

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CR No.2626 of 2017 (O&M)

Date of Decision: August 18, 2017

ABW Infrastructure Ltd. And another

... Petitioners

Versus

M/s. AIR Shagoon (Network) Pvt. Ltd.

... Respondent

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Sanjay Verma, Advocate,
for the petitioners.

Ms. Alka Sareen, Advocate
for the respondent.

ANIL KSHETARPAL, J.

Defendant is the petitioner in this revision petition filed under
Article 227 of the Constitution of India.

Respondent/plaintiff had filed a suit for possession, recovery of arrears of lease money, mesne profit and for mandatory injunction. It was pleaded by the plaintiff that petitioner/defendant was tenant of Unit No.302 ABW Tower, IFFCO Chowk, Gurgaon. It was claimed that there is an unregistered lease deed dated 10.05.2010. Plaintiff further asserted that there was continuous non-payment of rent for a period of 10 months and hence, the plaintiff terminated the lease vide notice dated 21.12.2015.

Defendant appeared and filed a copy of the lease deed dated 10.05.2010. Defendant filed an application under Section 8 of the Arbitration and Conciliation Act (for short 'the Act') for referring the dispute to arbitration in terms of Clause 18.9 of the lease deed, which is extracted as under: –

“18.9 Dispute Resolution:

(a) any dispute, difference or claim, that is not settled within fifteen (15) business days of the date on which such dispute, difference or claim is raised, arising out of or in connection with this deed including the construction, validity, execution, performance, termination or breach thereof a “Dispute” shall be referred to final and binding arbitration under the Arbitration and Conciliation Act, 1996, as amended (the “Arbitration Act”). Such arbitration shall be held in Delhi. All proceedings of such arbitration shall be in the English-language. The parties agree that the Dispute shall be adjudicated by a single arbitrator mutually agreeable to and appointed by the Parties venue at

New Delhi.

(b) the arbitral award(s) rendered shall be final and binding.

Each party shall bear their respective out of pocket expenses (including their respective legal advisers fees).

(c) notwithstanding any other provision of this Deed, any Party shall be entitled to seek injunctive or other provisional relief from the courts in Delhi pending the final decision or award of the arbitrator.

(d) For all purposes, the Jurisdiction of Court shall be Delhi.”

The learned trial Court dismissed the aforesaid application on the ground that the suit for possession cannot be adjudicated upon by the arbitrator. The trial Court further held that the lease deed is completely silent on the situation that if after the expiry of lease deed, the lessee does not hand over possession of the premises back to the lesser, then how the lesser would recover the possession back. The Court further held that even with respect to the relief of mesne profit, the arbitration clause would not apply. Defendant/petitioner has challenged the aforesaid order.

I have heard the learned counsel for the parties at length and with their assistance gone through the paper book.

It is admitted position on the record that the tenant does not claim protection under the rent control laws. The plaintiff had only filed a suit for possession, which is under the common law.

The issue which needs consideration is whether the dispute between the landlord and tenant can be referred to the arbitrator or not, if

the tenant does not claim protection under the rent control legislation/special statute.

Arbitrability of the dispute between the parties is normal. However, there are certain well-known exceptions. Hon'ble Supreme Court of India in the judgement reported as AIR (2011) 5 SCC, 532 *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and others*, has held that if the eviction of the tenant is governed by special statutes where the tenant enjoys statutory protection against eviction, then the specified Courts would only have exclusive jurisdiction and the matter cannot be adjudicated upon by the arbitrator. Para 22 of the aforesaid judgement is extracted as under: –

“22. Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora (courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit

is pending, will refuse to refer the parties to arbitration, under [section 8](#) of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. The well recognized examples of non-arbitrable disputes are : (i) 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; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

In view of the aforesaid judgement, it is clear that in the present case, the tenant does not claim that the tenancy is governed by special statute where the tenant enjoys statutory protection against eviction.

In view of the above, the reasoning assigned by the learned trial Court while dismissing the application under Section 8 of the Act, is perverse.

Learned trial Court has further held that arbitrator cannot decide the question of mesne profit. The arbitrator is certainly empowered to decide as to what compensation the landlord is entitled to in case the tenant is found liable for eviction. The assessment of mesne profit is not an

issue, which cannot be adjudicated upon by the arbitrator. The Arbitral Tribunal is a private fora chosen voluntarily by the parties to adjudicate upon the dispute in place of Courts. The courts would always lean in favour of the interpretation that such dispute would be adjudicated upon by the Arbitral Tribunal.

The learned trial Court has further held that the suit for possession cannot be adjudicated upon by the Arbitral Tribunal. This finding of the Court is also erroneous. Once the parties with open eyes entered into an agreement and make a provision of settlement of the dispute through Arbitral Tribunal, the dispute has to be referred to arbitration, unless the dispute sought to be raised fall within the exceptions as carved out by the Hon'ble Supreme Court.

Learned counsel for the respondent has further submitted that the lease deed has come to an end on sending the notice terminating the lease. Therefore, the arbitration clause does not survive.

I am afraid such argument raised by the learned counsel for the respondent cannot be accepted. Merely because lease has been terminated, the clause for dispute resolution would not come to an end. The clause providing for arbitration covers all disputes, differences or claim. The entire dispute is arising out of the aforesaid lease deed, which contains arbitration clause. Therefore, the submission of the learned counsel for the respondent cannot be accepted.

Learned counsel for the respondent has referred to various judgements of the High Courts to contend that a dispute between the

landlord and tenant cannot be referred to arbitration. I am afraid that in view of the aforesaid judgement passed by the Hon'ble Supreme Court in *Booz Allen's* case (supra), the argument of the learned counsel for the respondent cannot be accepted. In this case, the tenant/petitioner is not claiming protection under the rent control legislation.

The order passed by the Civil Judge (Jr. Division), Gurgaon dated 18.02.2017 is clearly erroneous. Therefore, the aforesaid order is set aside. Revision petition is allowed. The parties would be free to take steps for appointment of arbitrator.

(ANIL KSHETARPAL)
JUDGE

18.08.2017
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Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No