

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**ARBITRATION PETITON NO.36 OF 2016**

Eurocoustic Products Limited .... Petitioner

Vs.

Union of India & Ors. .... Respondents

Mr. Birendra Saraf alongwith Ms. Tanmayee Salekar, Ms. Chhaya Rane i/by M/s Shah & Sanghavi, Advocates for the Petitioner.

Mr. Shrishailya S. Deshmukh a/w S.V. Chaugule, Advocate for respondents no. 2 and 3.

Coram : Smt. R.P. SondurBaldota, J.

Date : 24<sup>th</sup> November, 2016

P.C.

1            This petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (the “Arbitration Act” for short) for appointment of Arbitrator for adjudication of the dispute raised by the petitioner.

2           The petitioner is the Company, incorporated under  
the Companies Act. Respondent no.1 is the Union of India.  
Respondent no.2 is the Collector of Union Territory of Daman

and Respondent no.3 is the Administrator of Union Territory of Daman and Diu.

3           The petitioner had approached the respondents for a plot of land at Daman for setting up an industry for manufacture of air-conditioners, refrigerators etc. By the Lease Deed dtd. 13<sup>th</sup> July, 1982, the petitioner was granted lease of a plot of land admeasuring 1365750 Ha, situate at Kachigam, Daman for a period of 30 years on payment of annual rent of Rs.15,364.15 ps. Clause 15 of the Lease Deed provided that the lease was subject to the provisions of the Goa, Daman and Diu Land Revenue Code, 1968 (“the Land Revenue Code” for short) and the Rules made thereunder. Consequently, the lease rent had been fixed in accordance with the provisions of Goa, Daman and Diu Land Revenue (Disposal of the Government Land) Rules, 1971. The lease deed was signed by the Secretary (Revenue) Government of Goa, Daman and Diu, Panaji for and on behalf of the President of India in exercise of the powers to grant lease provided for at Section 26 of the Land Revenue Code. The lease expired by the efflux of time on 12<sup>th</sup> July, 2012. On such expiry, the petitioner became liable to be summarily evicted from the land by the Collector in the manner provided for under Section 40(2) of the Land Revenue Code i.e. by serving a notice requiring the petitioner to vacate the land within such time as appears reasonable to the Collector. The respondents are yet to take this action against the petitioner.

4           The petitioner, by it's letter dtd. 19<sup>th</sup> August, 2011 requested respondent no.2 to renew the lease for a further period of 30 years. In that letter, the petitioner referred to the sublease of the land to it's sister concerns. It appears that this was done by way of settlement of the disputes between the family members of the promoter of the petitioner. After such settlement, the land in possession of the petitioner is reduced to 96864.88 sq. mtrs. as against 1,13,700 sq. mtrs. Respondent no.2 then issued notice to the petitioner dtd. 11<sup>th</sup> October, 2012 pointing out that the land leased to the petitioner could not have been sub-divided without consent of the respondents. There was further correspondence between the parties in that regard. Ultimately, respondents no. 2 and 3, by the letter dtd. 21<sup>st</sup> March, 2014 informed the petitioner that the administration had agreed to extend the lease for another period of 30 years on payment of lease rent of Rs.1,08,97,299/- per annum (Rs.9,08,108.25 ps. per month). This lease rent was fixed pursuant to the revision in the circle rates for the purpose of lease in respect of the government land from 23<sup>rd</sup> March, 2012 by issue of office order. Subsequently, Notification dtd. 22<sup>nd</sup> July, 2015 is issued thereby amending Goa, Daman & Diu Land Revenue Code (Disposal of Government Land) Rules, 1971 (hereinafter referred to as the "Rules"). The petitioner, by it's letter dtd. 2<sup>nd</sup> April, 2014 accepted the extension of lease of the land but raised a dispute as the lease rent. Thereafter the

petitioner, by its letter dtd. 10<sup>th</sup> June, 2015 addressed to respondent no.3 invoked arbitration as contained in Clause 15 of the Lease Deed and sought appointment of an arbitrator. Respondent no.2, by its reply dtd. 2<sup>nd</sup> May, 2016 contended that the dispute regarding the lease rent to be fixed was not arbitrable and it was not covered by the arbitration clause contained in the Lease Deed dtd. 13<sup>th</sup> July, 1982. According to the respondents, the dispute as regards the rent under the proposed lease was not the outcome of the Lease Deed. Therefore, invocation of the arbitration by the petitioner was misconceived. Thereafter the petitioner filed the present petition on 27<sup>th</sup> June, 2016 under Section 11 of the Arbitration Act for appointment of an Arbitrator.

5           It would be worthwhile to note at this stage the three relevant clauses under the Lease-Deed i.e. clause 8, relating to extension of the Lease-Deed, clause 11 for application of the Land Revenue Code and the arbitration clause at clause 15, the interpretation of which is called for in the petition.

“8     the Lessor on expiry of the period of the lease may in his discretion, renew the lease with respect to the said land for such period and subject to such terms and conditions as agreed upon between the parties hereto.

11    the lease shall be subject to the provisions of the Goa, Daman and Diu Land Revenue Code, 1968 and the Rules made thereunder.

15 In the event of any question in dispute differences arising under or out of or in connection with the conditions herein contained or touching or concerning the meaning or effect thereof, or any matter contained therein or as the rights, duties or liabilities of the parties hereto howsoever in connection with this agreement, the same shall be referred to the Sole Arbitration of a person to be appointed by the Lt. Governor of the Goa, Daman and Diu. ((There will be no objection to any such appointment on the ground that the arbitrator as appointed is a Government servant and that he had to deal with the matter to which this agreement relates or that in the courses of his duties as such Government Servant had expressed his view on all or any of the matters in dispute or difference. The award of arbitrator as appointed shall be final and binding on the parties to this presence subject as aforesaid, the provisions of the Indian Arbitration Act, 1940 for the time-being in force shall apply to the Arbitration proceedings under this clause.”

6 According to the petitioner, refusal by the respondents to appoint an arbitrator is totally erroneous and unsustainable for the following reasons stated at para 17 of the petition :

(i) Clause 15 of the Lease-Deed dated 13<sup>th</sup> July, 1982 is wide enough to extend to all the terms of the said Lease including the renewal clause contained in clause 8 thereof.

(ii) the Renewal Clause being a part of the Lease-Deed and having been agreed to have been exercised by Respondent no.2, there was a dispute only regarding one of its terms and conditions being the lease rental on the renewal, which dispute is necessarily required to be adjudicated by the Arbitrator”.

(iii) The contention of Respondent no.2 for refusing to appoint an Arbitrator on the ground that the Lead period had expired is unsustainable in law as an Arbitration Clause survives beyond the tenure of an Agreement containing it especially if the dispute relates to and arises from a clause provided in the agreement itself and the manner in which such clause is required to be exercised/implemented.

Mr. Saraf, the learned advocate appearing for the petitioner additionally submits that the latest amendment to Section 11 of the Arbitration Act by insertion of Sub-Section 6(A) therein has substantially reduced the scope of enquiry by the court while deciding the application for appointment of an arbitrator and that the enquiry is now confined to “examination of existence of an arbitration agreement alone”. The relevant provisions of Section 11 (6A) of the Arbitration Act reads as under :

11 **Appointment of arbitrators---**

- (1) .....
- (2) .....
- (3) .....
- (4) .....
- (5) .....
- (6) .....

6A The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

7 Respondents no. 2 and 3 have filed their affidavit-in-reply to oppose the petition. They contend that the Lease-Deed dtd. 13<sup>th</sup> July, 1982 relied upon by the petitioner has expired on 13<sup>th</sup> July, 2012 and thereafter there is no renewal till date. Therefore, no dispute can arise under the expired lease agreement for invocation of the arbitration thereunder. Hence, the petition as filed is not maintainable. It is also contended in the reply that there can be no dispute as regards the lease rent payable on renewal of the lease because the agreement itself is subject to the provisions of the Revenue Code and the Rules. With the amendment of the Rules, the revision in the rent automatically becomes applicable to the government land and the same is not a negotiable factor.

8 Mr. Saraf submits that the arbitration agreement contained in the Lease-Deed being a collateral term in the contract, did not come to an end even on expiry of the Lease-Deed. As regards the nature of the arbitration clause forming part of an agreement, Mr. Saraf relies upon decision of the Apex

Court in National Agricultural Coop. Marketing Federation India Limited vs. Gains Trading Limited, reported in (2007) 5 Supreme Court Cases, page 692. The observations of the Apex Court relied upon by Mr. Saraf read as under :

“6. The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract (Vide *Heyman v. Darwins Limited*, *Union of India v. Kishorilal Gupta & Bros.* and *Naihati Jute Mills Ltd., v. Khyaliram Jagannath.*) This position is now statutorily recognised. Sub-section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause”.

9           The second decision relied upon by Mr. Saraf, in support of the same argument also of the Apex court, is in

National Insurance Company Limited vs. Boghara Polylab Private Limited, reported in (2009) 1 Supreme Court Cases, page 267. In this decision, the Apex Court has considered in detail the questions falling for consideration of the Court in an application under Section 11 of the Arbitration Act. Undoubtedly, the decision is of the period prior to the latest amendment to the Arbitration Act. The gist of the observations of the Apex Court in the decision cited are that the arbitration clause is a collateral term of the contract distinguished from its substantive terms, but nonetheless, it is an integral part of it. Howsoever, the comprehensive terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation and the arbitration clause perishes with the contract. The arbitration clause however will survive where the contract comes to an end on account of repudiation, frustration, breach etc. in which cases it is the performance of the contract that has come to an end but the contract is still in existence for certain limited purposes in respect of the dispute arising under it or in connection with it. When the contract subsists for certain purposes, the arbitration clauses in those contract operate in respect of those purposes. It is the argument of Mr. Saraf that though the Lease-Deed has expired by efflux of time, the same subsists for clause 8, which is for renewal of the lease and the arbitration clause will operate for any dispute in respect of that clause.

10           The third decision relied upon by Mr. Saraf also of the Apex Court, is in Booz Allen And Hamilton Inc vs. SBI Home Finance Limited and Others, reported in (2011) 5 Supreme Court Cases, page 532. This decision considers the nature and scope of issues arising for consideration in an application under Section 11 of the Arbitration Act for appointment of an Arbitrator. The Apex Court holds that while considering such an application, the Chief Justice or his designates would not embark upon an examination of the issue of “arbitrability” or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. The three facets of arbitrability noted by the Apex Court in the decision are :

- (i) whether the dispute is capable of adjudication and settlement by arbitration.
- (ii) whether the dispute is covered by the arbitration agreement and
- (iii) whether the parties have referred the dispute to the arbitration.

It has further held that the adjudication of certain disputes is beyond the private fora chosen voluntarily by the parties. Adjudication of a certain category of disputes is reserved by the legislature exclusively for the public fora as a matter of public

policy. Certain other category of cases though not expressly reserved for adjudication by public fora, may by necessary implication stand excluded from the purview of the private fora. The examples of such absolutely non-arbitrable disputes stated therein are :

“(i) the disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody etc.

(iii) guardianship matters,

(iv) insolvency and winding up matters,

(v) testamentary matters and

(vi) eviction or tenancy matters governed by special statutes, where the tenants enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

11 Mr. Deshmukh, the learned counsel appearing for respondents no. 2 and 3 submits per contra that in the facts and circumstances of the case, on expiry of the Lease-Deed, the agreement for arbitration also stood extinguished, as there is no automatic renewal of lease provided therein. He submits that this aspect specifically fell for consideration of the Apex Court and Andhra Pradesh High Court in Delhi Development

Authority vs. M/s Anant Raj Agencies Pvt. Ltd., reported in (2016) SCC OnLine, S.C. Page 308 and Penumalli Sulochana vs. Harish Rawtani, reported in (2013) 5 ALD, page 573 (DB). In both the decisions cited, the courts were considering a clause for extension of lease subject to certain conditions. The Andhra Pradesh High Court rejected the similar argument stating the following reasons :

“13 A perusal of the clause, at the first blush, would given an impression that it covers not only the disputes that arise during the subsistence of lease, but also on expiry thereof. However, if one takes into account, the principles of law that govern a lease, a different view point emerges. The only purpose that a lease deed would serve is that it governs the relationship between a lessor and a lessee as long as the lease subsists. The subsistence of lease under the deed can be up to the specific period mentioned in it. If there exists any provision for extension of lease subject to certain conditions, there is a possibility to construe that the term of the lease, covered by the document, can be extended. Where, however, the term is for fixed time and the parties also understood that the lease does not spillover beyond a date mentioned therein, the relationship between the parties ceases to be governed by the lease deed. Once the lease deed became redundant, any clause contained in it also ceases to be of any relevance to the parties.

14 The expression “after its expiry or early determination thereof employed in clause 32 has a clear and definite purpose to

serve. The intention of the parties can be gathered from the language employed therein. This has to be understood in the context of the circumstances mentioned in the same clause. An early determination of the lease can certainly become the subject-matter of arbitration since the document remains in force till 31.1.2012. The words “after expiry” have to be understood as covering the disputes that arise during the subsistence of the lease, under the document. For instance, if there existed any dispute between the parties as to violation of terms and conditions during the subsistence of the lease, the mere fact that the lease expired by the time the claim was raised or resolved does not taken away them from the purview of arbitration.

16 Therefore, the arbitration clause contained in the lease deed ceases to be of any relevance unless the dispute between the parties it the one that has arisen during the subsistence of the lease. In other words, if the claim of one of the parties is in relation to state of affairs that arose after the expiry of the lease period, the clause would not bar adjudication of the dispute through Courts.”

As regards decision of the Apex Court, the facts of the case before it involved the lease granted by the Delhi Development Authority and the question was whether the clause contained therein for extension of the lease was governed by the arbitration clause. The Lease-Deed in that case was governed by Sections 21 and 22 of the Delhi Development Act and the Rules framed thereunder. The Apex Court noted that Section

21 of the Delhi Development Act empowers the Delhi Development Authority in respect of the disposal of the land in limited circumstances, which includes the lease of land. The power to grant lease includes renewal of lease. Therefore, in the absence of renewal of lease of the property in question, there could not be an automatic renewal.

12 Mr. Deshmukh submits that the facts in the case on hand are much narrower as regards the power for renewal of lease. Section 26 of the Land Revenue Code does not authorise the Collector to renew the lease unlike Section 221 of Delhi Development Act. This would mean that, at the highest, there can be a fresh lease in favour of the petitioner. Therefore, even otherwise, there is no question of an arbitration agreement between the parties in respect of the proposed lease of the land to the petitioner.

13 In the above-noted facts of the case and the submissions advanced, the two questions that need to be answered for deciding the petition are as under :

(i) Whether there exists an arbitration agreement between the parties in respect of the terms and conditions for lease of the land to the petitioner from 13<sup>th</sup> July, 2012.

(ii) What is the scope of enquiry by the court for deciding an application for appointment of arbitrator under the amended Section 11 of the

Arbitration Act, with insertion of Sub-section (6A) therein.

14 As regards the first question of existence of the arbitration agreement between the parties, in my considered opinion, in the facts of the case, the same must be answered in the negative. Undoubtedly as argued by Mr. Saraf, the arbitration clause no.15 in the Lease-Deed is very wide. According to him, it could not have been wider. But the question is whether even with its width, it can embrace the dispute as regards the future Lease-Deed. Mr. Saraf also points out that even after the Lease-Deed stood terminated with efflux of time, the petitioners have continued to occupy the land and have even paid the lease rent at the old rate to the respondents. Further the respondents are yet to take any action for eviction.

15 The facts of the present case are similar to those in the decision of the Apex Court in the case of Delhi Development Authority (supra) cited by Mr. Deshmukh. The Lease-Deed executed in favour of the petitioner was in exercise of the power granted to the Collector under Section 26 of Land Revenue Code. This Section empowers the Collector to grant lease of an un-occupied land to any person for such purpose and on such conditions as he may determine, subject to the Rules made by the government in this behalf. Section 26 further provides that in any such case, the land shall be held only for the period and for the purpose and subject to the conditions so determined.

The fact that the lease was granted under Section 26 was made clear in the Lease-Deed itself, by making it subject to the Land Revenue Code and the Rules. Clause 11 of the Lead-deed makes it, specifically, subject to the provisions of the Land Revenue Code and the Rules made thereunder. Therefore there could be no automatic renewal of the lease in favour of the petitioner. Also there cannot be implied renewal of lease. There must be an agreement duly executed by resorting to the power under Section 26 of the Land Revenue Code. Further Clause 8 of the agreement as worded does not provide for extension of the lease. It creates no rights or obligations whatsoever. It merely records a future possibility that may or may not materialise. Besides its materialisation is completely at the discretion of the respondents. As such this clause has no connection to the agreement of lease reflected in the other clauses of the Lease Deed. Consequently the arbitration clause contained therein cannot extend to clause 8. Any such extension would amount to extension to a non-existent contract of lease or extension to the negotiations for a future contract of lease. Hence, it is inconceivable that the arbitration clause would survive on extinguishment of the Lease-Deed by efflux of time, whether in substantive or collateral form. Admittedly, the dispute desired to be referred to arbitration by the petitioners is not in respect of any of the other clauses in the Lease-Deed. Consequently, it must be held that there is no arbitration agreement between the parties in respect of the dispute as regards the terms and

conditions relating to the lease to be granted to the petitioner for the land for the period 13th July, 2012 onwards.

16           This brings us to the second question as regards the scope of enquiry under the amended Section 11 of the Arbitration Act. Can the enquiry thereunder be a mechanical process of simply finding out, prima facie, existence of a clause in so many letters for arbitration. One clue to this would be in the decision of the Apex Court in SBP & Co. vs. Patel Engineering Limited and another reported in (2005) 8 Supreme Court Cases, page 618, wherein the nature of the power exercised under Section 11 was being considered i.e. whether it is a judicial power or an administrative power. The Seven Judges Bench by it's majority decision, has held that the power is judicial. Can this decision be treated as set at nought by the Legislature by the amendment to Section 11 of the Arbitration Act. In my humble opinion, the answer must be no. No agreement can exist in a void or vacuum. For it to exist as an agreement, there must be an object to be achieved and steps to be taken by the two parties to it, towards achievement of the object. The arbitration agreement is no exception. For it to exist as an agreement, there must be arbitrable dispute between the parties for reference to arbitration. Therefore, an enquiry into existence of arbitration agreement will necessarily include within his fold enquiry into existence of arbitrable dispute to which it is expected to be applied. This must be now

harmonised with the amendment to Section 11 of the Arbitration Act, which need not be very difficult. In view of the amendments, the enquiry into arbitrability of the dispute would be restricted to absolutely non-arbitrable dispute as mentioned by the Apex Court in *Booz Allen case* (supra), i.e. a dispute not capable of adjudication and settlement by arbitration. The well recognised examples of the non-arbitrable disputes mentioned therein are enumerated at paragraph 10 above. There is one more reason to support this view. One of the several aspects considered by the Apex Court in *SBP & Co. case* (supra) was the aspect of the effect of the order on the party against whom the arbitration is invoked. It observed :

“ It is also not correct to say that by the mere constitution of an Arbitral Tribunal, the rights of the parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be the preliminary expenses and his objection is upheld by the Arbitral Tribunal. Therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an Arbitral Tribunal.”

Such effect of the order appointing arbitrator upon the other side when the dispute is absolutely not arbitrable would undoubtedly be relevant, in the public interest.

17           In the case on hand, Mr. Deshmukh points out that the dispute sought to be raised by the petitioner of the quantum of lease-rent payable on renewal of lease is not a negotiable factor. It is fixed statutorily. The rent payable earlier was also fixed under the Rules and rent proposed for renewal is also fixed under the Rules. Therefore, the dispute regarding it is not capable of adjudication and settlement by arbitration.

18           For the reasons stated hereinabove, the petition is dismissed.

(Smt. R.P.SondurBaldota, J.)