

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 15.12.2017

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

**O.P.No.602 of 2017
and A.No.4374 of 2017
and O.A.No.197 of 2017**

M/s.Bhadra International (India) Pvt. Ltd.,
rep. by its General Manager (Finance & Accounts),
A-9, Airlines Office Gallery,
2nd Floor, Anna International Terminal,
Chennai Airport, Chennai - 600 027
and its registered office at
No.42, Rani Jhansi Road,
New Delhi - 110 055

..... Petitioner

Versus

1. Airports Authority of India,
rep. by its Airport Director,
Having office at Chennai International
Airport, Chennai - 600 027

2. The Chairman, Airports Authority of India,
Rajiv Gandhi Bhawan, Safdarjung Airport,
New Delhi - 110 003

..... Respondents

PETITION filed under Section 11(5) of the Arbitration and Conciliation Act,
1996 to appoint a sole Arbitrator to resolve the dispute between the
petitioner and the respondents.

For Petitioner: Mr.P.S.Raman, S.C.
for Ms.R.Maheswari

For Respondents: Dr.Xavier Arulraj, S.C.
for Ms.A.Arul Mary

ORDER

This order disposes O.P. No.602 of 2017, O.A.197 of 2017 and A. No.4374 of 2017. The original application filed by Bhadra International (India) Pvt. Ltd. (in short 'Bhadra') prays for an order of interim injunction restraining the respondents from evicting or disturbing the applicant from possession of 7105 sq.mts. of land and 454.3 sq.mts. of office space occupied by the applicant in the Chennai Airport.

2. This Court vide order dated 28.02.2017, considered the prayer for interim relief and directed the respondents to maintain status quo with respect to occupation of the 7105 sq.mts of land and 454.3 sq.mts. of office space subject to the payment of a sum of Rupees One Crore to AAI to be maintained in a separate account until further orders. The said order stands complied with by Bhadra.

3. The application is filed by Airports Authority of India and the Chairman, Airports Authority of India (in short 'AAI') seeking a vacation of the interim order granted as above.

4. The Original Petition filed by Bhadra seeks the appointment of an Arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act 1196 (in short 'Act'). While the original application is filed on the strength of arbitration agreement dated 05.01.2011, the prayer for appointment of arbitrator is based on agreement dated 23.06.2014 between Bhadra and AAI.

5. An objection is raised to the maintainability of the OP as well as the OA by Dr.Xavier Arulraj, learned Senior Counsel, appearing for Ms.Arulmary, learned counsel for AAI, who disputes the existence of a clause for arbitration as between the parties. Detailed submissions on this aspect by Dr.Arulraj and Mr.P.S.Raman, learned senior counsel for Ms.Maheswari, learned counsel for Bhadra have been taken into careful consideration.

6. The parties had entered into a Licence Agreement for Ground Handling Services on 29.11.2010 whereunder AAI had granted Bhadra a licence for providing ground handling services within the premises of the AAI at the Chennai and Kolkata Airports. The agreement, a comprehensive one valid for a period of 10 years till 22.09.2020, provides for the payment of royalty and additional royalty on the gross turnover earned by Bhadra from its activities under the agreement. Disputes have arisen between the parties in this regard that are now pending resolution in proceedings for arbitration before Mr.Justice S.S.Nijjar.

7. Clause 4 of the agreement entitles the licensee to office space upon payment of licence fee to be fixed by AAI from time to time. A separate licence agreement for space/land and completion of contractual obligations was to be executed by the parties, reiterated at clause 18. Clause 26 of the agreement provides for the payment of rentals in respect of the built-up space and land subject to an escalation of 7.5% or as determined by AAI from time to time.

8. Clause 78 of the agreement records the agreement of parties to refer all disputes and differences arising out of or in any way touching or concerning the agreement, to arbitration.

9. A licence agreement dated 05.01.2011 was entered into for the rental of the land pursuant to agreement dated 29.11.2010. This agreement granted a licence to Bhadra for use of land for a period of three years, (15.3.2010 to 14.03.2013) and stipulated the terms of payment at clause 4 thereof being Rs.2080.13 per square meter per annum upto 31.03.2011, to be annually compounded at the rate of 7.50% on the first April of every subsequent year. Clause 4 states that the rate would be revised/rationalised by way of escalation with effect from 01.04.2011 upon the finalization of the land lease policy of AAI and any such escalation should be settled unconditionally and without demur by Bhadra. The agreement also contains an annexure containing the general terms and conditions, where at clause 20, the parties agree to refer disputes and differences to arbitration.

10. The moot question is whether licence agreement dated 05.01.2011 has been renewed by the parties, enabling Bhadra to maintain this petition before me. Both parties would refer to voluminous communications inter se to establish their respective stands, Dr.Arulraj to the effect that agreement for renewal had not been finalised or executed and Mr.Raman to the contrary.

11. Dr.Arulraj would submit that the draft of the renewal agreement

for the period after expiry of agreement dated 05.01.2011 had been

provided by AAI to Bhadra with repeated requests for execution, to no avail. The term of agreement dated 05.01.2011 was three years, from 15.3.2010 to 14.3.2013 or upto the date on which the Agency, that accepts the ground handling tender, starts occupying the site, whichever is earlier. Vide letter dated 28.05.2013 AAI had enclosed the licence agreement in standard format calling upon Bhadra to execute the same immediately. Reminders were issued on 08.07.2014, 20.08.2014 and 04.09.2014. Vide letter dated 09.10.2014, Bhadra, without referring to any of the earlier letters, merely requests for a regularisation of the issue of lease rentals. The renewal of licence agreement was however not executed.

12. Thereafter AAI issues letter dated 27.10.2014 addressed to 28 parties conveying the revision and escalation in base rate of land lease rent/licence fee for the period 01.10.2014 to 31.03.2017. The rate of licence for unpaved land was re-fixed at Rs.6300/- per sqm per annum and the rate of licence fee for paved land at Rs.7560/- per sqm per annum, in addition to service tax. Other terms and conditions were set out in the same communication.

13. It is the contention of the learned senior counsel that 27 out of 28 of the allottees have accepted the rate revision and it is only the present applicant, who has neither accepted the same nor executed the document for renewal of licence agreement. Bhadra is however continuing to operate in the premises by virtue of the orders of this Court dated

14. Bhadra, in reply to the letter of AAI dated 20.08.2014 calling for revision of rentals, states that half the allotted land was not paved and thus the classification of the land was liable to be suitably amended. Significantly no reference is made to the renewal of licence agreement, which is specifically requested by AAI in letter dated 20.08.2014. On 08.12.2014 Bhadra again makes a request to reconsider the rate hike calling the revision 'astronomical'. Thereafter a bank guarantee dated 13.01.2015 of Punjab National Bank in favour of AAI for an amount of Rs.32.64,200/- is furnished by Bhadra.

15. The exchange of communications inter se between the parties continued with AAI, vide letters dated 20.01.2015 and 24.4.2015, reiterating its requests for advance licence fee and execution of the licence agreement.

16. On 01.05.2015 AAI rejects the request of Bhadra for reconsideration of the revised rates. This order was communicated to Bhadra under cover of letter dated 14.05.2015. On 22.07.2015 Bhadra made a personal representation for the re-consideration of the rates and the following decisions taken at the meeting were crystalized by AAI and communicated under cover of letter dated 28.07.2015:

'1. In the first instance, M/s.Bhadra shall clear the land dues at the pre-revised rate upto the current financial year 2015-16.

2. The issues expressed by M/s.Bhadra and other suchstakeholders at Chennai Airport will be forwarded to CHQ to enable take a final decision as many land licensees including the

oil companies resist the payment of land license fee at the revised rate.

3. After a final decision is conveyed by CHQ M/s.Bhadra shall submit the security deposit required and the land license agreement as per CHQ's decision.

4. G.M.(Cargo) shall ensure that the ground handling services done by M/s.Bhadra meet the desired service level standards and initiate appropriate action against M/s.Bhadra in terms of the agreement entered into, if they do not meet the desired standards.

5. APD also decided that M/s.Bhadra should depute representatives to resolve the issues regarding timely of data for GTO billing, reconciliation of such data etc with the revenue section, Department of F&A.

6. Further, APD desired that amappint of land area, handed over to all agencies at Chennai Airport, be prepared by the land department with details from F&A Department. The same shall indicate the status of the agreements with the agencies and details of whether payments are bing made at revised/pre-revised rate etc. which will be monitored by the land directorate.'

17. It is relevant to note that vide letter dated 07.04.2016, while reiterating the request to surrender various position of paved land under occupation by Bhadra, AAI states as follows:

'The license for the paved land expires on 31.03.2017 and you are requested to submit an application, seeking renewal of licence of the 7200 sqms. of paved land held, well in time to enable process the case further.'

18. The above request is reiterated yet again by letter dated 26.09.2016 by AAI in the following terms:

'It is to inform that the licence for the paved land of 7105 spms. is about to expire on 31.03.2017 and you are requested to submit an application, seeking renewal of licence for a further period from 01.04.2017, along with a no due certificate obtained from the Revenue Section-Department of F&A, well in time to enable process the case further.'

19. On 24.1.2017 a demand is made by AAI on Bhadra for an amount of Rs.103,21,67,234/- excluding interest on delayed payment as on 31.12.2016. The demand is reiterated on 07.02.2017.

20. At a meeting held on 02.03.2017 between Bhadra and AAI, the parties discussed various issues under dispute. As far as the issue on royalty was concerned, the matter was before a learned Arbitrator in separate proceedings. As far as the demand relating to space and land was concerned the minutes reveal a statement to the effect that the arrangements towards Space Rent and Land Rent awarded under separate Award letters and Agreements would stand out of the ambit of Arbitration. Hence AAI reiterated its demand for payment of the total outstanding dues of Rs.12.96 Crores (after adjusting the TDS pertaining to Land/Space) in respect of Space Rent and Land Rent to be settled immediately.

21. In its counter to the Original Application dated 30.07.2017, AAI has taken the stand in paragraph 17 that agreements dated 05.01.2011 and 23.06.2016 contain an arbitration agreement in clause 20 and as such the application was not maintainable. AAI thereafter goes on to urge

that Bhadra ought to initiate arbitration in terms of Section 8 of the Act.

Para 17 of the counter in Original Application is extracted hereunder:

'17. I humbly submit that the terms of the agreement dated 05.01.2011 and 26.06.2014 are different contracts, for use of the land and premises of the AAI, apart from the license for Ground Handling Services. They are governed by separate agreement, depending on the nature of occupation and use of premises . They have a separate arbitration clause under Clause 20 of the General Terms and Conditions in Annexure-I of the Agreement, dated 05.01.2011 and 23.06.2014. That agreement is not before any Arbitration proceedings. Therefore, the above application is not maintainable before this Hon'ble Court. If at all they are aggrieved, they have to invoke only another arbitration under section 8 of the Arbitration and Conciliation Act, 1996. This Hon'ble Court has no jurisdiction to decide the above Original Application, as the dispute involved is governed by an arbitration agreement.'

22.The entire paragraph appears to proceed on the assumption that the present application was filed as part of a suit and is thus not maintainable before the Court. One thing however, is clear. AAI, in making the aforesaid submission clearly admits the presence of the Arbitration agreement between the parties. Notwithstanding the aforesaid admission as extracted above, Dr.Arulraj would maintain that:-

(i) The licence agreement dated 05.01.2011 had expired on 14.03.2013 and it, along with the arbitration clause therein could no longer be invoked;

(ii)No other licence agreement was executed by Bhadra despite the issue of several letters and reminders by AAI. The claim of Bhadra that a licence agreement dated 23.06.2014 was submitted to AAI, is contrary to

fact;

(iii) The Ground Handling Agreement dated 29.11.2010 executed by the parties is unambiguous to the effect that Bhadra shall pay the licence fee at the prevailing fee as fixed by the authority from time to time.

(iv) The licensee resisted the move of upward revision only on 08.12.2014 and if at all there was any dispute, Bhadra should have invoked the arbitration clause within a reasonable period of two months from the time of dispute and not with such substantial delay.

(v) After the amendment of Chapter V-A of the AAI Act, introduced in 2003, the eviction officer is entitled to proceed only under the Airports Authority of India Act, 1994. All agreements referring to the Public Premises Act stand modified to that effect. A corrigendum has been issued on May, 2013, to Bhadra, to the effect that eviction officers can initiate action against the unauthorised occupation under the Airports Authority of India Act, 1994.

23. The question that thus poses itself for decision before me in the context of Section 11 (6A) of the Act is whether the parties have agreed upon arbitration as a method of resolution of disputes and whether a valid arbitration clause exists as between the parties.

17. The provisions of Section 7 of the Act reads thus:

' 7 Arbitration agreement. —(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

24. In the present case, AAI, vide letters dated 07.04.2016 and 26.09.2016, has specifically called upon Bhadra to renew the licence as 'the licence for the paved land expires on 31.03.2017'. The obvious assumption, therefore, is that there was a subsisting agreement, valid till 31.03.2017.

25. The contradictory stands adopted by both parties are summarised hereunder:

(i) As far as Bhadra is concerned, it maintains the position that the original agreement dated 05.01.2011 has been extended subsequently by agreement dated 23.06.2014. To that end, the agreement duly signed by Bhadra on stamp paper dated 23.06.2014 has been placed at page 27 of its typed set.

(ii) This agreement is not signed and is denied outright by AAI.

(iii) The correspondences exchanged between the parties reveal the repeated reminders for execution of the renewal of licence agreement.

(iv) On the other hand, AAI itself makes reference to agreement dated 23.06.2014 in its counter to the original application. I cannot ignore this reference, in the face of which, the insistence of AAI that the renewal has not been executed by Bhadra does not fly.

(v) As early as on 01.05.2014 Bhadra addresses a letter to the Deputy General Manager - Commercial, AAI, Bhadra requesting the renewal of agreement for allotment of paved land. The letter is received by AAI on 09.05.2014. The request is reiterated by Bhadra on 20.08.2014.

(vi) On 01.12.2014, Bhadra has forwarded two renewed bank guarantees bearing Nos.1988ILG007710 and 1988ILG015314 dated 28.12.2010 and 20.11.2014 respectively, valid till 31.12.2017.

(vii) Also on record is a letter from Punjab National Bank, a third party to the transaction referring to the same guarantees dated 28.12.2010 and 20.11.2014. The Bank Guarantees make reference to lease agreement dated 01.04.2014 between AAI and Bhadra for the lease of paved land ad measuring 4771 sq.mts. at Chennai Airport.

(viii) The minutes of the discussion at Meeting dated 23.02.2017 reveal at point 1 that the issue of arbitrability of space Rent and Land were discussed and reference was made to the same being out of the scope of arbitration. However, no decision appears to have been reached

26. The provisions of Section 7 (4)(a), (b) and (c) extracted earlier validate an arbitration agreement, if it is contained in a document signed by the parties, an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement.

27. In the present case, the voluminous records that have been produced before me as extracted and discussed above, indicate that, over time, the focus of the parties has been towards the settlement of the disputes relating to land rentals. Requests for execution of the renewal agreement have been made, surprisingly, by both parties. There is, however, no letter produced before me to show a confirmation of either party to the effect that the renewal of licence agreement has, in fact, been executed. This is a factor that I have to glean from the documents produced before me. On an examination of the documents and pleadings, and the diverse stands that emanate thereupon, in my view, the balance tips in favour of Bhadra by virtue of the following factors: (i) Reference by AAI in its counter to the O.A. to agreement dated 23.06.2014 (ii) the stand in counter to O.A. by AAI that the matter should be referred to Arbitration. (iii) Statement of AAI in letters dated 07.04.2016 and 26.09.2016 to the effect that the lease agreement expires on 31.3.2017 leading one to the conclusion that there is a valid subsisting agreement. (iv) The reference to date of expiry of the current agreement as '31.3.2017' by AAI in letters dated 07.04.2016 and 16.09.2016 corresponds to the date of licence mentioned in the Bank Guarantee, as '01.04.2014'. (v) The Bank Guarantee making reference to agreement

dated 01.04.2014 and valid till 31.12.2017 is furnished by Punjab National Bank, a third party that supports the conclusion that the licence has indeed been extended.

28. On the basis of the above discussion, I am satisfied that a clause for arbitration exists as between the parties and refer the matter to arbitration.

29. An objection is also raised by AAI is to the effect that the present dispute would come within the ambit of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, (in short, 'Public Premises Act') and as such is not liable to be referred to arbitration. The agreement between the parties is one for grant of license for the use of paved land. At Clause 17 the parties agree as follows:

'17. The plot of paved land as well as the buildings/structures/installations thereon shall be deemed to be public premises as defined in the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. The Licensee shall be subject to all the provisions of the said Act and any rules and regulations framed thereunder.'

30. Then again, the parties at clause 20 of the General Terms and Conditions, being Annexure A to the Agreement, agree to resolve disputes and differences touching upon or concerning the agreement, by way of arbitration. The exception is as regards those matters which have been otherwise provided for or to which the Public Premises Act and Rules apply. The clause reads as under:

20. All disputes and differences arising out of or in any way touching or concerning this Agreement except those decision is

otherwise herein before expressly provided for or to which the Public Premises (Eviction of Unauthorized Occupants) Act 1971 and the rules framed there under, which are now in force or which may thereafter come into force, are applicable shall be referred to the sole arbitration of a person to be appointed by the Chairman of the Authority or in case the designation of Chairman is changed or his office is abolished by the person for the time being entrusted; whether or not in addition to other function with the functions of the Chairman, Airport Authority of India, by whatever designation such person may be called and if the arbitrator so appointed and is willing to act on sole arbitration of some other person to be similarly appointed and willing to act as sole arbitrator, there will be no objection to any such appointment that the arbitrator so appointed is a servant of the Authority and that he had to deal with the matters to which this Agreement relates and that in the course of his duties as such servant of Authority, he had expressed views on all or any of the matters in dispute or difference. The arbitrator may, with the consent of the parties, extend from time to time the time for making the publishing of award. '

31. The show cause notice issued by AAI is in terms of Section 28-G (4) of Airports Authority of India Act, 1994 (in short, 'AAI Act'), which reads as follows:

'28G.(1)

(2).....

(3)

(4) No order under sub-section (1) or sub-section (2) shall be made against any person until after the issue of a notice in writing to the person calling upon him 30 to show cause within such period not being less than seven days but not exceeding thirty days as may be specified in the notice as to why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same have been considered by the eviction officer. '

32. The question now is whether the resolution of the demands made upon Bhadra by AAI to remit the arrears of rent and damages is a dispute that would come within the ambit of the arbitration clause, or seeing as paved land under licence constitutes, in accordance with clause 17 of the agreement, Public Premises, resort to the provisions of the Public Premises Act and the procedure set out thereunder.

33. The provisions of the Public Premises Act provides in Section 14, that the recovery of rent, etc. shall be as an arrear of land revenue. Upon certification of the amount of arrears by the Estate Officer, the same shall be forwarded to the Collector, who shall proceed to recover the same as an arrear of land revenue.

34. The Supreme Court in the case of *Duro Felguera, S.A. V. M/s.Gangavaram Port Limited* dated 10.10.2017 in Arbitration Petition No.30 of 2016 holds that, in deciding a petition under Section 11(6), the Court shall confine its examination to the existence of an arbitration agreement as between the parties and nothing more. In line with the judgment aforesaid, while expressing satisfaction in regard to the existence of the arbitration clause as between the parties, I reserve for decision by the learned Arbitrator appointed by me in paragraph 35, the question of whether the payment of rent and the consequent eviction in default thereof would come within the ambit of excepted items under clause 20 of the agreement. This issue may be decided as a preliminary issue in terms of Section 16 of the Act prior to proceeding to hear and adjudicate upon the merits, if at all.

35. I appoint Mr.Justice F.M.Ibrahim Kalifulla as the Sole Arbitrator to enter upon reference and adjudicate the disputes inter se the parties. The learned Arbitrator is requested to, after issuing notice to the parties and upon hearing them, endeavour to pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of this order. He is at liberty to fix his remuneration and other incidental expenses, which shall be borne by both parties equally.

36. The Original Petition is disposed of and the connected applications are closed. No costs.

15.12.2017

Index:Yes/No

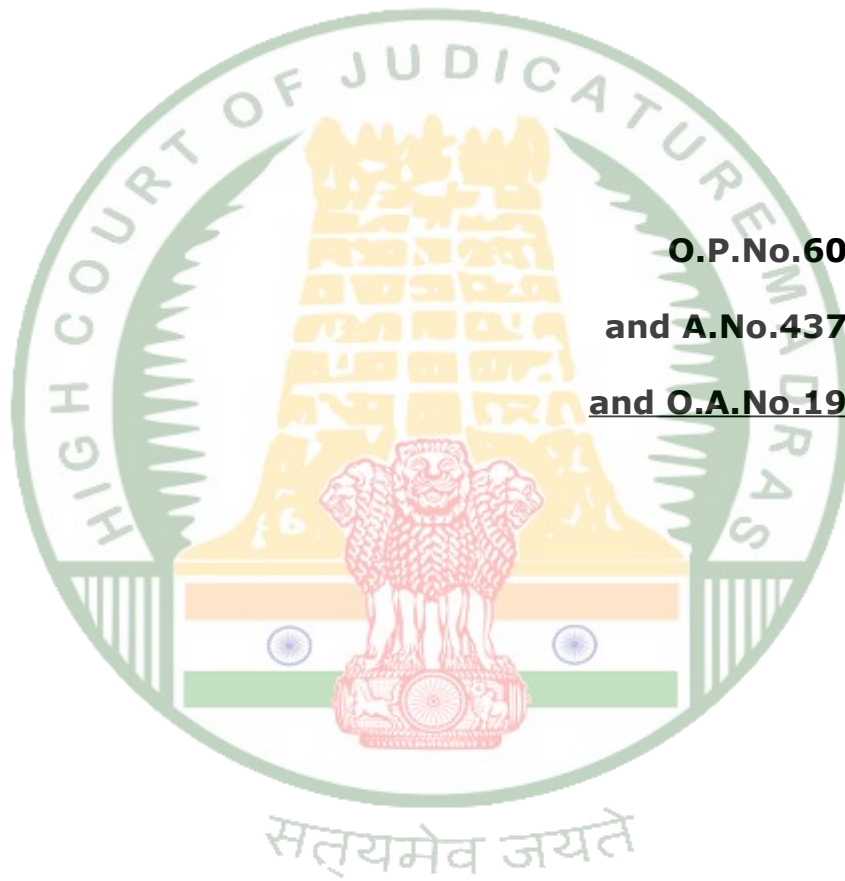
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ANITA SUMANTH, J.

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