIR 2006 SC 450, provided that the function of the Court in an application under Section 11 is adjudicatory and not merely ministerial, and as such the Court can determine whether a particular dispute is an excepted matter or not.”

29. There is no grey area in the present case, and it does not require any exercise of interpretation of the contractual terms, or require a trial, to say that disputes and differences which fall in the exclusive

domain of the Estate Officer appointed under the Public Premises Act cannot be referred to arbitration.

30. However, the position is different with regard to the claim/ issue “Whether the ITDC has violated the terms of sub-lease dated 19.02.2002 and MSIL has suffered losses and harassment due to the same, whereby ITDC is liable to compensate MSIL for all such losses, harassment and litigation expenses, and if yes, what extent”. The said claim/issue cannot be determined by the Estate Officer appointed under the Public Premises Act, and falls for determination by the Arbitral Tribunal, provided the alleged violation of the terms of the sub-lease does not pertain to the termination thereof vide notice dated 14.06.2010.

31. Since the problem posed in the present case is a peculiar one, the answer to the same that I can think of, is equally peculiar. The issues sought to be raised by the petitioner for adjudication through arbitration, except the issues with regard to specific performance of the sub lease agreement/relief for renewal thereof, and with regard to alleged violation of the terms of the sub-lease deed dated 19.02.2002 by ITDC/respondent (other than on the ground of termination of the sub-lease vide notice dated 14.06.2010) and the resultant damages, if any, suffered by the petitioner fall within the exclusive domain of the Estate Officer. These two issues cannot be proceeded before him. The

issue/claim for specific performance cannot be determined unless the more fundamental issue: as to whether the petitioner is an unauthorized occupant, or not, and; whether the termination notice dated 14.06.2010 is valid and legal, or not, is first determined conclusively. But the other issue, as aforesaid, can be determined by the Arbitral Tribunal.

32. Consequently, I sustain the order dated 23.05.2011, with the modification that the only issue that the Arbitral Tribunal shall presently determine is: Whether the ITDC has violated the terms of sub-lease dated 19.02.2002 and MSIL has suffered losses and harassment due to the same, whereby ITDC is liable to compensate MSIL for all such losses, harassment and litigation expenses, and if yes, what extent, provided the alleged violation of the sub-lease dated 19.02.2002 by the respondent ITDC is not on account of the termination of the sub-lease vide notice dated 14.06.2010.

33. Once the rest of the issues are determined under the Public Premises Act, it shall be open to the parties to seek reference of other claims/issues to arbitration. In case the petitioner succeeds in its attack to the termination notice dated 14.06.2010 before the Estate Officer appointed under the Public Premises Act, and in case it is held that the petitioner is not an unauthorized occupant liable to be evicted

under the Public Premises Act, the petitioner shall be entitled to seek further orders in this petition.

34. It is ordered accordingly.

SEPTEMBER 29, 2011

'BSR'/SR

VIPIN SANGHI, J