

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No.2027 of 2011**

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1. M/S Reliance Industries Ltd a Company incorporated under the Companies Act, 1956 having its registered Office at Maker Chambers IV, 3<sup>rd</sup> Floor, 222 Nariman Point, Mumbai 400 021 and having Its State Office at Reliance Transconnect Centre, 229, Ekta Complex, Near Sonali Petrol Pump, M.G. Setu Path, Pahari, Patna (Bihar) Pin Code- 800007 through its Constituted Attorney namely, Sh Rajiv Verma, son of Late Niranjana Prasad Verma having Patna Address above. .... Petitioner

Versus

1. Smt. Nilu Rai W/O Dr. Ashok Kumar Rai Kalisthan, P.O. & P.S.- Begusarai, Distt.- Begusarai. ... Respondent

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**Appearance :**

For the Petitioner/s : Mr. Manoj Kumar Ambastha, Advocate

For the Respondent/s : Mr. Md. Waliur Rahman, Advocate

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***CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI***  
**CAV ORDER**

4      06-04-2016      Petitioner/defendant is aggrieved by an order dated 09.12.2010 passed by Sub-Judge, 1<sup>st</sup>, Begusarai in Money Suit No.08 of 2009 whereby and whereunder the learned lower court rejected prayer of the petitioner to refer the matter to arbitrator in accordance with Section 8 of the Arbitration and Conciliation Act 1996.

2. It has been submitted on behalf of the petitioner that 1275 Sq.Ft. (Carpet Area) on the second floor of the building belonging to Respondent/Plaintiff was hired by the petitioner under an agreement (license) dated 01.02.2005 for a period of 9 years 11 months with effect from 1<sup>st</sup> March 2005 to 31<sup>st</sup> January 2015 on the terms and conditions so enumerated therein. It has further been submitted that as per Clause-VI of the license deed, it



has been provided that in the event of any dispute arising by and between the parties, the same shall be amicably resolved by Conciliation and having failed, by way of arbitration wherein provisions of the Arbitration and Conciliation Act, 1996 would be applicable with a further discloser with regard to place of arbitration at Kolkata.

3. It has been submitted on behalf of petitioner that building has been vacated on 31.03.2009. Subsequently thereof, Money Suit No. 08/2009 has been filed at the end of landlord on the ground so enumerated therein asking for reliefs of decree for Rs.2,47,500/- as arrear of rent, cost of the suit, any other relief or reliefs which the plaintiff found entitled for and, accordingly, petitioner/defendant was noticed who appeared and prayed before the learned lower court that in terms of agreement, any kind of dispute having arisen amongst the parties were to be resolved firstly, by conciliation, failing which, through arbitration and during course thereof, there would be applicability of Arbitration and Conciliation Act, 1996, as well as the place of arbitration has also been perceived at Kolkata, therefore, the matter should be referred to arbitrator.

4. The learned lower court had rejected the prayer on wrong and flimsy grounds whereupon the same has been

challenged under present petition.

5. In order to substantiate the plea, it has been submitted on behalf of petitioner that admittedly, house in question was taken on rent and for that, both the parties entered into an agreement. When, both the parties bound themselves with the terms and condition so arrived at, then in that event, the aforesaid terms and conditions has to be followed in same tone and tenor. Filing of Money Suit wherein Rs. Rs 2,47,500/- has been asked for in lieu of arrear of rent has also been advanced in terms of agreement, therefore, Clause-VI thereof, should also have been considered by the learned lower court in the background of the fact that admission of the suit suggests impliedly with regard to acceptability of deed of agreement.

6. Furthermore, it has been submitted that Clause-VI of the deed of agreement directs that any kind of dispute relating to tenancy arising amongst the parties, that means to say, the landlord and tenant which also suggests dispute relating to rent and thereupon, instead of proceeding with the trial, the learned lower court should have followed the gamut of Section-8 of the Arbitration and Conciliation Act,1996 and in likewise manner, should have duly acknowledged the prayer made by the petitioner under Section 8 of the Arbitration and Conciliation Act, 1996.

Furthermore, it has also been submitted that the learned lower court was totally wrong in its finding so much so observing that after 01.02.2007, date of termination of contract as per communication made by the plaintiff with regard thereto, the agreement lost its legal identity. Consequence thereof, Clause-VI of the agreement was not applicable.

7. To explain the misinterpretation by the learned lower court on this score, it has been submitted that when agreement lost its identity as held, then in that event, the agreed quantum of fair rent had also gone when agreement is found exeunt one, then claim of respondent/plaintiff asking for a decree to the tune of Rs. 2,47,500/- as arrear of the rent would not survive as the same has been raised on account of deed of agreement. That means to say, the suit in its present form, on account of aforesaid deficiency is found non maintainable and further, should have been decided as a preliminary issue. Contrary to it, the agreement must be considered to be alive, and once considered so, Clause-VI has to be honoured.

8. In order to buttress such submission, learned counsel for the petitioner referred Annexure-2, the plaint and further submitted that the tenancy in terms of agreement has been accepted by the respondent/plaintiff and so, submitted that finding

of the learned lower court that agreement had ceased to survive on account of vacating the premises has been made under wrong notion.

9. Learned counsel for the petitioner, in support of submission has relied upon the *Hindustan Petroleum Corpn. Ltd., v. M/s. Pinkcity Midway Petroleum* reported in *AIR 2003 SC 2881*, and in the case of *National Agricultural Co-op. Marketing Federation India Ltd. V. Gains Trading Ltd* reported in *AIR 2007 SC 2327*.

10. While refuting the submission made on behalf of petitioner, it has been submitted on behalf of respondents that whatever has been advanced at the end of petitioner happens to be non sustainable in the eye of law as well as on factual position. The Money Suit has been filed for realization of the rent for the period during course of which premises was occupied by the petitioner even after termination of tenancy as per agreement and so, for such continued occupation, rent has been calculated as per last paid rent in terms of agreement. The parties were given an option to intimate adversary regarding their choice to terminate the inter se relationship which, respondent/plaintiff followed and as soon as notice has been served divulging termination of tenancy, then in that event, after expiry of the agreed period, building was

to be vacated wherein petitioner/defendant failed side by side, failed to pay the rent for the aforesaid period, on account thereof, was liable to pay the rent till the day of actual vacation on the basis of last paid rent.

11. Further, elaborating the issue, it has been submitted on behalf of respondent/plaintiff that accepting the last paid rent in terms of tenancy duly acknowledged by a deed of agreement, was made basis for identifying the arrear of the rent although, after receipt of the notice, as enumerated in the deed of agreement itself, the inter se relationship became deplumed and in likewise manner, the relevancy of the document, i.e. deed of agreement.

12. When the deed of agreement lost its legal identity, then in that event, Clause-VI thereof, will not be applicable and as Clause-VI is not applicable, therefore, there would not be application of Section 8 of the Arbitration and Conciliation Act 1996. As such, the learned lower court had rightly held so and rejected the prayer made on behalf of petitioner/defendant.

13. From perusal of Annexure-1, the agreement, it is evident that there happens to be specific discloser therein that in terms of Clause-IV (1) (a), having an option available with regard to termination of agreement, three months notice was required which had already been followed with. That means to say after

expiry of three months as stipulated, the building was to be vacated. Agreement, as per terms and condition was operative only till existence of the tenancy. Once tenancy has been terminated, then, unless the agreement could have guided further more, difficult to accept its application even then thereafter. Though the premises continued under unauthorized occupation of petitioner/defendant. The aforesaid view found plausible at a glance, however, needs thorough consideration.

14. Even, apart from the decisions referred by the learned counsel for the petitioner, recently, in the case of *M/s. Sundaram Finance Ltd v. T. Thankam* reported in *AIR 2015 SC 1303*, over the applicability of Section 8, it has been held as follows:-

11. The position was further explained in *Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums*[AIR 2003 SC 2881]. To quote:

"14. This Court in the case of *P. Anand Gajapathi Raju v. P.V.G. Raju* has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the

existence [pic]of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration."

12. In *Branch Manager, Magma Leasing and Finance Limited and another v. Potluri Madhvilata and another*[(2009) 10 SCC 103 ], the position has been restated holding that no option is left to the court, once the pre-requisite conditions of Section 8 are fully satisfied.

13. The attempt of the trial court and the approach made by the high court in bifurcating the cause of action, is fallacious. It would only lead to delaying and complicating the process. The said issue is also no more res integra. In *Sukanya Holdings (P) Limited v. Jayesh Pandya and another*[(2003)5 SCC 531] at paragraphs-16 and 17, it was held as follows:

"16. The next question which requires consideration is - even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal

and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

14. In *Orix Auto Finance (India) Limited v. Jagminder Singh and another* [(2006)2 SCC 598], referring to public policy, this Court has taken the view that if agreements permit the financier to take possession of the finances vehicles, there is no legal impediment on such possession being taken, unless the contract is held to be unconscionable or opposed to public policy".

15. Once an application in due compliance of Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law - *generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.

Therefore, there happens to be no controversy with regard to applicability of Section 8 of the Act whenever there happens to be presence of Clause in the deed identifying the same.

15. But again the question remains whether, after serving of notice in compliance of Clause-IV(1) (a) of the deed of agreement, the agreement survives after expiry of stipulated period of three months, the intention of the parties whether it should be allowed to be enforceable even thereafter or given a go-by. For better appreciation Clause-IV (1) (a) is incorporated hereinbelow:-

**IV. DETERMINATION OF GRANT OF LICENCE:-**

**(i) PRIOR TERMINATION:**

(a) The Licensee may revoke/terminate this Agreement for any reason whatsoever, by giving to the Licensor three (3) months notice in writing in that behalf, at the address of the Licensee as stated in this Agreement. Whereupon the Licensee shall, on the expiry of the said notice period of three (3) months, be at a liberty to remove itself and all its goods/belongings from the said premises and shall hand over the vacant premises to the Licensor against receipt of the refundable interest-free Security deposit from the Licensor.

16. Clause VI of the deed contains provision of arbitration in following manner:-

**VI. ARBITRATION:-**

In the event of any dispute arising by and between the parties hereto, the same shall be amicably resolved by conciliation, failing which, by arbitration subject to the provisions of the Arbitration and Conciliation Act 1996 at Kolkata.

17. As perceived from rival contentions the first and

foremost question surfaces regarding acceptance of Arbitration Clause, in the background of the fact that inter se relationship under garb of deed of lease/license/agreement found lost, due to its termination. Aforesaid legal intricate issue has been fully explained in **ASHAPURA MINE-CHEM LIMITED V. GUJARAT MINERAL DEVELOPMENT CORPORATION** reported in **(2015) 8 SCC 193** wherein it has been held:-

20. In this context, we find, the reliance placed upon by Mr. Dushyant Dave, learned senior counsel for the appellant on the decisions in Reva Electrical Car Company Private Ltd. [(2012)2 SCC 93], Today Homes and Infrastructure Pvt. Ltd. [(2014)5 SCC 68] and Enercon (India) Limited [(2014)5 SCC 1] fully support the stand of the appellant. The decision in Reva Electrical Car Company Private Ltd. [(2012)2 SCC 93] was a case which arose under Section 11 of the Act. A question was raised on behalf of the respondent in the said case to the effect that with the termination of the MoU itself, the Arbitration Clause would cease to exist. Dealing with the said question, the learned Judge has held as under in paragraphs 54 and 55: (*Reva Electric Car Case* [(2012)2 SCC 93], SCC p.107)

"54. Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, *the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract.* To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates

the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, *it would not be possible to accept the submission of Ms Ahmadi that with the termination of the MoU on 31-12-2007, the arbitration clause would also cease to exist.*

55. As noticed earlier, the disputes that have arisen between the parties clearly relate to the subject-matter of the relationship between the parties which came into existence through the MoU. Clearly, therefore, the disputes raised by the petitioner need to be referred to arbitration. Under the arbitration clause, a reference was to be made that the disputes were to be referred to a single arbitrator. Since the parties have failed to appoint an arbitrator under the agreed procedure, it is necessary for this Court to appoint the arbitrator."

(Emphasis

added)

21. In *Today Homes and Infrastructure Pvt. Ltd.* [(2014)5 SCC 68], this Court approved the statement of law stated by the learned Judge of this Court in *Reva Electrical Car Company Private Ltd.* [(2012)2 SCC 93]. Paragraph 14 can be usefully referred to which reads as under: [ *Today Homes and Infrastructure (P) Ltd. case* [(2014)5 SCC 68]

"14. The same reasoning was adopted by a member of this Bench (S.S. Nijjar, J.), while deciding *Reva Electric Car Co. (P) Ltd. v. Green Mobil*, [(2012)2 SCC 93] wherein the provisions of Section 16(1) in the backdrop of the doctrine of kompetenz kompetenz were considered and it was inter alia held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, *the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the contract.* Reference was made in the said judgment to the provisions of Section 16(1)(b) of

the 1996 Act, which provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void." (emphasis added)

22. Again this very question came up for consideration in *Enercon (India) Limited [(2014)5 SCC 1]* to which one of us (F.M.I Kalifulla, J.) was a party. In the said decision, the nature of transaction between the parties was more or less identical to the facts of this case. The contention raised on behalf of the appellant in that case was that there can be no arbitration agreement in the absence of a concluded contract, that, therefore, there was no question of an arbitration agreement coming into existence and, therefore, there was no scope for referring the dispute for arbitration. As against the above submissions, it was contended on behalf of the respondent in the said decision that even if the existence of the main contract is under dispute, the Court is concerned only with the arbitration agreement, i.e. the arbitration clause and that when once such a Clause is very much present, that would by itself result in the matter being referable for arbitration.

23. In fact, in the said case, the Clause relating to arbitration was found in Clause No.18.1 which provided for an attempt to resolve the dispute, controversy or difference through mutual consultation and if it is not resolved through mutual consultation within 30 days after commencement of discussion, then the parties may refer the dispute, controversy or difference for resolution to an Arbitral Tribunal. Dealing with the said Clause and the arguments raised on behalf of the respective parties, the law has been laid down as under in paragraphs 82 and 83 which are to the following

effect: [Enercon (India) Ltd. Case [(2014)5 SCC 1] SCC pp. 37-38]

"82. Further, the arbitration agreement contained in Clauses 18.1 to 18.3 of IPLA is very widely worded and would include all the disputes, controversies or differences concerning the legal relationship between the parties. It would include the disputes arising in respect of the IPLA with regard to its validity, interpretation, construction, performance, enforcement or its alleged breach. *Whilst interpreting the arbitration agreement and/or the arbitration clause, the court must be conscious of the overarching policy of least intervention by courts or judicial authorities in matters covered by the Indian Arbitration Act, 1996.* In view of the aforesaid, it is not possible for us to accept the submission of Mr Nariman that the arbitration agreement will perish as the IPLA has not been finalised. This is also because the arbitration clause (agreement) is independent of the underlying contract i.e. the IPLA containing the arbitration clause. Section 16 provides that the arbitration clause forming part of a contract shall be treated as an agreement independent of such a contract.

83. *The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract.* The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the national courts would be required to ensure the success of arbitration, *but this would not detract from the*

*legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties."*  
(Emphasis added)

18. As has been held in **ASHAPURA** (supra) case, even after termination of agreement, whenever resolving of dispute through mode of Arbitration is found, that would survive, whereupon, prayer of the petitioner is found legally maintainable.

19. Once, it is found that agreement clause is found enforceable, then in that event, it should be followed up in true spirit. And for that, before coming to scrutinize the terms and condition, the paragraph 29 of the **ASHAPURA** (supra) case is to be taken note of wherein, it has been observed:-

“29. Having thus ascertained the legal position regarding the stand alone agreement relating to arbitration with particular reference to arbitration agreement in a legal transaction between the parties, when we refer to Clause 27 of the MoU, we wish to find out whether the said Clause satisfies the principles set down and applicable to a stand alone Arbitration Agreement. When we refer to Clause 27, we find that in the event of failure of an amicable settlement at the bilateral level relating to a dispute or difference arising between the appellant and the respondent to be reached as contained in Clause 26 of the MoU, then such unresolved dispute or difference concerning or arising from the MoU, its implementation breach or termination whatsoever including any difference or dispute as to the interpretation of any of the terms of the MoU is referable to the sole Arbitrator appointed by the appellant and the respondent. Therefore, irrespective



of the question or as to the fact whether the MoU fructified into a full-fledged agreement, having regard to the non-fulfilment of any of the conditions or failure of compliance of any requirement by either of the parties stipulated in the other Clauses of MoU, specific agreement has been entered into by the appellant and the respondent under Clause 27 to refer such controversies as between the parties to the sole arbitrator by consensus. Therefore, when consensus was not reached as between the parties for making the reference, eventually it will be open for either of the parties to invoke Section 11 of the Act and seek for reference of the dispute for arbitration.”

20. Now coming back to the relevant clause, it is evident that first part of the clause suggests resolving of dispute through conciliation. It is apparent from Annexure-3, petition dated 20.04.2010 filed on behalf of petitioner/defendant that nothing has been disclosed over the same. Furthermore, from the relevant clause, it is manifestly clear that subsequent step is to be taken only after having their steps under conciliation proceeding, disserved. Thus, without having an effort of reconciliation at a first instance would certainly mortise the prayer so made on behalf of petitioner.

21. Furthermore, as is evident the clause is suffering from ambiguity, as neither mode of selection/appointment of arbitrator has been identified, nor parties have been given any sort of liberty option. In the aforesaid eventualities, the proper

recourse whenever will be available to the parties would be asking for nomination of the arbitrator as provided under Section 11 of the Arbitration and Conciliation Act, and in that event, the presence of place will, contrary to whatever been incorporated in the deed, will be properly identified by the court itself in terms of suitability along with quantum of fee to be paid to the arbitrator in proper ratio.

22. This petition is disposed of in terms of observation made hereinbefore.

**(Aditya Kumar Trivedi, J)**

Patna High Court  
April 6<sup>th</sup> 2016  
Perwez/AFR

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