

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

CIVIL MISCELLANEOUS APPEAL NOS.970 AND 987 OF 2016

Between:

Hyderabad Metropolitan Development
Authority (HMDA) and others .. Appellants

and

M/s Hotel Malligi Pvt. Ltd. .. Respondent

DATE OF THE JUDGMENT PRONOUNCED: 03.01.2017

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SMT. JUSTICE ANIS**

1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
3. Whether Their Lordships wish to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

ANIS, J

*** THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SMT. JUSTICE ANIS**

+ CIVIL MISCELLANEOUS APPEAL NOS.970 AND 987 OF 2016

% DATED 3rd JANUARY, 2017

Hyderabad Metropolitan Development
Authority (HMDA) and others .. Appellants

Vs.

\$ M/s Hotel Malligi Pvt. Ltd. .. Respondent

<Gist:

>Head Note:

! Counsel for the Appellants : Sri V.Narasimha Goud (AP)

^Counsel for the Respondent : Sri S.Niranjan Reddy and
Sri K.V.Rusheek Reddy

? CASES REFERRED:

1. AIR 1959 SC 1262
2. 1992 Supp (2) SCC 29
3. AIR 2009 SC 2519
4. 2015 (6) ALD 486
5. (2012) 7 SCC 587

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SMT. JUSTICE ANIS**

CIVIL MISCELLANEOUS APPEAL NOS.970 AND 987 OF 2016

C O M M O N J U D G E M E N T

(Per Hon'ble Sri Justice Sanjay Kumar)

Parties and the cause being the same, these two cases are amenable to disposal by way of this common order.

C.M.A.No.970 of 2016 arises out of the order dated 17.08.2016 passed by the learned XI Additional Chief Judge, City Civil Court, Hyderabad (*hereinafter*, 'the Court below'), in Arbitration O.P.No.1669 of 2016, extended thereafter from time to time, i.e., on 01.09.2016, 07.09.2016, 14.09.2016, 19.09.2016 and 20.09.2016. C.M.A.No.987 of 2016 arises out of the order dated 29.09.2016 passed by the Court below in Arbitration O.P.No.2229 of 2016. The orders under appeal were passed under Section 9 of the Arbitration and Conciliation Act, 1996 (for brevity, 'the Act of 1996'). Hyderabad Metropolitan Development Authority (HMDA), the respondent in the O.P.s, is the appellant in both appeals, filed under Section 37 of the Act of 1996.

The respondent in these appeals, M/s. Hotel Malligi Pvt. Ltd., Bellary District, Karnataka, was granted a licence by the HMDA over the land admeasuring 2500 square metres situated adjacent to the IMAX theatre at Hyderabad (*hereinafter*, 'the licensed premises') for developing and operating any one or a combination of Restaurants, Food Courts, Indoor Entertainment Centre, etc. This licence agreement was executed by and between the parties on 01.08.2011 and was to come into effect 60 days thereafter, i.e., on 01.10.2011. The licence period was for five years which expired on 30.09.2016. It is an admitted fact that the respondent entered into an understanding with Paradise Food Court under agreement dated

28.01.2012 *vis-à-vis* the licensed premises and received amounts far in excess of what it paid to the HMDA.

While so, the HMDA issued notification dated 04.08.2016 in relation to the licensed premises inviting bids for grant of a licence to develop, operate and maintain a Food Court thereon. This led to the respondent filing Arbitration O.P.No.1669 of 2016 before the Court below under Section 9 of the Act of 1996 seeking an injunction restraining the HMDA from taking further action pursuant to the tender notification dated 04.08.2016. By order dated 17.08.2016, the Court below opined that the respondent had invested huge amounts to start the Food Court in the licensed premises; had not committed any default in payment of the agreed licence fees; that the letter of the respondent seeking extension of the lease of the licensed premises and renewal of the licence was pending but the tender notification was issued on 04.08.2016 arbitrarily. The Court below accordingly held that the balance of convenience was in favour of the respondent and granted an ad interim *ex parte* injunction restraining the HMDA from taking further action or going ahead with any proceeding pursuant to the notification dated 04.08.2016.

This order was to remain operative till 01.09.2016 but was extended thereafter from time to time, the last such extension being on 20.09.2016. On the said day, the Court below concluded the hearing and reserved orders, while extending the interim order granted earlier till further orders. Admittedly, the Court below is yet to pronounce its final orders.

As the licence period under the agreement dated 01.08.2011 was to expire on 30.09.2016, it appears that the respondent apprehended a threat to its possession and filed a separate petition under Section 9 of the Act of 1996 in Arbitration O.P.No.2229 of 2016

before the Court below, wherein it sought an injunction restraining the HMDA from taking any further action, including its eviction from the licensed premises, till the disposal of the arbitration proceedings.

By order dated 29.09.2016 passed therein, the Court below observed that the workers and employees of the HMDA had visited and tried to interfere with the possession of the licensee and threatened to get it vacated from the premises on 30.09.2016 and held that the balance of convenience lay in its favour. The Court below accordingly granted an *ex parte* ad interim injunction restraining the HMDA from taking further action, including eviction of the licensee, from the licensed premises till 15.11.2016.

It is against these orders of the Court below that the present appeals were preferred by the HMDA.

Heard Sri V.Narasimha Goud, learned standing counsel for the HMDA, and Sri S.Niranjan Reddy, learned senior counsel representing Sri K.V.Rusheek Reddy, learned counsel for the licensee.

As this Court heard these appeals at length and the validity of the interim orders passed by the Court below in the pending Arbitration O.P.s was subjected to challenge, interim stay of further proceedings in Arbitration O.P.No.1669 of 2016, including pronouncement of final order therein, was granted on 01.12.2016.

Sri V.Narasimha Goud, learned standing counsel, would point out that the notification dated 04.08.2016 clearly demonstrated that there was no intention on the part of the HMDA to disturb the licensee during the subsistence of the reserved licence period under the agreement dated 01.08.2011. Learned standing counsel would point out that at the point of time the licence was granted in the year 2011, the licence fee contemplated per year was only Rs.55,00,000/- whereas the expected returns per year from granting such licence is

now Rs.2.00 crore and the upset price was therefore fixed at Rs.2.00 crore for the first year under the tender notification dated 04.08.2016. He would point out that the tender validity of the bids to be submitted thereunder was 90 days, which clearly demonstrated that the award of the licence thereunder would have been made only after 30.09.2016, the date of expiry of the respondent's licence period. He would contend that the apprehension of the licensee that the HMDA would cut-short the licence period was therefore without basis and assert that there was no cause whatsoever for it to file Arbitration O.P.No.1669 of 2016. He would point out that efforts were made by the HMDA on 29.09.2016 to bring it to the notice of the Court below that the licence period was expiring on 30.09.2016 but despite the same the Court below, having reserved orders on 20.09.2016, failed to pronounce the final orders till date. Learned standing counsel would assert that on the very same day, viz., 29.09.2016, the Court below again granted an interim order in Arbitration O.P.No.2229 of 2016, overlooking the fact that there was only a licence in favour of the respondent, whereunder it could not lawfully seek to prolong its occupation beyond the licence period. He would also assert that the renewal application filed by the respondent was rejected as long back as in August, 2016, and that there was no basis whatsoever to allow it to prolong its possession and occupation over the licensed premises to the detriment of public interest.

On the other hand, Sri S.Niranjan Reddy, learned senior counsel, would rely upon the terms and conditions of the licence agreement dated 01.08.2011 and contend that though renewal of the licence was at the discretion of the HMDA, the first right of refusal for extension was given to the respondent and, therefore, such a valuable right could not be brushed aside by the HMDA even after

the expiry of the stipulated licence period. Learned senior counsel would assert that the licensee invested Rs.3.00 crore for developing the licensed premises and consequently had valuable rights and interest therein. He would point out that the licence agreement itself permitted the licensee to enter into any agreement, contract and arrangement as it thought fit, necessary and expedient in furtherance of the purpose and for proper implementation of the terms of the agreement. He would therefore assert that the franchise agreement of the licensee with Paradise Food Court in relation to the licensed premises was not illegal or beyond the terms of the licence agreement. He would also state that when the HMDA sought to terminate the licence on the strength of this franchise agreement, the said move was struck down by this Court. Learned senior counsel would contend that the first right of refusal given to his client gave rise to an arbitrable dispute and therefore, the licensee was well within its rights in approaching the Court below under Section 9 of the Act of 1996 to seek interim protection pending initiation of arbitration proceedings. Learned senior counsel would further point out that the HMDA filed a vacate stay petition before the Court below on 02.09.2016 and, arguments having concluded on 20.09.2016, the Court below reserved orders thereon.

He would further state that on 29.09.2016, the HMDA officials informed the licensee that it had no right to continue after 01.10.2016 and threatened to take coercive measures. Learned senior counsel would assert that owing to the genuine apprehension that it would be unceremoniously evicted from the licensed premises; the licensee once again approached the Court below by way of a fresh petition under Section 9 of the Act of 1996. Learned senior counsel would again assert that the licensee was given the first right of

refusal under the licence agreement and being bound by the same, the HMDA was estopped from ignoring this valuable right of the licensee. He would point out that the tender notification dated 04.08.2016 clearly demonstrated that this valuable right of the licensee was completely ignored. He would therefore assert that it was well within the right of the licensee to seek specific performance of this term in the licence agreement and ask for the *status quo* to be preserved pending resolution of this arbitrable dispute. As regards Arbitration O.P.No.2229 of 2016, learned senior counsel would state that the HMDA sought time on 15.11.2016 to file its counter and the matter was accordingly posted on 06.12.2016. Learned senior counsel would state that as the Court below is seized of the matter and is yet to pronounce orders in Arbitration O.P.No.1669 of 2016, it is wholly premature for this Court to interfere in the matter at this stage. He would therefore pray for dismissal of the appeals leaving it open to the Court below to proceed further in the matter.

In reply, Sri V.Narasimha Goud, learned standing counsel, would state that the first right of refusal was not automatic and was subject to review of satisfactory performance like regular payments to the HMDA and compliances with GHMC norms and Traffic Police Rules etc. He would therefore assert that the licensee cannot rely upon this clause to prolong its occupation over the licensed premises beyond the stipulated licence period. Learned standing counsel would point out that Article 7 of the licence agreement specifically provided that upon expiry of the tenure of the licence, the licensee shall hand over the site with all the immovable assets to the HMDA without any claim for compensation. He would further point out that there was mischief in relation to Arbitration O.P.No.2229 of 2016 in as much as the case status website in relation to this O.P. indicated

that the case was heard by the Court below on 29.09.2016 and the next hearing was on 17.10.2016, the purpose being 'Notice'. He would point out that the 'Business' portion of the website data stated that an *ex parte* ad interim injunction was granted till 17.10.2016 and concluded with the sentence - 'Notice to respondents through Court and R.P by 17.10.2016'. However, the certified copy of the order dated 29.09.2016 indicated that the date '17.10.2016' was changed to '15.11.2016' at every place where it found mention therein. Learned standing counsel would assert that this indicated that all is not well with how this case is being dealt with. He would conclude by reiterating that the Court below erred in interfering in the matter at the fag-end of the licence period and in permitting the licensee to prolong its occupation over the licensed premises, ignoring the legal status of a licensee.

Though the Court below is presently seized of the Arbitration O.P.s filed by the licensee under Section 9 of the Act of 1996, consideration of the merits of the case to a limited extent is warranted in these appeals as the Court below has effectively brought matters to a grinding halt by granting and extending *ex parte* interim injunction orders in both the O.P.s., while at the same time sleeping over the final orders which were reserved as long back as on 20.09.2016. However, be it noted that any observations made by this Court on the merits of the case are only for the limited purpose of disposing of these appeals and the Court below is at liberty to examine the case before it independently and in accordance with law, uninfluenced by any observations made herein.

At the outset, it would be necessary to note the legal status of a licensee. Section 52 of the Indian Easements Act, 1882 (for brevity, 'the Act of 1882') defines 'licence' thus:

Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a licence.

Section 64 of the Act of 1882 provides that when a licensee is evicted before he has fully enjoyed, under the licence, the right for which he contracted, he is entitled to compensation from the grantor.

In ***ASSOCIATED HOTELS OF INDIA LIMITED V/s. R.N.KAPOOR***¹, the Supreme Court observed that if a document gives only a right to use the property in a particular way or under certain terms, while it remains in possession and control of the owner thereof, it will be a licence and the legal possession, therefore, continues to be with the owner of the property but the licensee is permitted to make use of the premises for a particular purpose but for which his occupation would be unlawful.

Unlike a lessee, the legal incidence of a licence, in normal parlance, is that licensee has no right to possession of the demised property as the legal possession always remains with the licensor. The licence creates neither interest nor estate therein and after expiry of the period of licence, the continuance in possession by the licensee would be as a trespasser, unless the covenant in the contract under which he came into possession creates such a right or is acquiesced by the licensor. His possession, therefore, would not be juridical. (***EAST INDIA HOTELS LTD. V/s. SYNDICATE BANK***²).

In the present case it is not in dispute that the agreement dated 01.08.2011 constitutes a licence. However, it is contended by

¹ AIR 1959 SC 1262

² 1992 Supp (2) SCC 29

Sri S.Niranjan Reddy, learned senior counsel, that notwithstanding the fact that the HMDA only granted a licence thereunder, the 'first right of refusal' for extension of the licence granted thereunder vested the licensee with the valuable pre-emptive right of renewing the licence. He would contend that denial thereof constitutes an arbitrable dispute and pending resolution of the same, *status quo* has to be continued so as to secure and protect the licensee's interest.

The concept of the "first right of refusal" is traceable to the 'Swiss Challenge Method', wherein upon receipt of a *suo motu* proposal from a developer, tenders are invited by way of advertisement; the tenders received in response to the advertisement are compared with the proposal given by the developer; this method confers on the developer, who has given the original proposal, the opportunity or the 'first right of refusal'; the original developer is required to match/raise his bid on par with/or more than the highest proposal tendered; the original proposer has the opportunity to take up the project on the highest offer; and, in the event he refuses, the highest bidder has the right to implement the project. If the original proposer exercises his right of first refusal, the project is then offered to the highest bidder. If the highest bidder refuses the offer the amount deposited by him can be forfeited. In the 'Swiss Challenge Method', there is no provision for allowing other tenderers to raise the bid further, when the "initiator of the proposal" agrees to raise his bid upto the highest bid. Under this method the originator of the proposal must, in consideration of his vision and his initiative, be given the benefit of matching the highest bid submitted. An unsolicited bid or a proposal received from a developer can thus be subjected to a bidding process by different modes including the

‘Swiss Challenge Method’. (See **RAVI DEVELOPMENT V/s. SHREE KRISHNA PRATHISTHAN**³).

The controversial article in the agreement dated 01.08.2011 pertaining to the ‘first right of refusal’ reads as under:

Renewal

After expiry of the License tenure, the License may be renewed on such terms and conditions as may be determined by the Licensor at its discretion “First Right of Refusal” for extension shall be based review of satisfactory performance like regular payments to HMDA and compliances with GHMC & Traffic Police Rules etc.’

To begin with, this Court finds no clarity in this article for ‘renewal’. The conventional concept of the ‘first right of refusal’, as set out *supra*, has no application to this renewal article, as the licensee did not come up with the original idea of development but responded to a tender notification. The renewal article begins by stating that the licence may be renewed on such terms and conditions as may be determined by the licensor at its discretion and then states that the ‘first right of refusal’ for extension shall be based on review of satisfactory performance like regular payments to HMDA and compliances with GHMC & Traffic Police Rules etc. *Prima facie*, the ‘first right of refusal’ contemplated under this article, if at all it can be called that, does not seem to be for the licensee but, rather, for the HMDA. The former part of the article demonstrates that after expiry of the licence period, its renewal, if any, is at the sole discretion of the HMDA. However, such exercise of discretion is subjected to the ‘first right of refusal’ by the HMDA based on the review of the satisfactory performance by the licensee in relation to regular payments to HMDA and complying with municipal and police rules etc. No other logical meaning can be given to this clause.

³ AIR 2009 SC 2519

Accepting the contrary construction placed upon this 'first right of refusal' would result in a contradiction between the two parts of the article apart from rendering the sole discretion vested in the HMDA redundant and also Article 7 of the agreement. This misconstrued interpretation of the article would therefore not vest the licensee with any pre-emptive right of renewal of the licence.

The concept of a licence, being wholly different from that of a lease, it is not open to the licensee to assert any leasehold rights over the licensed premises after expiry of the licence period and seek to prolong its occupation thereof. Its status upon expiry of the licence period is that of a trespasser. In any event, even if the licensee is in a position to establish that it was lawfully deprived of the benefits of the licence during its subsistence, the only relief that it can seek is in the form of compensation/damages. There is no legal and tenable basis for a licensee to assert a right to continue in occupation of the licensed premises after expiry of the licence period. The Court below seems to have been unmindful of the distinction between a licence and a lease, as is clear from the order dated 29.09.2016 passed in Arbitration O.P.No.2229 of 2016, where it used the terms 'licence' and 'lease' interchangeably.

As pointed out by a Division Bench of this Court in **ICICI BANK LIMITED V/s. IVRCL LTD. AND ORS.**⁴, an *ex parte* injunction, as a principle, should be granted only under exceptional circumstances and no such injunction should be granted unless the petitioner establishes that it has a *prima facie* case, meaning thereby that there is a *bonafide* contention between the parties or a serious question to be tried. In the present case, there seems to be no clarity either between the parties or in the Court below as to what is the import of

⁴ 2015 (6) ALD 486

the so-called article of renewal. This Court finds, on due consideration, that the said article does not lend itself to the interpretation sought to be placed on it by the licensee.

Sri V.Narasimha Goud, learned standing counsel, would place reliance on **COX AND KINGS LTD. V/s. INDIAN RLY. CATERING AND TOURISM CORPORATION LTD. AND ANR.**⁵, to contend that merely because the licensee invested money in developing the licensed premises, it cannot seek an injunction to permit it to continue in occupation beyond the licence period. In this case, the Supreme Court was dealing with a lease and not a licence but even then, the lessee was held disentitled to a mandatory injunction to permit operation of the leased train after the lease agreement/arrangement was terminated. The Supreme Court pointed out that the petitioner's remedy would lie in an action for damages for variation of any of the terms and conditions of the agreement.

That apart, this Court must take serious note of the fact that the Court below reserved orders in the matter as long back as on 20.09.2016 and remains somnolent, ignoring the mandate of Rule 142 of the Civil Rules of Practice and Circular Orders, 1980 with regard to the time frame for pronouncement of its order. When public interest is involved, the Court below is not justified in adopting this tardy approach in dealing with a case. All the more so, when the HMDA, an instrumentality of the State, specifically asserted that the public exchequer was being put to loss.

Further, the careless manner in which the dates were changed by the Court below, as is evident from the website data and the certified copy of the order dated 29.09.2016 in Arbitration O.P.No.2229 of 2016, warrants particular mention. As rightly

⁵ (2012) 7 SCC 587

pointed out by Sri V.Narasimha Goud, learned standing counsel, these kind of post-facto alterations made by the Court below do not inspire confidence and shake the faith of litigants in the sanctity of the judicial process.

Be it viewed from any angle, this Court finds no justification in the Court below granting injunctions in favour of the licensee permitting it to continue in occupation of the licensed premises after the admitted expiry of the licence period. As is clear from the statute and case law, the only remedy for the licensee, if it makes out a case, is to sue for damages and it cannot resort to trespassing over the licensed premises after expiry of the licence period.

The appeals are accordingly allowed. The licensee is granted one week from today to hand over peaceful physical vacant possession of the licensed premises to the HMDA. Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. In the circumstances, there shall be no order as to costs.

SANJAY KUMAR, J

ANIS, J

3rd JANUARY, 2017

**Note: L.R. copy to be marked
B/o Svv**