

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

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Date of decision: 25th April, 2016

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W.P.(C) No.588/2016

**M/S FORTUNE GRAND MANAGEMENT
PVT. LTD.**

..... Petitioner

Through: Mr. P.S. Bindra, Adv.

Versus

**DELHI TOURISM & TRANSPORT DEVELOPMENT
CORPORATION**

..... Respondent

Through: Mr. R.K. Dhawan & Ms. Richa Dhawan,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the proceeding initiated by the respondent in Petition No.1/2016 titled Delhi Tourism and Transport Development Corporation Vs. M/s Fortune Grand Management Pvt. Ltd. before the Estate Officer under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (PP Act) on the grounds i) that the Agreement dated 16th August, 2013 between the parties provide for resolution of all disputes by reference to Arbitral Tribunal comprising of three Arbitrators with the petitioner and the respondent appointing one Arbitrator each and the third Arbitrator being appointed by the two Arbitrators; ii) that the petitioner prior to initiation of proceedings under the PP Act had already initiated arbitral proceedings by

instituting petitions in this Court under Section 9 and Section 11(6) of the Arbitration and Conciliation Act, 1996 (Arbitration Act) and till the question whether the purported termination of the agreement by the respondent is legal or not, the possession of the petitioner of the premises cannot be said to be unauthorized and two parallel proceedings cannot simultaneously go on; and, iii) that Sh. Piyush Agarwal Estate Officer who has issued the notice is biased / prejudiced having already acted on behalf of the respondent in the dispute with the petitioner by filing a caveat in this Court.

2. The petition came up first for consideration on 27th January, 2016 when the counsel for the respondent appearing on advance notice relied upon ***International Amusement Ltd. Vs. India Trade Promotion Organization*** AIR 2015 SC 749. However on a *prima facie* consideration of the said judgment, the same appeared to be in the context of arbitration clause subject matter of agreement therein and which was found to be materially different from the arbitration clause in the agreement between the parties hereto. Accordingly, the matter was listed for further consideration on 29th January, 2016. On 29th January, 2016, the counsels were heard further on the aspect whether the PP Act would prevail over the arbitration agreement and finding the issue to be a legal one, need for counter affidavit was not felt and judgment was reserved.

The petitioner thereafter applied for stay of proceedings before the Estate Officer and which application came up for consideration on 18th March, 2016 when notice of the same was issued though no stay granted.

3. The bid of the petitioner / its predecessor for renovation, operation, maintenance, marketing, management and transfer of Food Court and Shops in Dilli Haat, Pitampura was accepted and an Agreement dated 16th August, 2013 was signed between the parties and whereunder the respondent granted to the petitioner for a period of 10 years the exclusive right, authority, authorization to plan, operate, allocate, market, maintain and manage the food court, restaurant and shops at Dilli Haat, Pitampura. Clause 18 of the said agreement is as under:

“18. Dispute Resolution

18.1. Dispute resolution

18.1.1. Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “Dispute”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 18.2.

18.1.2. The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly,

equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

18.2. Conciliation

- 18.2.1. In the event of any Dispute between the Parties, either Party may call upon the Chairman of the DTTDC to mediate and assist the Parties in arriving at an amicable settlement thereof. If the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 18.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 18.3.

18.3. Arbitration

- 18.3.1. Any Dispute which is not resolved amicably by conciliation, as provided in Clause 18.2, shall be decided by reference to Arbitral Tribunal appointed in accordance with Clause 18.3.2. Arbitration shall be held in accordance with the provisions of Arbitration and Conciliation Act, 1996. The venue of arbitration shall be Delhi, and the language of arbitration proceedings shall be English.
- 18.3.2. The Arbitral Tribunal shall consist of three arbitrators. Each Party shall appoint one arbitrator, and the third arbitrator shall be appointed by the two arbitrators so appointed and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Arbitration and Conciliation Act, 1996.

18.3.3. The arbitrators shall make a reasoned award (the “Award”). Any Award made in any arbitration held pursuant to this Article 18 shall be final and binding on the Parties as from the date it is made, and the Operator and the DTTDC agree and undertake to carry out such Award without delay.

18.3.4. The Operator and the DTTDC agree that an Award may be enforced against the Operator and / or the DTTDC, as the case may be, and their respective assets wherever situated.

18.3.5. This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.”

4. Disputes and differences arose between the parties on 28th September, 2015. The respondent issued a show cause notice to the petitioner. The petitioner besides replying to the show cause notice also requested the respondent to resolve the disputes in terms of Clause 18 of the Agreement. However the respondent vide letter dated 3rd December, 2015 terminated the Agreement.

5. The petitioner filed O.M.P. (I) (COMM.) No.59/2015 supra under Section 9 of the Arbitration Act seeking stay of the notice dated 3rd December, 2015 and to restrain the respondent from interfering with the peaceful use and occupation of the petitioner of the aforesaid project facility. Vide order dated 11th December, 2014 therein a Commissioner was appointed to inspect the

project facility and to put locks over the same and to submit the keys along with report to the Court.

6. The respondent acting through Mr. Piyush Agarwal aforesaid filed a caveat in this Court with respect to any writ petition to be filed by the petitioner.

7. The petitioner however filed Arbitration Petition No.47/2016 under Section 11(6) of the Arbitration Act for appointment of an Arbitrator in accordance with the arbitration Agreement between the parties.

8. The respondent on its part initiated the proceedings under the PP Act.

9. The first question to be considered is whether the initiation by the respondent of the proceedings under the PP Act is bad for the reason of the respondent, in the Agreement with the petitioner, having agreed upon resolution of all disputes by reference to Arbitral Tribunal in accordance with the Arbitration Act.

10. According to the counsel for the respondent, the question is no longer *res integra* in view of the dicta in ***International Amusement Ltd.*** supra. Undoubtedly, the Supreme Court therein also was concerned with the maintainability of proceedings under the PP Act in the light of the arbitration clause in the Agreement between the parties in that case. There also, while the

India Trade Promotion Organization (ITPO) had commenced proceedings under the PP Act, International Amusement Ltd. had commenced proceedings under the Arbitration Act and filed an application under Section 8 of the Arbitration Act before the Estate Officer which was rejected and impugning which a writ petition was filed before this Court. Also, since the nominee of the Chief Justice had also appointed an Arbitrator in exercise of powers under Section 11(6) of the Arbitration Act, another writ petition against the said order was filed by the ITPO. This Court held that the matters enumerated under Section 15 of the PP Act cannot be referred to arbitration for adjudication by Arbitrator. Supreme Court, on an interpretation of the following clauses of the agreement in that case:

“27. The licensed premises are public premises as defined in the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and fall within the jurisdiction of the Estate Officer, Pragati Maidan.

28. In case of any dispute arising out of or in connection with this agreement the disputes shall be referred to the sole arbitration of the Chairman, India Trade Promotion Organisation or his nominee whose decision / award shall be final, conclusive and binding on the parties. Application for reference to arbitration shall be made by either party within two months of arising of the dispute.”

held Clause 28 aforesaid to be not an arbitration clause but a clause of expert determination.

11. However Clause 18.3 of the Agreement in the present case is undoubtedly an Arbitration Agreement within the meaning of Arbitration Act. It is for this reason that I had on 27th January, 2016 not agreed with the contention of the counsel for the respondent that the matter was squarely covered by the dicta of the Supreme Court in ***International Amusement Ltd.*** supra. I may however add that it was undoubtedly also the contention of the counsel for ITPO before the Supreme Court that the jurisdiction conferred upon the Estate Officer by the PP Act cannot be taken away by a contract between the parties incorporating arbitration clause and that the Estate Officer has exclusive jurisdiction which is not arbitrable and the parties cannot by contract agree to refer the matters in respect thereto by arbitration but the said contention was not adjudicated by the Supreme Court which decided the matter purely on the plea of there being no arbitration agreement between the parties.

12. The counsel for the respondent on the next date i.e. 29th January, 2016 also drew attention to ***Natraj Studios (P) Ltd. Vs. Navrang Studios*** (1981) 1 SCC 523, ***Ranjit Kumar Bose Vs. Anannya Chowdhury*** (2014) 11 SCC 446, ***Central Warehousing Corporation, Mumbai Vs. Fortpoint Automotive Pvt. Ltd.*** (2010) 1 Mh.L.J. 658 (FB) and ***Jiwan Dass Vs. Life Insurance Corporation of India*** 1994 Supp. (3) SCC 694.

13. Supreme Court in *Natraj Studios (P) Ltd.* supra held that since under the Bombay Rents, Hotel and Lodging House Control Act, 1947 exclusive jurisdiction had been conferred on the small cause court to decide dispute between landlord and tenant, the jurisdiction of the Arbitrator under the Arbitration Clause in the agreement between the landlord and tenant to decide such disputes stands excluded. Similarly in *Ranjit Kumar Bose* supra the arbitration clause in the tenancy agreement providing for any dispute arising out of tenancy agreement to be settled by Arbitrator in accordance with provisions of Arbitration and Conciliation Act, 1996 was held to be of no avail in the light of the bar contained in Section 6 of the State Tenancy Act, 1997 which prescribed that notwithstanding anything to the contrary contained in any contract, the dispute as to recovery of possession of premises by landlord from tenant has to be decided only by the Civil Judge having jurisdiction under the Tenancy Act. The Full Bench of the Bombay High Court in *Central Warehousing Corporation, Mumbai* supra was concerned with the question whether in view of Section 5 of the Arbitration Act, the jurisdiction of the small cause court under the Presidency Small Cause Courts Act, 1882 would be ousted by the arbitration clause in the Agreement between the licensor and the licensee. On an interpretation of Section 41 of the Presidency Small Cause

Courts Act and Section 5 and Section 2(3) of the Arbitration Act, it was held that even if the license agreement contains arbitration agreement, the exclusive jurisdiction of the court of small causes under Section 41 of the Presidency Small Cause Courts Act is not effected in any manner and that the arbitration agreement in such case would be invalid and inoperative on the principle that it would be against public policy to allow the parties to contract out of the exclusive jurisdiction of the small causes court by virtue of Section 41 of the Presidency Small Cause Court Act.

14. I may however state that the question as far as this Court is concerned is not *res integra*. A Division Bench of this Court in ***Fabiroo Gift House Vs. India Tourism Development Corp.*** MANU/DE/1712/2002 referring to Section 15 of the PP Act as under:

“15. Bar of jurisdiction.—No court shall have jurisdiction to entertain any suit or proceeding in respect of—

- (a) the eviction of any person who is in unauthorised occupation of any public premises, or
- (b) the removal of any building, structure or fixture or goods, cattle or other animal from any public premises under section 5A, or
- (c) the demolition of any building or other structure made, or ordered to be made, under section 5B, or
- [(cc) the sealing of any erection or work or of any public premises under section 5C, or]

- (d) the arrears of rent payable under sub-section (1) of section 7 or damages payable under sub-section (2), or interest payable under sub-section (2A), of that section, or
- (e) the recovery of—
 - (i) costs of removal of any building, structure or fixture or goods, cattle or other animal under section 5A, or
 - (ii) expenses of demolition under section 5B, or
 - (iii) costs awarded to the Central Government or statutory authority under sub-section (5) of section 9, or
 - (iv) any portion of such rent, damages, costs of removal, expenses of demolition or costs awarded to the Central Government or the statutory authority.”

held that a claim for recovery of arrears of rent payable under Section 7(1) or damages payable under Section 7(2) or interest payable under Section 7(2A) of the PP Act cannot be subject matter of arbitration. Another Division Bench of this Court in ***Harjit Singh Vs. Delhi Development Authority*** MANU/DE/0397/2009 also held that the kind of disputes which as per the terms of the perpetual lease deed were to be arbitrated by the Lieutenant Governor could not be subject matter of arbitration; it was held that the dispute insofar as it related to eviction of the petitioner from the public premises has to be decided by the statutory authority under the PP Act and only the dispute which was not covered by the PP Act could be adjudicated in accordance with the arbitration clause in the agreement between the parties.

15. On an interpretation of the arbitration clause in ***Exclusive Motors Pvt. Ltd. Vs. India Tourism Development Corporation*** MANU/DE/0834/2009, a Single Judge of this Court held the matters within the jurisdiction of PP Act to be not arbitrable. LPA No.589/2009 preferred thereagainst is found to have been withdrawn on 13th November, 2013. Following the aforesaid judgments, I have in ***Nuurrie Media Ltd. Vs. Indian Tourism Development Corp. Ltd.*** MANU/DE/4814/2009 held that there could be no arbitration with respect to the disputes covered under the PP Act.

16. The same view was also taken by me in ***Airports Authority of India Vs. Grover International Ltd.*** MANU/DE/0537/2011 that a tenant / lessor of a public premises upon its tenancy / lease being determined, cannot before the public authority has had an opportunity to initiate proceedings for eviction under the PP Act, rush and raise the dispute of validity of termination in a Court or in arbitration proceedings and invite adjudication thereon and contend that the same is maintainable for the reason of the proceedings under the PP Act having not been initiated till then. It was further held that if the public authority does not initiate the proceedings under the PP Act, the termination in any case would be of no avail whether it be valid or invalid and if proceedings under the PP Act are initiated then the invalidity of the termination has to be

set up as a defence in the said proceedings only and cannot be subject matter of adjudication before any other fora. It was reasoned that under Section 5 of the PP Act, the satisfaction, to be accorded whether a person is an unauthorized occupant or not is of the Estate Officer and not of any other fora and that if it were to be held otherwise, it would frustrate the jurisdiction of the Estate Officer. Reliance was placed on *Ashoka Marketing Ltd. Vs. Punjab National Bank* (1990) 4 SCC 406 holding the PP Act to be a special legislation enacted to deal with the mischief of rampant unauthorized occupation of public premises.

17. Mention may lastly be made of the judgment of the Division Bench of this Court in *India Trade Promotion Organisation Vs. International Amusement Limited* (2007) 142 DLT 342, it was held by referring to Section 2(3) of the Arbitration Act that Section 15 read with Sections 5 and 7 of the PP Act confers exclusive jurisdiction on the Estate Officers appointed under Section 3 of the said Act to deal with applications under Sections 5 and 7 of the PP Act and that the PP Act being a special Act which also prescribes the complete procedure for adjudication of proceedings under the PP Act is a complete code in itself and proceedings under Sections 5 and 7 of the PP Act cannot be made subject matter of arbitration. The said reasoning was not

interfered with by the Supreme Court and as far as this Court is concerned, is binding. In fact, as far back as in *Kesar Enterprises Vs. Union of India* MANU/DE/0117/1994 the Division Bench of this Court had also observed that Arbitrator will have no jurisdiction in matters in view of Sections 7 and 15 of the PP Act.

18. As far as the contention, of the Estate Officer Sh. Piyush Agarwal being biased is concerned, I am of the view that no such ground also is open to the petitioner. Against the order of the Estate Officer, the remedy of statutory appeal before the District Judge is available and even if the order of the Estate Officer were to be found to be biased, the same can be corrected therein.

19. There is thus no merit in the petition.

Dismissed.

20. Needless to state that the petition having been dismissed, CM No.9964/2016 filed by the petitioner for stay of proceedings before the Estate Officer and notice whereof was issued for 2nd May, 2016 becomes infructuous and is disposed of.

No costs.

RAJIV SAHAI ENDLAW, J.

APRIL 25th, 2016
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